



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 207 OF 2018

BEDAN LYANDA MUSILA.....APPELLANT

VERSUS

SYNRESINS LIMITED.....1ST RESPONDENT

NICHOLAS JUSTUS EDWARD CHARLES.....2ND RESPONDENT

SIMBA SIGNS LIMITED.....3RD RESPONDENT

(Being an appeal from the Judgment delivered on 4th April, 2018 by Hon. D. Ocharo (Mr.) (Senior Resident Magistrate) Chief Magistrate's Court at Milimani Commercial Court in CMCC No. 7057 of 2014).

JUDGMENT

1. The Appellant, Bedan Lyanda Musila who was the Plaintiff in the Lower Court instituted this suit vide a plaint dated 12/11/2014. He sought Judgment against 1st to 4th Defendants jointly and severally for Kshs. 242,811, interest and costs. The said amount was stated to be the cost of repairing his Motor Vehicle registration no. KBN 133G make Subaru Forester which was involved in an accident on 27/11/2011 with Motor Vehicle KAQ 885H which was being driven by the 2nd Respondent and was owned by the 1st and the 3rd Respondents and the 4th Defendant who is not a party in this Appeal. The Accident was blamed on the negligence of 2nd Respondent.
2. The 1st, 2nd and 3rd Respondents denied the claim through their joint statement of Defence. The 4th Defendant did not enter appearance and Judgment was entered against him on 1/7/2016.
3. The 1st, 2nd and 3rd respondents filed the Notice of Motion dated 19/2/2018, under Order 17 Rule 2(3) of the Civil Procedure Rules, seeking orders for dismissal of the suit against them for want of prosecution. It was contended that the suit had not been prosecuted for a period exceeding two years and that it was apparent that the Appellant had lost interest in the suit. It was further averred that the 1st, 2nd and 3rd Respondents continued to suffer the anxiety of defending the suit and the risk of losing potential witnesses and evidence.
4. The application was opposed. It was stated in the replying affidavit that the Appellant had taken steps in the suit and had applied for Judgment against the 4th Defendant who had not entered appearance in the suit. That judgment was entered against the 4th Defendant and the Appellant proceeded with execution against the 4th Defendant but without success as the 4th Defendant could not be traced. It was further added that the Appellant had not lost interest in the suit and was ready and willing to prosecute it against the 1st, 2nd and 3rd Respondents. That the dismissal of the suit was a draconian measure and the Respondents stood to suffer no prejudice. That the Appellant was ready to file their list of witnesses, witness statements and list of documents.
5. On 4/6/2018, the Trial Magistrate allowed the application with costs. That is what triggered this Appeal.
6. The Grounds of Appeal are as follows:

1. THAT the Learned Magistrate erred in law and in fact in failing to give an opportunity to the Appellant to be heard on the Respondent's Application dated 19/2/2018 seeking to dismiss the Appellant's suit for want of prosecution.

2. THAT the Learned Magistrate erred in law in failing to consider and take into account the averments contained in the Replying Affidavit in response to the Respondents' said Application, in particular the reasons for and length of the delay in prosecution of the suit.

3. **THAT** the Learned Magistrate erred in Law and in fact in denying the Appellant his constitutional rights to a fair hearing.

4. **THAT** the Learned Magistrate erred in Law and in fact in failing to consider whether the Appellant's suit could be heard and justice done without further undue delay.

5. **THAT** the Learned Magistrate erred in Law and in fact in failing to consider whether the Respondents had been prejudiced by the delay and whether justice could still be done despite the delay.

6. **THAT** the Learned Trial Magistrate erred in law in being quick to dismiss the Appellant's suit for want of prosecution.

7. I have considered the Appeal and the submissions made by the respective counsel for the parties.

8. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this 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, this 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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

9. Order 17 rule 2(1) provides as follows:

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit”.

10. The principles governing the dismissal of a suit for want of prosecution are that; delay must be inordinate, the inordinate delay is inexcusable and the Defendant is likely to be prejudiced. In the case of **Ivita v. Kyumbu [1984] KLR, 441**, the court held as follows:-

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the Plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the Plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

11. I have perused the Record of the Lower Court. *Ex parte* Judgment was entered against the 4th Defendant on 26/2/2018. No other proceeding is on the record until the 4th April, 2018 when the application for the dismissal of the suit for want of prosecution was heard. The Respondents argued the said application. The Appellant's counsel sought time to file written submissions which was not given. The Trial Magistrate considered the application and the Replying Affidavit and allowed the application with costs.

12. Although the Appellant was not given the opportunity to file written submissions, the Replying Affidavit was on record and was considered. It was the Appellant's position in the said Replying Affidavit that he first pursued the entry of Judgment against the 4th Defendant then commenced execution proceedings against the 4th Defendant. It was also the Appellant's averment that the said execution proceedings were not successful. It is apparent that the Appellant did not take any steps in this file from 1/7/2016 when Judgment was entered against the 4th Defendant until the application at hand was filed.

13. The Appellant's explanation that he was pursuing the execution against the 4th Defendant while the case against the other Defendants was inactive is not satisfactory and reflects lack of interest in the case against the other Defendants. It appears the Respondents had to bear the case hanging over their heads without any steps being taken to prosecute the same. The suit was filed in the year 2014 and the application for dismissal was filed in year 2018.

14. This court's conclusion is that the delay was inordinate and was not satisfactorily explained. The delay was prejudicial to the Respondents whose position was that they stood the risk of losing potential witnesses and evidence. It was submitted for the Appellant's side that the constitution provides for the right to a fair trial. However, this right applies to all the parties.

15. In the upshot, I find no merits in the Appeal and dismiss the same with costs.

Dated, signed and delivered at Nairobi this 10th day of June, 2021

B.THURANIRA JADEN

JUDGE