Chaka Motors Limited v KG Construction Limited & 2 others (Civil Appeal 159 of 2019) [2024] KEHC 298 (KLR) (22 January 2024) (Judgment)

Neutral citation: [2024] KEHC 298 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 159 OF 2019

FR OLEL, J

JANUARY 22, 2024

BETWEEN

CHAKA MOTORS LIMITED ..... APPELLANT

AND

KG CONSTRUCTION LIMITED ..... 1ST RESPONDENT

EUNICE MUTIE ..... 2ND RESPONDENT

MUTIE MUSAU ..... 3RD RESPONDENT

(Being an Appeal from the Ruling of Senior Resident Magistrate Jerop Brenda Bartoo dated 7th November 2019 delivered in Machakos CMCC Case No 60 of 2015)

JUDGMENT

1. This appeal arises from a ruling of Hon Jerop Brenda Bartoo (SRM) dated November 7, 2019 and delivered in Machakos CMCC No. 60 of 2015 where she dismissed the appellants Notice of motion application dated 11th July 2019, seeking to reinstate the primary suit which had been dismissed for want of prosecution on November 26, 2018.

2. Being wholly dissatisfied by the Ruling the Appellant did on December 4, 2019 file their memorandum of appeal and raised four (4) grounds of appeal namely that;

    a. That the learned magistrate erred in law and in fact in failing to appreciate the affidavit evidence together with the documents adduced in support of the application dated 11th July 2019.

    b. That the learned trial magistrate erred in law and in fact in failing to attach due weight to the Appellants evidence, submission's and Authorities.

    c. That the learned magistrate erred in law and in fact in ruling that the applicant was not keen on prosecuting the matter.

d. That the learned magistrate erred in dismissing the plaintiffs Application

3. The Appellant prayed that this appeal be allowed, the Ruling of the trial Magistrate be set aside, and they be allowed to prosecute the primary suit filed before the court below.

Appellants Submissions

4. The Appellant submitted that they were never served with the notice to show cause in the primary suit to have this matter dismissed and further they were unable to fix the suit for hearing as the primary file was missing and not available in the registry. The trial magistrate was faulted for erroneously disregarding Annexure GC 1-4 based on the the reason that they were not stamped. This was an error as it was common practice for the registry not to receive letters for fixing a date without the physical file being available and this explained why all their letters annexed were not court stamped.

5. The trial court over looked the court clerks remarks on one of the letters indicating that the court file is not available and the fact that they did serve the respondents advocates with the said letters, and receipt was acknowledged. It was thus not true that they had prepared the said letters for the benefit of the said application to hoodwink the court. For reasons that, the court file was missing, they could not fix a hearing date and those were circumstances beyond their reach. Reliance was placed on *Skyview Properties limited & Another v Kennedy Amos Njoroge & 3 others* (2017) eKLR & *Mwangi Nedangi Kimenyi v Attorney General & another*.

6. The trial court failed to consider the key issues for determination which were, whether the delay to prosecute the matter has been intentional and continuous, secondly whether the conduct of the plaintiff amounts to an abuse of the process of court and finally whether the delay was inordinate and inexcusable. The appellant did submit that in this instance, the delay in fixing this matter was not caused by a lapse on their end, as they had all along been trying to fix the matter for hearing, but could not succeed due to the missing file. The delay was thus not intentional on their part nor was their conduct an abuse of the process of the court.

7. The appellant also urged the court to consider the fact that they were not served with the notice to show cause to explain why the suit should not be dismissed reason whereof they were condemned unheard. Reliance was placed on the case of *Salkas Contractors Ltd v Kenya Petroleum Refineries Ltd* (2004) eKLR. The delay was thus excusable and this court was urged to reinstate the suit and have it heard on merit.

Respondents Submissions.

8. The Respondent filed their submission on October 18, 2023 and raised the following issues for determination;

a. Whether the Learned Magistrate erred in law in dismissing the suit for want of prosecution.

b. What should be the orders on costs?

9. The Respondent submitted that, order 17 rule 2 of the *Civil Procedure Rules* allowed a party to move court to dismiss a matter, where the other party had not taken a date or any step therein for over one year. The primary suit had been filed on February 6, 2015 and had never been set down for hearing until the time it was dismissed on November 26, 2018.The court could not be faulted for its decision as the record confirmed no activity on the file and no sufficient reason had been advanced to dissuade court from dismissing the suit. The courts action could therefore not be faulted. Reliance was placed *Ivita*

Kyumbu (1975) eKLR & Hon *Attorney General v Law society of kenya & another* Civil Application No 133 of 2011.

10. The Respondent was also faulted for being indolent by not taking up hearing dates nor was their attempt to explain away the delay on grounds that parties were negotiating, a valid excuse as no correspondence of such negotiations was attached. The respondent would also be prejudiced by the order reinstating the suit and there was need to end litigation. Reliance was placed on *Kivanga Estate's Limited v National Bank of Kenya limited* (2017) eKLR Civil Appeal No 217 of 2015 & *Nilesh Premchand Mulji shah & Another T/A ketan Emporium v M.D Popat and others* (2016)eKLR Civil case No 285 of 2010.

11. The Respondent urged this court to find that this appeal has no merit and the same be dismissed with Costs.

Analysis And Determination.

12. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See *Santosh Hazari v Purushottam Tiwari (Deceased)* by LRs (2001) 3 SCC 179.

13. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *Civil Procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko v Varkey Joseph* AIR 1969 Keral 316.

14. I have considered the entire record of appeal, the pleadings that were filed, the ruling of the trial magistrate and submissions filed both at the trial court and before this court and condensed the issues raised in the grounds of appeal to which, one issue which can determine this appeal either way.

    a. Whether the appellant was served with the notice to show cause, why the suit should not be dismissed, before the said order was issued and the effect of or lack of service thereof.

15. Article 50 (1) of the *Constitution* of Kenya provides that ;

> " Every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

16. Article 47(1) & (2) of the *Constitution* of Kenya, further provides that;

    47(1). Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

    47(2). if a right or fundamental freedom of a person has been or is likely to be affected by administrative action, the person has a right to be given written reasons for the Action.

17. The parameters for according these rights to a deserving party have also been crystallized by case law. See *Richard Nchapi Leiyagu v. IEBC & 2 others* [2013]eKLR; *Mbaki & others v. Macharia &*

another [2005] 2EA 206; and the Tanzanian case of *Abbas Sherally & another v Abdul Fazaiboy*, Civil Application No. 33 of 2003; in which it was variously held, *inter alia*, that: the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law; the right to be heard is a valued right; and that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice.

18. As to what constitutes fair administrative action, the court in President of the *Republic of South Africa and others v. South African Rugby Football Union and others* (CCT16/98) 2000 (1) SA 1, stated thus:

> "Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades..."

[Emphasis supplied]

> Thus, a person whose interests and rights are likely to be affected by an administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided under Article 47 (2) ofthe *Constitution* . Generally, one expects that all the precepts of natural justices are to be observed before a decision affecting his substantive rights or interest is reached. It is however also clear that in exercising its powers to superintend bodies and tribunals with a view to ensuring that Article 47 is promoted the court is not limited to the traditional judicial review grounds. The *Fair Administrative Action Act*, 2015 must be viewed in that light.

19. Finally the often-cited case of Ridge v. Baldwin [1964] AC 40 restated the right to fair hearing as a rule of universal application in the case of administrative acts or decisions affecting rights. In his speech to the House of Lords in 1911, Lord Loreburn aptly put is as a 'duty lying upon everyone who decides anything' that may adversely affect legal rights. Halsbury Laws of England, 5th Edition 2010 Vol. 61 at para 639 on the right to be heard states that:

> "The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court."

20. The court, effectively has a duty to look into not only the merits and legality of the decision made due to the requirement of "reasonable" action under article 47, but also the process and procedure adopted due to the requirement of following all precepts of natural justice under both Articles 47 and 50 (1)

of the *Constitution* . The court is thus expected not only to pore over the process but also ensure that in substance there is justice to the applicant.

21. The court proceedings show that the plaintiffs advocate was in court on17th August 2017, when a hearing date was taken for October 26, 2017. The Appellants counsel was to serve the Respondents. On the said October 26, 2017, for reasons not recorded the file was never placed before the court. The next proceedings are on November 26, 2018, when the matter was dismissed for want of prosecution. There is no indication on the record how the date of November 26, 2018 was taken and from the record perused by this court the appellant was not served with a notice to show cause why the suit should not be dismissed as is mandatorily required in law.

22. The order of November 26, 2018, was null *abinitio*. It matters not that the appellant was to an extend indolent. The dismissal order was in law a nullity, and as stated in *Macfoy v United Africa Company* [1961] 3 All ER 1169:

> " If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to setting aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so."

Disposition

23. On this basis, this appeal succeeds. The orders of Ruling of Hon Jerop Brenda Bartoo (SRM) dated November 7, 2019 and delivered in Machakos Cmcc No. 60 of 2015 where she dismissed the appellants Notice of motion application dated July 11, 2019, seeking to reinstate the primary suit which had been dismissed for want of prosecution on November 26, 2018 is hereby set-aside and the said suit is reinstated for hearing on Merit.

24. Each party too shall bear their own costs of this appeal.

25. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 22ND DAY OF JANUARY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 22nd day of January, 2024.

In the presence of;

Ms Waithaka for Appellant