REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 73 OF 2018

JANE WANJIKU MAINGI.....APPELLANT

VERSUS

NELSON RITHO MUTHOGA.....RESPONDENT

(Being an Appeal from the Order/Ruling of Hon. B. M. Ochoi Principal Magistrate

delivered on 6th December 2018 in Mukurweini PMCC No. 10 of 2017)

JUDGEMENT

Brief Facts

1. Before the Principal Magistrate Mukurweini was PMCC No. 10 of 2017 that was dismissed on 13th September 2018 for want of prosecution and non-attendance. The appellant then filed an application dated 24th September 2018 to set aside the dismissal orders and reinstate the suit hearing. The said application was dismissed for lack of merit and being aggrieved by the decision of the magistrate, the appellant lodged this appeal. The appellant cited three grounds in her Memorandum of Appeal to the effect that the trial magistrate erred in law and in fact for failing to consider the grounds relied on in the application dated 24/9/2018.

2. By consent, parties agreed to put in and exchange written submissions on the appeal.

Appellant's Submissions

3. The appellant states that at all times she was keen to be compensated as she was claiming damages for injuries she sustained in a road traffic accident. She further states that parties were negotiating with an aim of settling the matter out of court and that is why she did not attend court for the hearing of the case. The appellant's counsel states that on 13/9/2018 when the suit was dismissed, he was attending an LSK Seminar and was unable to attend court. The appellant was not aware that the matter was proceeding that day and such did not attend court as well.

4. The appellant further submits that on 31/7/2018 when the court gave the parties one last chance to come up with a consent in default, there would be no further adjournment, the appellants counsel was not present in court. He was before the High Court attending to other matters. He further states that he was not given such instructions by the defence counsel and he further points out that the record at page 35 of the Record of Appeal does not bear a record of such warning.

5. The appellant contends that the suit was a test for five files No.s 73,74,75,76 and 77 all of 2019 and had the court given a chance to the parties to record a consent, it would have saved judicial time instead of having to conduct a full hearing. After the suit was dismissed, the plaintiff states that she filed an application reinstate the suit for hearing but the application was dismissed and thus she was unheard. She relied on the case of **Nyeri HCCA No. 86 of 2013 Equity Bank Limited vs Andrew Kariuki (Trading as Andrew Kariuki & Co. Advocates)** to support her contention. The appellant prays that the court allows her appeal.

Respondent's Submissions

6. The respondent confirms that they reached out to the appellant to have the matter settled out of court but the negotiations proved unsuccessful for parties failed to reach an agreement. The court noted that the matter has been adjourned severally in a bid to reach a settlement but negotiations completely failed. The court then went ahead and issued a last adjournment and a warning that in the event the plaintiff does not attend court, the court would take the appropriate action. On subsequent court attendances when the matter was scheduled for mention or hearing, the apellant constantly sought for adjournments on the basis that parties were still negotiating until the suit was

dismissed.

7. The respondent submits that the court has been indulging the appellant severally to the detriment of the respondent. The pendency of the suit continues to cause unwarranted anxiety and expense to the respondent as the same has hung over his head from 2017 to date. The respondent further submits that the pendency of the suit continues to vex him as he is denied of his right to a fair trial. He relies on the case of **Ceres Estate Limited vs Kieran Day & 4 Others [2013] eKLR** to support his contention.

8. The respondents urges the court to infer from the conduct of the appellant and find that she has lost interest in the suit. The respondent contends that it is upon the appellant to prosecute her case to the end, as she is the one who instituted the suit and therefore her excuse that she was not aware of the court's warning of the last adjournment amounts to negligence. Furthermore, the appellant's counsel on 15/5/2018 had sent someone to hold his brief and thus the instructions issued by the court should have been informed upon the appellant.

9. The respondent argues that the grounds pleaded by the appellant and her submissions are not sufficient to allow this court exercise its discretion in allowing the appeal. As such, the respondent prays that the appeal be dismissed with costs.

Issues for determination

10. The main issue for consideration is whether the trial court exercised its discretion in a judicious manner in dismissing the appellant's application.

The Law

11. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:**

> **"….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 into account of particular circumstances or probabilities materially to estimate the evidence."**

12. It was also held in **Mwangi vs Wambugu [1984] KLR 453** that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

13. Dealing with the same point, the Court of Appeal in **Kiruga vs Kiruga & Another [1988] KLR 348,** observed that:-

> **"An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand."**

14. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

15. In **Shah vs Mbogo & Another [1966] EA 166**, Harris J set out the guiding principle on a judge's discretion in setting aside a judgement:-

> **"I have carefully considered the principles governing the exercise of the court's discretion to set aside a judgment obtained ex parte. This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertent or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice."**

16. The principles in the **Shah –Vs- Mbogo** case are also applicable in the application. Having perused the court record, I find that the trial court exercised its discretion judiciously in dismissing the appellant's application. The matter before the magistrate came up for hearing severally and was always adjourned for the reason that the parties are negotiating. The trial court made note of the various uncalled for adjournment s as indicated in the proceedings of 15/5/2018. A warning that no further adjournment would be given was issued and recorded on 15/06/2021 that failure to record a consent, the matter would proceed for hearing. Despite this, the court allowed an adjournment again on 31/07/2018 to the counsel. On 13/9/2018, the appellant's counsel was not in court but gave instructions for counsel to hold his brief. The court made note that it had already allowed for an adjournment more than five times and that the parties were not being truthful about the status of negotiations. The court placed the file aside directing that the matter would proceed for hearing at 12pm. At the appointed time, none of the parties were present, it dismissed the suit.

17. In my view, the presiding magistrate had over a number of times accommodated the parties in their host of applications for adjournment in this appeal. He reached a stage where he issued warnings to the parties but they came back later and still applied for adjournment on the same grounds that parties are negotiating. By the time the court dismissed the matter on 13/09/2018, it had reached a point of no return. It seems like both parties had lost interest in the matter. The court noted that the plaintiff never appeared in court at any one time during the dates that the case was fixed for hearing. In a matter where negotiations fail, the counsel for the plaintiff would have acted without too much delay, by taking a hearing date for the case to be heard for the sake of his client. The respondent had nothing to lose and may be the delay

served him well.

18. The application for reinstatement of the suit dated 24/09/2018 was not opposed but based on the history of delay evident in the file, the magistrate dismissed it on 06/12/2018. Further, the court noted that the appellant had not even sworn an affidavit in support of the application. Such an affidavit would have explained the absence of the appellant during all the hearing dates when he failed to appeal since this one of the reasons given by the magistrate for dismissal of the suit. The said application whose outcome aggrieved the appellant did not form part of the record of appeal. The magistrate's conclusion that the plaintiff had lost interest in this suit was based on sound facts borne by the record.

19. It is my considered view that the ruling of the learned magistrate delivered on 06/12/2018 was not vitiated by any error. Neither did the magistrate fail to consider the grounds for reinstatement of the suit presented before him.

20. I find no merit in this appeal and I hereby dismiss it accordingly.

21. Each party to meet its own costs of this appeal

22. This ruling shall apply to the four (4) files in this series HCA Nos 74,75,76 and 77 all of 2018.

23. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 16TH DAY OF NOVEMBER 2021.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 16th day of November 2021