



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 551 OF 2016

SAMMY CHACHA RIOBA.....APPELLANT

-VERSUS-

HARAMBEE CO-OPERATIVE SAVINGS & CREDIT

SOCIETY LIMITED.....RESPONDENT

(Being an appeal against the ruling and order of Honourable D. Mbeja (Mr.) (Senior Resident Magistrate) delivered on 5th August, 2016 in Milimani CMCC NO. 5792 OF 2005)

JUDGMENT

1. Sammy Chacha Rioba, the appellant in this instance, instituted a suit vide the plaint dated 30th May, 2005 in which he sought for aggravated and exemplary damages plus costs of the suit against the respondent.
2. The appellant pleaded in his plaint that on 10th May, 2005 the respondent issued a public notice in the Daily Nation Newspaper publishing defamatory words against the appellant, which notice was also issued on the above date in the Standard Newspaper, and repeated on 11th May, 2005.
3. The particulars of the defamatory words and their natural and ordinary meaning were set out in the plaint.
4. The appellant pleaded that as a result of the publications made against him, he has suffered grave injury to his reputation.
5. The respondent entered appearance and filed its statement of defence dated 20th June, 2005 to refute the appellant's claim.
6. Later on 21st February, 2012 the appellant's suit was dismissed want of prosecution under the provisions of Order 17, Rule 2(1) of the Civil Procedure Rules.
7. Consequently, the appellant filed an application seeking a review of the dismissal order and a further order that the suit be reinstated, which application was allowed.
8. Subsequently, the suit underwent a second dismissal on 22nd March, 2016, causing the appellant to file another application dated 23rd March, 2016 seeking orders similar to those sought earlier on.
9. The aforementioned application was opposed by the respondent.
10. Upon hearing the parties on the application, the trial court dismissed it with costs vide its ruling delivered on 23rd March, 2016.
11. Being aggrieved by the above decision, the appellant has sought to challenge the same by way of an appeal. Through his memorandum of appeal dated 19th August, 2016 the appellant has put in the following grounds:
 - i. THAT the learned trial magistrate misdirected himself and erred in law and in fact by holding the appellant's case dismissed with costs.

ii. THAT the learned trial magistrate misdirected himself and erred in law and in fact by holding that the appellant has been sluggish in prosecuting his case.

iii. THAT the learned trial magistrate misdirected himself and erred in law and in fact by holding that there has been inordinate delay and lack of vigilance on the appellant's side.

12. This court issued directions to the parties to file written submissions on the appeal. The appellant submitted that the trial court misapprehended the reasons given for non-attendance, which were that the matter did not appear on the causelist.

13. The appellant urged this court to consider a vast array of authorities, such as the Court of Appeal case of **Harrison Wanjohi Wambugu v Felista Wairimu Chege & another [2013] eKLR** where the court found that the reasons given by the appellant for non-attendance were excusable, thereby reinstating an appeal which had been dismissed for non-attendance.

14. It was also the appellant's argument that the respondent has not shown that it stands to be prejudiced should the suit be reinstated, adding that in any case, any inconvenience caused to the respondent or its advocate can very well be compensated through costs.

15. Further to the foregoing, the appellant faulted the trial court for misinterpreting the overriding objective and straying from judicial precedents that have held that courts should always be reluctant to dismiss suits.

16. In this respect, the appellant drew this court's attention to the case of **James Mwangi Gathara & another v Officer Commanding Station Loitokot & 2 others [2018] eKLR** in which the High Court in its detailed analysis of a similar application for reinstatement of the suit held that courts ought to exercise their discretion in doing justice to the parties.

17. On its part, the respondent supported the trial court's reasoning and decision, contending that the trial court considered all relevant factors before choosing to dismiss the appellant's application for reinstatement.

18. In response to the subject of judicial discretion, the respondent referred this court to the authority of **Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR** where the Court of Appeal rendered that in considering the mistake of a counsel, the exercise of judicial discretion in favour of an applicant is not automatic since an advocate's duty is not restricted to his or her client; rather, he or she has a corresponding duty to the court and to the opposing party.

19. It was the respondent's contention that neither the appellant nor his counsel made any attempts at giving a detailed and reasonable explanation for non-attendance on their part.

20. In closing, the respondent submitted that if the appeal is allowed and the suit is reinstated more than 14 years since its filing, the respondent stands to suffer prejudice.

21. I have considered the contending submissions on appeal and the numerous authorities cited by the parties. As is required of me, I have also re-examined the lower court record and proceedings.

22. It is clear that the three (3) grounds of appeal concern themselves with the manner in which the learned trial magistrate applied his discretion and the outcome of declining to reinstate the appellant's suit. I will therefore address the grounds of appeal together.

23. Looking at the lower court proceedings and as earlier indicated, it is apparent that the appellant's suit was dismissed for non-attendance on 22nd March, 2016, prompting the filing of the application in question.

24. In his supporting affidavit to the Notice of Motion dated 23rd March, 2016 the appellant's advocate *Sammy Chacha Rioba* explained the non-attendance by stating that the suit was not listed on the online causelist found on the Kenya Law website, which led him to believe that the matter had been taken out of the causelist.

25. The advocate went ahead to state that upon following up on the lower court file from the registry, he was informed that the file was in court and that it had been listed before Court No. 203 (Honourable Chesang') and that upon proceeding to court, he learnt that the suit had already been dismissed for non-attendance of both parties.

26. It was ultimately the advocate's contention that the non-attendance was not intentional but resulted from the confusion between the online and physical causelists.

27. The respondent put in the replying affidavit of *Tikoishi Naikumi Koitaat* to oppose the Motion, stating that the appellant has time after time neglected to prosecute his case which was filed over 10 years ago and this is evidenced by an earlier dismissal prior to the dismissal in question.

28. The deponent further asserted that in the meantime, key witnesses for the respondent have since transitioned, thereby negatively impacting the respondent's ability to adequately defend its case.

29. The learned trial magistrate, upon hearing the parties on the Motion, reasoned that not only did the appellant not dispute that the suit was listed on the physical causelist, but it is admitted that neither of the parties was in court when the matter was called out.

30. The learned trial magistrate also took into consideration the earlier dismissal of the suit and was of the view that despite the age of the

suit, the same is yet to proceed for hearing.

31. In addition, it was the learned trial magistrate's reasoning that the Motion before him bore a striking resemblance to the application relating to the earlier dismissal order.

32. In the end, it was the learned trial magistrate's position that litigation must come to an end, citing the case of **Ukay Estate Ltd & another v Shah Hirji Manek Ltd & 2 others [2006] eKLR** in which the Court of Appeal rendered the following:

“...the doctrine is not merely a technical one applicable only on records. It has a solid base from considerations of high public policy in order to achieve the twin goals of finality to litigation and to prevent harassment of individuals twice over with the same account of litigation. Put another way, there must be an end to litigation and no man shall be vexed twice over the same cause.”

33. The learned trial magistrate further acknowledged the purpose behind the overriding objective of the court as being to facilitate the expeditious and just determination of suits.

34. Finally, the learned trial magistrate took the view that there has been an inordinate delay in prosecuting the suit, thus dismissing the application.

35. The law on expeditious prosecution of suits is well settled. As the learned trial magistrate aptly put it, the overriding objective of civil procedure requires that parties exercise a high level of diligence and commitment in prosecuting their suits.

36. In the event that a suit is dismissed for non-attendance as was the case here, courts are called upon to consider whether the reasons given are viable and exercise their discretion as they deem fit.

37. In the present matter, I noted that the suit was filed way back in 2005. Going by the record, the suit was severally before court but was never heard due to frequent adjournments on both sides.

38. It is important to mention that when the parties appeared before the lower court on 26th February, 2014 they were granted a last adjournment and a hearing date was set.

39. However, when the parties appeared for the next hearing on 28th April, 2014 an adjournment was sought by the appellant's advocate and the parties were directed to fix a date from the registry.

40. Going by the lower court proceedings, it is apparent that the hearing date of 22nd March, 2016 was fixed by the appellant's advocate *ex parte* from the registry and it remains unclear whether the respondent was served with a hearing notice to that effect.

41. Needless to say that the appellant annexed to his Motion a copy of the causelist. I have looked at the same and confirmed that the appellant's suit was indeed listed for hearing before Hon. M. Chesang (Mrs.) (Senior Resident Magistrate) on the abovementioned date.

42. According to the lower court record, none of the parties was in attendance when the matter was called out, leading to its dismissal.

43. All the above factors were taken into consideration by the learned trial magistrate. Moreover, upon my re-evaluation of the proceedings, I have not come across anything to show that the appellant's advocate truly visited the registry to follow up on the file as claimed.

44. If at all the said advocate was unsure of the listings, he ought to have demonstrated diligence in confirming with the physical causelist which as I have laid out, showed that the matter was listed. It is inexcusable for him to simply assume that the matter had been taken out in the absence of clear information to that effect.

45. Further to this, the appellant made no mention that either of the plaintiff witnesses was in court and ready to proceed with the hearing of the suit; otherwise, they would have brought their presence to the attention of the court during call-out of the matter.

46. In the premises, I agree with the learned trial magistrate's reasoning that the actions or omissions of both the appellant and his advocate depicted indolence and a lack of seriousness in prosecuting his case.

47. Might I add that even though both parties were responsible for adjourning the suit on various occasions previously, the duty ultimately fell upon the appellant to be proactive in ensuring his suit was heard at the earliest opportunity especially given the age of the suit; this was not demonstrated.

48. The above, coupled with the fact that the suit had undergone a previous dismissal as noted above, leads me to concur with the learned trial magistrate that surely, litigation must come to an end and in any event, the explanation offered by the appellant is neither practical nor credible.

49. Having looked at the learned trial magistrate's analysis, I am satisfied that he correctly applied his mind to the relevant legal principles and overriding objective, though I noted that the magistrate may have misinterpreted the authority of **Ukay Estate Ltd & another v Shah Hirji Manek Ltd & 2 others [2006] eKLR** since the doctrine which was discussed therein is that of *res judicata* which would not apply here.

50. In conclusion, I find no fault in the learned trial magistrate's reasoning and finding.

51. The upshot is that the appeal is hereby dismissed for being unmeritorious, and the trial court's ruling delivered on 5th August, 2016 is hereby upheld. The respondent shall have costs of the appeal.

Dated, Signed and Delivered at Nairobi this 21st day of January, 2020.

.....

J.K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent