Muriuki v Muriithi (Civil Appeal E067 of 2021)
[2024] KEHC 5749 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5749 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E067 OF 2021

DKN MAGARE, J

MAY 9, 2024

BETWEEN

STEPHEN NJOGU MURIUKI ..... APPELLANT

AND

CHARLES NDIRANGU MURIITHI ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Ruling and order of the Hon. Wendy Kagendo given on 30/6/2021 in Nyeri CMCC 76/2014. The Appellant Appealed on the grounds that the learned magistrate erred in law and fact:
    a. In failing to appreciate the reasons advanced by the Appellants for the delay in prosecuting their respective matters in the learned magistrate.
    b. By holding that the Appellants had not furnished a plausible reason for the delay in prosecuting their respective matters.
    c. In relying on Order 17 Rule 5 of the *Civil Procedure Rules* to dismiss the case.
    d. Disregarding the submissions by the Appellants.
2. The Appellant as such prayed for reliefs that the Ruling dated 30th June 2021 be set aside and replaced with an Order allowing the Appellant's Application dated 23rd February 2021 with costs, reinstating the primary suit to hearing.

Pleadings

3. In the Plaint dated 10th March 2014, it was pleaded that on 3rd August 2013, the Appellant was travelling as a passenger in Motor Vehicle Registration No. KBD xxxJ Matatu at Kiawara Market on

Nyeri-Nyahururu Road when the Respondent drove Motor Vehicle Registration No. KBC xxxL so negligently that it lost control and hit the said matatu causing the Appellant injuries.

4. The Appellant pleaded negligence on the part of the Respondent and also set out the injuries suffered. Apparently there was a test suit filed which stayed the matter pending determination of the test suit. Subsequently, there was a test Appeal, being Nyeri HCCA 15 of 2015. It was determined in 2019.

5. Upon issuance of what it considered notice, the then chief magistrate dismissed this suit on 22/6/2020. The reason was that the suit remained unprosecuted since 2014. Pursuant to section 60(1)(0) of the Evidence Act, I note, as a matter of general notoriety that the dismissal was done at the height of Covid-19 pandemic.

6. The Appellant to set aside was filed an Application dated 23rd February 2021 seeking to reinstate the suit. This was towards the tail end of the pandemic. As such I shall not consider the delay between dismissal and application as of any consequence. I should be recalled that until 31/7/2021, there were severe restrictions on movement and lockdowns in courts. It was never business as usual. There was no action taken since 30/9/2014. There was no other action until the matter was placed for dismissal on 29/6/2020. After dismissal the mater went to sleep until 2/3/2021, a period of 9 months later. The application sought the following prayers: -

    a. That this Honourable Court be pleased to set aside orders issued on 22/6/2020 dismissing the suit for want of prosecution.

    b. The Honourable court issue are order reinstating the suit for a hearing and determination on merit.

    c. Costs be provided for.

7. The delay was attributed pending of a test suit Nyeri HCCA 15/2015 *Charles Ndirangu Muriithi v Paul Ogomonyayo*, being CMCC Suit No. 78 of 2013 Paul Ogoma Ongayo v Charles Ndirangu Muriithi.

8. It was the Appellant's case that the test suit was concluded on 23/4/2015. There was an Appeal preferred by the Respondent herein which was decided on 20/12/2019 affirming liability of the Respondent. The the period of delay was less than 1 year to 22/6/2020. The delay in filing the Application that was dismissed was equally less than one year. Cumulatively it is less than 2 years.

9. The Appellant stated that they then moved the lower court to set the suits down for directions only to establish that the suits had been dismissed for want of prosecution. The Appellant made the Application to set aside. This resulted in the current Appeal.

10. The Respondent opposed through grounds dated 18/3/2021. The respondent stated that he could have forgotten crucial details luckily for the Appellant, he did not oppose pendency of the test suit.

11. The court stated that there was no satisfactory explanation given. The delay of 6 years is inexcusable and as such dismissed the Suit for want of prosecution.

Submissions

12. The Appellant filed submissions dated 29th January 2024. They submitted that the learned magistrate erred in its finding that the Appellant had not rendered a plausible reason for the delay in prosecution the suit.

13. That the reason was well documented to have been occasioned by the existence of the High Court Civil Appeal No. 15 of 2015 on liability in the test suit and which liability would be used in determining the

liability of this suit and other suits in the series. They relied on the case of *Naftali Opondo Onyango v National Bank of Kenya* (2005) eKLR. They submitted that the Appellant was not notified prior to the dismissal of the suit and the dismissal stated to be under Order 17 Rule 5 was improper and untenable as such a law did not exist. I was urged to allow the Appeal.

14. On the part of the 1st Respondent it was submitted that the learned magistrate was correct in its finding and the Appeal was as such not meritorious. They submitted that no plausible reason was offered for the reinstatement of the suit and the Application was filed 8 months after the dismissal of the suit as per Order 17 Rule 2 of the *Civil Procedure Rules*.

15. It was their case that the Appellant had the obligation to advance the overriding objective and which they failed. Reliance was placed on Sections 1A (3) the *Civil Procedure Act* and the case of *John Maina Mburu t/a John Mburu & Co. Advocates v George Gitau Munene*, Milimani High Court Civil Suit No. 265 of 2011. I was urged to dismiss the Appeal.

Analysis

16. The appellant filed a memorandum of Appeal and set forth 6 grounds. This were unnecessarily long. Order 42 Rule 1 of the *Civil Procedure Rules* provides are hereunder: -

> " 1. Form of appeal –
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> 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

17. The Court of Appeal had this to say about compliance with Rule 86 of the *Court of Appeal Rules* (which is *pari materia* with Order 42 Rule 1 of the *Civil Procedure Rules*) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v Firoz Hussein Tundal & 2 Others* [2013] eKLR) and *Nasri Ibrahim v IEBC & 2 Others* [2018] eKLR. In the latter case, this Court lamented:
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> > "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson

Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J) dated 19th September 2018 raise only two issues..."

18. In the case of *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] eKLR, the Court of Appeal observed that: -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the Kenya Ports Authority Act ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross v Hezekiah Kiptoo Kimue & 4 others*, Civil Appeal No. 223 of 2013, this Court stated:
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> > "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

19. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a learned magistrate, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

20. Luckily for the parties, there were no witnesses heard. The court thus has a wide latitude in that respect. In the case of *Sugut v Jemutai & 3 others* (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment), Kiage JA, stated as follows: -

> " I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the *Court of Appeal Rules* 2010; *Selle v Associated Motor Boat Co* [1968] EA 123). I do accord due respect to the factual findings of the learned magistrate out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified.
>
> I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge. I think that this further widens our latitude for departure where necessary."

21. In the case of *Mbogo and Another v Shah* [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

22. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and Others* [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the learned magistrate's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

23. The Court is to bear in in mind that it had neither seen nor heard the witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

24. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

25. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 is as follows: -

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

26. In *Fidelity & Commercial Bank Ltd v Kenya Grange Vehicle Industries Ltd* (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as hereunder: -

> " Courts adopt the objective theory of contract interpretation and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

27. In *Prudential Assurance Company of Kenya Limited v Sukhwender Singh Jutney and Another*, Civil Appeal No. 23 of 2005 the Court citing a passage in *Odgers Construction of Deeds and Statutes* (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

> "It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence."

28. The learned magistrate and this court will similarly construct documents as there are no witnesses required to know the content of a document. Therefore, where the findings of the learned magistrate are consistent with the evidence generally, this Court should not interfere with the same.

29. On the face of the Application, the delay is inordinate. However, the court did not address the question of stay pending the test suit and subsequently, the test Appeal, Nyeri HCCA No.15 of 2015.

30. Of importance, there was no factual contestations. The Respondent filed grounds of opposition to the impugned Application. By filing grounds of opposition, the respondent was conceding to factual matrices. In effect there were no disputation on the fact. The only issue, to them was whether, the facts as set out in the Application were reason enough for the 'inordinate' delay.

31. It is worthy noting that it is the court that stayed the suit pending determination of a test suit. The parties, especially the Appellant have no say to the said delay. The period of delay was therefore only 9 months. Dismissal under Order 17 Rule 5 could not apply to a stayed suit. We were not told by the Appellant, who is a party to the test suit, when they informed the Appellant the outcome of the Test Appela.

32. I agree with the appellant in their submissions relying on the case *Naftali Opondo Onyango v National Bank of Kenya* [*supra*] where the court stated as follows: -

> "In *Salkas Contractors Ltd v Kenya Petroleum Refineries*: Mombasa C.A. No.250 of 2003 (UR) the Court of Appeal quoted Salmon in *Allan v Sir Alfred McAlpine and Sons Ltd* (1968) 1 ALL ER 543 as follows:
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> "The Defendant must show:
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> (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff so many years or more on one side of the lien and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.
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> (ii) That this inordinate delay is inexcusable. As a rule until a credible excuse is made out the natural inference would be that it is inexcusable.
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> (iii) That the Defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the Plaintiff or between each other or between themselves and third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly

proved. As a rule the longer the delay the greater the likelihood of prejudice at the trial."

The Court of Appeal stated that the above principles apply in Kenya and had been followed consistently by Kenyan Courts. Cheson J as he then was applied the principles in the case of *Ivita v Kyumbu* (l984) KLR 441 When he observed that:-

3. The test applied by the Courts in an Application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is whether justice can be done despite the delay. Thus, even if the delay is prolonged if the Court is satisfied with the Plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the Court."

33. It should be remembered that dismissal of suits is meant to rid the court of cases that were filed and left in some corner. It is a way of getting rid of un-necessary backlog. The test on dismissal of suits for want of prosecution was laid in *Mwangi S. Kimenyi v Attorney General and Another*, [2014] eKLR, when the court restated the test as follows:-

1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties."

34. The object of the court is to achieve justice for both parties. In *Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 Others* [2015] eKLR, the Court of Appeal posited as hereunder: -

"It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the *Constitution* which succinctly states that "judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution." Judicial officers are also state officers, and consequently, are enjoined by Article 10 of the *Constitution* to adhere to national values and principles of governance which require them whenever applying or interpreting the *Constitution* or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld.

For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties' interests) and while others may transcend the interest

of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice."

35. The purpose of the existence this Court is this to do justice to both parties. In *Harris Horn Senior, Harris Horn Junior v Vijay Morjaria* Nyeri Civil Appeal No. 223 of 2007 when confronted with similar arguments, the Court made observations therein inter alia as follows:

(32) As for the need to do justice to the parties before it, we have no doubt that this is the core business of the Court. However, a court of law cannot ignore principles of substantive law or case law governing the particular aspect of justice sought from its seat. Its primary role is to ensure that the justice handed out is kept anchored on both the law and the facts of each case."

36. It is not the responsibility of this court to be mechanical and ignore clear cases of injustice. I find that the test suit has been determined on the basis of 100% liability as against the Respondent. The only question remaining is medical evidence for purpose only of quantum.

37. There is no loss the Respondent will suffer as their fate was sealed not by this court but the court hearing the test suit. Hearing the matters will not therefore prejudice the Respondents. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR this Court stated: -

" The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.

38. In this matter the delay was properly explained. The Respondent knew the status of the test suit but did not produce any contradictory evidence. In the case of *Nesco Services Limited v CM Construction [EA] Limited* [2021] eKLR, justice G V Odunga as then he was stated as doth:

41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In *Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others* [2012] eKLR the court stated as follows:

"Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:

'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of *Kimotho v KCB* (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

42. The court will and shall presume that such evidence, if produced will be against the Appellant. In The circumstances obtaining in this matter was that there was no basis for dismissal.

43. I note, with concern that some defendants use the aspect of the test suit to delay the matters in court in vain hope that they will be subsequently dismissed. Courts granting an order for test suit must include a fail-safe order for the conclusion if the test suit within specific time frames.

44. In the circumstances the court fettered its discretion in failing to tackle the aspect of the test suit. The test suit was imposed on the Appellant and cannot be used against them. They have no control over the same. I find the Appeal merited and I allow the same.

45. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the Respondent or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

46. The delay was occasioned by both sides in having an unnecessary test appeal and the Respondent for not being candid to the court. The order therefore recommends itself is for each party to bear cost of the Appeal and the Application dated 22/2/2021.

Determination

47. In the circumstances I issue the following orders: -

a. The appeal is allowed.

b. The order given on 30/6/2021 is hereby set side and in lieu thereof I substitute with an order setting aside the dismissal of the suit and reinstating the same for hearing.

c. The suit shall be heard and determined by 15/5/2025, failing which it shall stand dismissal with costs to the Respondent.

d. The matter shall be placed before the chief magistrate who shall allocate courts to hear the matter.

e. Consequently, this file shall be placed before the chief magistrate for directions on 25/5/2024.

f. This file is closed.

g. The lower court file be returned forthwith.

DELIVERED, DATED AND SIGNED VIRTUALLY ON THIS 9TH DAY OF MAY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Patrick Law Associates Advocates for the Appellant

J K Kibicho & Co. Advocates for the Respondent