Chembea v CIC Insurance Group Limited (Civil Appeal 11 of 2020) [2023] KEHC 27643 (KLR) (3 October 2023) (Judgment)

Neutral citation: [2023] KEHC 27643 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 11 OF 2020

F WANGARI, J

OCTOBER 3, 2023

BETWEEN

MWINYI ABDI CHEMBEA .... APPELLANT

AND

CIC INSURANCE GROUP LIMITED .... RESPONDENT

(Being an Appeal from the Ruling and Order of Honourable G. Kiage, SRM, delivered in Mombasa CMCC No. 1129 of 2013 on 14th February 2020)

JUDGMENT

1. This Appeal arises from the Ruling and Order of Trial Court delivered on 14th February 2020 in Mombasa CMCC No. 1129 of 2013. The Trial Court dismissed the Appellant's Application dated 19th September 2019 seeking to reinstate the suit after dismissal for non-attendance on 17th September 2019.
2. The Appellant being aggrieved by the Award filed 3 Grounds of Appeal. The Grounds of Appeal were as follows:
    a. The Learned Magistrate erred in dismissing the Appellant's notice of Motion Application dated 19th September 2019.
    b. The Learned Magistrate erred in law and fact in misapprehending the applicable principles.
    c. The Learned Magistrate erred in in law and fact in failing to exercise discretion in favour of the Appellant.
3. The Appellant therefore sought the following reliefs:
    a. The Ruling and Order of 14th February 2019 be set aside and substituted with an order allowing the Application dated 19th September 2019.

b. Alternatively, the Application be heard afresh before a different Magistrate.

4. The parties filed submissions. The Appellant submitted that this first Appellate court is mandated to reevaluate the evidence and arrive at its own conclusion. Reliance was placed on the case of Selle & Another v Associated Motor Boat Co. & Others.

5. It was further submitted that failure of counsel to attend court when the file was called out was not deliberate. Counsel submitted that on the basis of Section 3A of the *Civil Procedure Act*, the court had wide discretion to reinstate the suit. Further reliance was place inter alia on the cases of Shanzu Investments Ltd v Commissioner of Lands (1993) eKLR and Kridha Ltd v Peter Salai Kituri (2020) eKLR.

6. The Respondent on its part submitted that the Appellant was indolent in prosecuting this suit and had for more than once adjourned the hearing against the duty of the Appellant to continuously prosecute the suit to determination. Reliance was placed inter alia on the case of Bilha Ngonyo Isaac v Kendu Farm & Another (2012) eKLR to assert the argument that the Appellant was not interested in the suit. Counsel prayed that the Appeal be dismissed with costs.

Analysis

7. This Court has considered the Record of Appeal filed in Court, submissions and authorities relied on by the parties in support and opposition to the Appeal.

Duty of the first Appellate Court

8. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy.

9. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies. In the case of Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123, the Court stated as follows:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

10. Further, 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..."

11. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those 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.

12. In the case of Peters vs 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..."

13. The issue in this case is whether the court should set aside the trial court's Order dismissing the Appellant's Application dated 19th September 2019 to reinstate the suit. It is not in dispute that the suit was dismissed on the date of hearing for non-attendance on the part of the Appellant and his counsel.

14. Order 12 Rule 7 of the Civil Procedure Rules provides as follows:

> " Where under this order judgment has been entered or a suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

15. The Applicant thus had the burden to prove reasons to justify setting aside of the dismissal order. The Appellant contends that the trial court erred in dismissing the Application dated 19th September, 2019 which sought to reinstate the main suit.

16. I have perused the Application. It is dated 19th September, 2019 and sought to set aside the order issued on 17th September, 2019. This is the Order that dismissed the suit for non-attendance.

17. It is common position by the Appellant and the Respondent that the trial court dismissed the suit for non-attendance on the date it was fixed for hearing because the Appellant and his counsel did not respond when the matter was called out. The Appellant's reason for absence was that counsel had left the court room to attend to another matter but the Plaintiff was available in court. The Respondent on the other hand maintained that counsel was not present and is he had left the court room, he ought to have asked a colleague to hold brief. There is no evidence that the Plaintiff was in court.

18. The setting aside of dismissal orders under Order 12 Rule 7 of the Civil Procedure Rules is typically a matter of discretion. The Applicant has to demonstrate that the trial court fettered its discretion and acted contrary to justice. This discretion has to be exercised judiciously, as was stated the case of Shah vs Mbogo (1979) EA 116 quoted with approval in the case of John Mukuha Mburu v Charles Mwenga Mburu [2019] eKLR:

> " ......this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."

19. The wording of Order 12 Rule 17 requires sufficient cause to shown or demonstrated as a consideration for setting aside a dismissal order for non-attendance.

20. In Wachira Karani v Bildad Wachira [2016] eKLR, the Supreme Court elucidated what sufficient cause entails. The apex court stated thus: -

> " sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"

21. The court in the above case added as follows: -

> "…While deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause. (Emphasis added)

22. The Trial Court stated as follows before dismissing the impugned Application:

> " …what is on record does not support the Plaintiff's intention. On 17th September 2019, the Plaintiff was unrepresented and the matter was closed upon Application of the Defendant's counsel for want of prosecution and not for non-attendance…"

23. From the above Trial Court's finding, I note that this is a misconception on the part of the Leaned Magistrate. The Rules do not provide for dismissal of a suit for want of prosecution on a date it is set down for hearing. Instead they provide for dismissal on account of non-attendance of a Plaintiff or a Defendant who has a counter-claim for that matter. Thus, to set the record straight, the way I understand the facts and the record herein is that the suit was dismissed for non-attendance of both the Plaintiff and his learned counsel on the date of hearing.

24. However, I am unable to find any manner in which the trial court exceeded or abused its discretion in the manner pleaded by the Appellant in this Appeal. The Plaintiff had the primary obligation to prosecute the suit and the reason for the absence of counsel and the Plaintiff when the matter was called out for the purpose of the hearing was not sufficiently explained and the trial court did not act with caprice in dismissing the Application.

25. In the case of Utalii Transport Co. Ltd and 3 Others -vs- N.I.C. Bank and Another (2014) eKLR, the court held that:

> " It is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court."

26. Parties have the obligation and duty to assist the court to adjudicate on the matters brought before it expeditiously as was held in Gideon Sitelu Konchella vs Daima Bank Limited (2013) eKLR where the court while citing the case of Mobil Kitale Service Limited vs Mobil Oil Kenya Limited, held that: -

> " It is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously...the overriding objection of this Act and Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act."

27. For the reasons stated above, I find no reason to disturb the trial court's decision in dismissing the Application dated 19th September, 2019. I am inclined to disallow the Appeal.

Determination

28. Following the foregone discourse, the upshot is that the following orders do hereby issue: -

    a. The Appeal is dismissed.

    b. Accordingly, in exercise of the powers granted to the Court under Section 27 of the *Civil Procedure Act*, I direct that each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 3RD DAY OF OCTOBER, 2023

……………………..

F. WANGARI

JUDGE

In the presence of:-

Maundu Advocate for the Appellant

Saringi Advocate for the Respondent