Ndung'u v Gichuki (Civil Appeal 75 of 2019)
[2024] KEHC 9126 (KLR) (10 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9126 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL 75 OF 2019

DKN MAGARE, J

JULY 10, 2024

BETWEEN

WILSON MAINA NDUNG'U ..... APPELLANT

AND

SUSAN NYAWIRA GICHUKI ..... RESPONDENT

(Being an appeal from the Ruling and Order of Hon. M. Okuche in Nyeri CMCC No. 385 of 2017, delivered on 10th December, 2019)

JUDGMENT

1. This is an appeal out of a decision in Nyeri CMCC 385 of 2017. The court dismissed the suit for want of prosecution. They raised the following grounds:-

    a. That the learned trial magistrate erred in law and fact in dismissing the appellant's suit for want of prosecution.

    b. That the learned trial magistrate erred in fact and in law in dismissing the Appellant's suit for want of prosecution and in failing to properly and accurately record the proceedings before him and more specifically, noting that on the three previous occasions that the matter came up for hearing, the court was not in session on the 25/9/2019 whereas on the 7/01/2019 and 29/10/2019 adjournments were granted on the defendant's behalf.

    c. That the learned trial magistrate erred in law and in fact in denying the Applicant's counsel an adjournment noting that it was their first request for an adjournment in the matter.

    d. That the learned trial magistrate erred in law and in fact in dismissing the sit in the circumstances of the case and thereby exercised his discretion capriciously.

e. That the learned trial magistrate erred in law and in fact in upholding procedural technicalities as opposed to substantive justice by failing to allow the matter to proceed to its logical conclusion.

f. That the learned magistrate erred in fact and in law in failing to appreciate that the respondent could reasonably be compensated by way of costs for any prejudice or delay occasioned.

2. The background is that the Appellant filed suit on 17/11/2017 over an accident on 17/11/2014 involving the Appellant's motor vehicle KBV 410C and a building that collapsed on the vehicle. They claimed a sum of Kshs.1,125,620/=.

3. Summons were served. The Respondent filed defence on 16/2/2018 stating that this was volenti non fit injuria. A preliminary objection dated 15/7/2018 was raised. The court dismissed the preliminary objection dated 19/10/2018.

4. The Plaintiff/Appellant amended his plaint on 23/1/2019 to introduce occupiers liability. The history of the matter is colourful. On 7/1/2019, the Respondent sought an adjournment as the defendant was taking her daughter to school.

5. It was adjourned with leave to amend. The matter was next in court for Mentions, before the Chief Magistrate Hon. Kagendo, as she then was, who indicated that the matter was a Court 3 matter.

6. The next date on 24/7/2019 the matter again was listed before Hon. W. Kagendo, CM who gave a date of 25/9/2019 in Court 3. On the said date, the Respondent was not ready. The Appellant requested that the matter be marked as a last adjournment. On the next hearing day, when the matter came for hearing, the Appellant sought his first adjournment.

7. The Respondent stated that a last adjournment had been given to the defendant and as such the plaintiff should have done anything they should have done. Unfortunately the court dismissed the matter.

Analysis

8. 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 trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

9. In the case of Mbogo and Another vs. 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."

10. 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 Vs 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 trial Court'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."

11. The court fettered its discretion. It is the Respondent who had delayed the matter, first through a baseless preliminary objection, secondly through just not being ready. The second delay was by the court. The matter was for Court 3 but was listed several times before the Chief Magistrate in spite of her clear orders that the case is for Court 3. The court then proceeds to dismiss the matter without hearing the Appellant.

12. However there was no evidence taken. The court herein has a wdier latitude. The same was as held in the case of *Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018*) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR) Kiage JA stated as doth: -

> "I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. 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 Vs Associated Motor Boat Co [1968] EA 123). I do accord due respect to the factual fndings of the trial court 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."

13. Where there are no provisions for dismissal, the court has inherent power to dismiss a suit. In the current case, however, there were no grounds for dismissing the suit. In the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969) EA 696 the court stated as follows: -

> "In cases falling outside the specific provisions quoted above. Farrel, J., adopted this view. Dalton, J., in Saldanha's case purported to follow the decision of Windham m C.J. in Mulji v Jadavji, [1963] EA. 217, but all that case decided was that the courts inherent jurisdiction could not be invoked where an l alternative remedy had been available. In the instant case, it is clear that none of the specific provisions for dismissing suits applied to the suit the subject of this appeal. That being so, I do not see how the courts inherent jurisdiction can be said to be fettered, as no alternative remedy existed."

13. The Supreme Court of Uganda in the case of The Management Committee of Makondo Primary School and Another vs. Uganda National Examination Board, HC Civil Misc Application No. 18 of 2010, as cited with approval by Lenaola, J (as he then was) in Mandeep Chauhan vs. Kenyatta National Hospital & 2 Others [2013] eKLR stated as follows: -

> "It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates

into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing."

14. The Court of Appeal in Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998 stated as follows: -

> " Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself....Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

15. The Appellant had been taken through several adjournments by the Respondent. He was making a very simple request, to substitute an officer with another. Nothing could have stopped the court granting a short adjournment to allow this to happen. I have perused the entire record and cannot find the Appellant's fault. All adjournments were court initiated or by the Respondent. The court was clearly wrong in attributing the default of the respondent to the Appellant.

16. In the circumstances I agree with the Appellant that the court was capricious and erratic in its decision. Consequently, I set aside the order dismissing and direct that the case be reinstated for hearing. The Appellants are awarded costs given that the Respondent is substantially to blame.

17. The Respondent shall bear the Appellant's costs of Kshs. 115,000/=.

18. 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 defendant 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.

20. Section 27 of the *Civil procedure Act* provides as follows: -

> "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

Determination

19. The upshot of the foregoing is that I make the following orders; -

a. The Appeal is merited and consequently allowed. The Respondents shall bear costs of Kshs. 115,000/= for the appeal payable within 30 days in default execution to issue.

b. The lower court case is reinstated for hearing.

c. The lower court matter be listed on 10/8/2024 before the Chief Magistrate for re-allocation.

DATED, SIGNED, AND DELIVERED AT NYERI ON THIS 10TH DAY OF JULY, 2024.

Judgment delivered through Microsoft Teams Online Platform.

MAGARE KIZITO

JUDGE

In the presence of:-

Miss. Otieno for the Appellant

No appearance for the Respondent

Court Assistant – Jedidah