**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**CIVIL APPEAL NO. 311 OF 2018**

**JAMES KARIUKI WACHIRA.........................................................................APPELLANT**

**-VERSUS-**

**KENYA AIRWAYS LIMITED.......................................................................RESPONDENT**

**(Being an appeal from the ruling and order of Mburu D. W. PM**

**in Milimani CMCC No. 3679 of 2007 delivered on 21st July, 2017)**

**JUDGMENT**

1. **James Kariuki Wachira** (the Appellant herein) as the plaintiff in the trial court had in 2007, sued **Kenya Airways Limited** (hereafter the Respondent), for special and general damages. The Appellant averred that the Respondent had in breach of duty and or contract as a bailee and carrier for reward, failed to deliver certain cargo to Harare, Zimbabwe.

2. The Respondent filed a statement of defence dated 15th June 2007 essentially denying the averments in the plaint and liability for breach of duty and or contract as a bailee and carrier for reward. On 14th October 2015 when the matter came up for hearing, the trial court proceeded to dismiss the suit due to non-attendance on the part of the Appellant. The Appellant thereafter moved the trial court by a motion dated 16th December 2016 seeking that the dismissal order be set aside and the suit be reinstated and be heard on merit. On grounds among others that non-attendance of counsel and the plaintiff was due to an excusable mistake arising from the fact that counsel had made an erroneous entry of the hearing date in his diary. The motion was supported by an affidavit sworn by counsel for the Appellant.

3. The Respondent opposed the motion by filing a replying affidavit deposed by **Geoffrey Kazungu**. Submissions were filed as directed by the trial court and by its ruling delivered on 21st July, 2017 the trial court dismissed the motion. Aggrieved with the outcome, the Appellant lodged this appeal which is premised on 6 grounds as follows:

> **1) "That the Learned Magistrate erred in law and in fact by misdirecting himself as to the issue before him and hence dismissing the cause in issue.**
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> **2) That the Learned Magistrate erred in law and in fact in relying and considering extraneous matter as foundation for his ruling.**
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> **3) That the Learned Magistrate erred in law and in fact in failing to consider the industry and earnest involvement by the Appellant in pursuit of prosecuting his case as against the Respondent.**
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> **4) That the Learned Magistrate erred in law and in fact in failing to appreciate the very solid points of law raised by the Appellant in his submissions.**
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> **5) That the Learned Magistrate erred in law and in fact in arbitrarily favoring the Respondent with an award in absolute conflict with law basis thereof.**
>
> **6) That the Learned Magistrate erred in law and in fact in failing to find that the legal prerequisites of an application for reinstatement – were existent and hence the Application ought not to have been dismissed."**

4. The appeal was canvassed by way of written submissions. On behalf of the Appellant, counsel submitted that the trial court did not address the issues before it but instead dwelt on matters that were extraneous to the application. Relying on the decisions in **Patriotic Guards Limited v James Kipchirchir Sambu [2018] eKLR** and **Tana & Athi River Development Authority v Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR as to the applicable principles,** counsel faulted the trial court for failing to exercise its discretion to avoid injustice or hardship to the Appellant on account of the mistake by counsel; and that the trial court did not consider whether the prejudice (if any) to the Respondent could be compensated by damages.

5. Counsel complained that the trial court overlooked the diligence of the Appellant in prosecuting his claim and failed to appreciate the points of law raised in the Appellant's submissions and authorities, including **Civil Appeal NAI. No. 216 of 1997 Joseph Muhiu v Medicino Giovanni** and **Civil Appeal NAI. (Civil Application) No. 70 of 2004 Savings & Loans Limited v Onyancha Bwomete**. Finally citing among others, the decisions in **Unga Limited v Magina Limited [2014] eKLR**, **Philip Keipto Chemwolo & Another v Augustine Kubende [1986] eKLR**, and Wilson **Cheboi Yebo v Samuel Kipsang Cheboi [2019] eKLR** counsel submitted that the delay in filing the motion was not inordinate and had been explained and that the mistake of counsel should not be visited upon the litigant. He urged the court to allow the appeal.

6. The Respondent supported the trial court's decision. The Respondent's counsel submitted that the Appellant's conduct since institution of the suit and the instant appeal demonstrate a lack of interest on his part. He asserted that trial court was entitled, based on the Appellant's conduct, to make a finding that Article 159 of the Constitution was inapplicable to the matter. He relied on several authorities including **Standard Chartered Bank (K) Ltd v Ondieki Ayuki [2018] eKLR, Utalii Transport Company Limited & 3 Others v NIC Bank & Another [2014] eKLR,** and **Nicholas Kiptoo Arap Koror Salat v Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR.** Counsel asserted that allowing the appeal would be prejudicial to the Respondent in light of the time elapsed since institution of suit and the delay in prosecuting the same, which would render procuring of witnesses a daunting task to the Respondent. In support of the submission counsel cited **Fran Investments Limited v G4S Security Services Limited [2015] eKLR** and **Bilha Ngonyo Issac v Keumbu Farm Ltd & Another [2018] eKLR.** As for the Appellant, it was argued that unlike the Respondent, he had not demonstrated that he would suffer prejudice if the appeal failed. And besides, the Appellant had the option of recourse against his own counsel for negligence. Counsel relied on the case of **Alice Mumbi Nganga v Danson Chege Nganga & Another [2006].** It was the Respondent's position that the appeal is without and ought to be dismissed.

7. The court has perused the record of appeal and considered the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced at the trial and to draw its own conclusion, but always bearing in mind that it did not have opportunity to see or hear the witnesses testify. **See: Peters v Sunday Post Ltd (1958) EA 424; Selle and Anor. v Associated Motor Boat Co. Ltd and Others (1968) EA 123;** and **William Diamonds Ltd v Brown [1970] EA 11** and **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) IKAR 278.** The Court of Appeal **Abok James Odera T/A A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR**, this Court stated as follows regarding the duty of a first appellate court: -

> **"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority versus Kusthon (Kenya) Limited (200) 2EA 212* wherein the Court of Appeal held,** *inter alia*, **that:-**
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> ***"On a first appeal from the High court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

8. This appeal relates to the exercise of the trial court's discretion concerning the motion before it seeking to set aside dismissal order. The Court of Appeal in **Mashreq Bank P.S.C v Kuguru Food Complex Limited [2018] eKLR** held that**:**

> **"This Court ought not to interfere with the exercise of a Judges' discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a court exercising judicial discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of Mbogo Vs. Shah, (supra)**
>
> **"…..A court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice". [**Emphasis added**]**
>
> **See;** ***United India Insurance Co. Ltd v. East African Underwriters (K) Ltd [1985] E.A 898: -***

9. The appeal emanates from the ruling delivered on 21st July, 2017 in which the trial court stated inter alia that:

> **"………Both parties through their respective advocates put in written submission which I have carefully considered. The plaintiff and his counsel allege that the matter was misdiarized. There is nothing annexed to the supporting affidavit to show that indeed the matter had been misdiarized; not even a copy of the advocates diary. This is just a mere allegation which is not supported by evidence.**
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> **The plaintiff has also not sworn an affidavit to explain his own absence from court on 14th October, 2015. He has not**

**informed the court whether he was aware of the hearing date. Did the plaintiff's advocate communicate the hearing date and which date was it? All these questions remain unanswered by the plaintiff. I find that there has not been a satisfactory explanation by the plaintiff and his advocate for their absence on 14th October, 2015; yet the date had been fixed by plaintiff's advocate. On this finding alone, the application dated 16th December, 2016 is for dismissing.**

**I have also observed that this is an old suit which dates back to year 2007 yet it has never been heard. The suit has previously come up for hearing at least six (6) times. Out of these, the plaintiff has caused 5 adjournments thereby contributing to delay of the conclusion of the matter. This is another indicator that the suit was ripe for dismissal.**

**I have further observed after the suit was dismissed on 14th October, 2015, the instant application was not filed until more than one year later on 17th January, 2017. The plaintiff has not bothered to explain this delay. Even after preparing the application on 16th December, 2017, it took the plaintiff one month to file the same in court. This is another reason why the notice of motion dated 16th December, 2016 must fail.**

**…………Reinstating this suit would be highly prejudicial to the defendant who has had the suit hanging over its head for more than 10 years.**

**……….The applicant cannot take refuge in Article 159 after failing to prosecute the suit for over 10 years and failing to attend court on 14th October, 2015.**

**……….There is absolutely no basis laid by the plaintiff/Applicant for setting aside the dismissal order of 14th October, 2015." (Sic)**

*10.* What the Appellant had asserted in his motion is that his counsel mistakenly mis-diarized the hearing date. **Apaloo, J.A**. (as he then was) famously stated in ***Phillip Kiptoo Chemwolo and & Anor. v Augustine Kubede (1986) eKLR:-***

***"I think a distinguished equity judge has said:***

***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merit."***

***I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of parties and not for the purpose of imposing discipline...."***

11. In its later decision the Court of Appeal in **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others, [2015] eKLR** no doubt adverting to the overriding objective in section 1A and 1B of the Civil Procedure Act made the following remarks:

**"From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side…"**

12. The court has wide discretion in setting aside an ex parte judgment or order. In the case of **Shah –Vs- Mbogo and Another [1967] E.A 116** the Court of Appeal set out the purpose of the discretion as follows:

**"The discretion to set aside an ex-part judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence 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 cause of justice."**

13. The exercise of the trial court's discretion was not automatic. The onus was on the Appellant to demonstrate the mistake alleged and to explain the lengthy delay in moving the court, in persuading the trial court. He did neither and the trial court correctly observed that the alleged mistake on the part of counsel concerning the hearing date had not been demonstrated in any way, and not even by annexing a copy of the counsel's diary. The trial court was not persuaded that the bald allegation by counsel sufficed and recounting the history of the matter, declined to grant the motion, which had been filed over a year since the dismissal order. At the time of dismissal, the Appellant's suit had been pending for over 8 years, had been listed for hearing and adjourned six times at his behest. The Appellant did not deem it necessary to swear any affidavit in support of the motion to explain his own absence on the hearing date. Parties cannot hide behind their counsel in instances where there has been inordinate delay in prosecuting their cases; after all, the litigation ultimately belongs to the parties thereto and not their counsel. It is difficult in the circumstances to see how the trial court could have properly exercised its discretion in the Appellant's favour.

14. It is indeed a truism that the main concern of the court in exercising its discretion is to do justice to the parties. While the effect of the dismissal of the suit upon the Appellant cannot be gainsaid, the history of his conduct in prosecuting the matter does not place him in good light. And it is easy to see that the Respondent having endured the delayed litigation for 8 years should apprehend prejudice if the suit were to be reinstated as its own witnesses may prove difficult to procure, given the passage of time. The question arising therefore is whether upon

reinstatement of the suit justice could still have been done between the parties in the circumstances.

15. As stated **in Nicholas Kiptoo Salat's case** Article 159 (2) of the Constitution and section 1A of the Civil Procedure Act command the courts to administer justice in a manner that is efficient, proportionate and cost effective while eschewing technicalities. And that the said provisions were never intended to supplant the rules of procedure or to provide succor to parties who demonstrate scant regard for rules of procedure and timelines, which serve the process of judicial adjudication. See also **Assets Recovery Agency v Charity Wangui Gethi & 3 others [2020] eKLR.**

16. In **Karuturi Networks Ltd & Anor. Vs. Daly & Figgis Advocates, Civil Appl. NAI. 293/09** the Court of Appeal had the following to say concerning the overriding objective in section 1A and 1B of the Civil Procedure Act:

> "**The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective….. and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court**…" (emphasis added)

17. Reviewing all relevant matters, this court is not persuaded that the trial court misdirected itself in any matter or considered any extraneous issues. On the contrary, it is my finding that the trial court considered all relevant facts and applied correct principles in exercising its discretion. Indeed, no good reason had placed before it to justify the reinstatement and prolonging of the life of a suit which the Appellant had shown little diligence in prosecuting, and at the Respondent's expense. At a time when courts are deluged by heavy caseloads, they can barely accommodate parties who appear to litigate at leisure, thereby clogging the wheels of the administration of justice and occasioning unnecessary expense to adverse parties. In the result, the court finds that the Appellant was not deserving of the orders sought in his motion before the trial court. This appeal is without merit and is dismissed with costs.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 11TH DAY OF NOVEMBER 2021.**

**C. MEOLI**

**JUDGE**

**In the presence of:**

**Appellant: N/A**

**Ms. Oduor for the Respondent**

**C/A: Carol**