



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 423 OF 2018

SAGAR BUILDERS LIMITED.....1ST APPELLANT

HARAN MAVJI2ND APPELLANT

VERSUS

JOHN KARUKU MBUGUARESPONDENT

(Being an appeal against the ruling of Hon. D. O. Mbeja, SRM delivered on 14th August, 2018 in CMCC No. 2812 of 2013 at Milimani Commercial Courts.)

JUDGMENT

This appeal arises from the ruling of the lower court delivered on 14th August, 2018 following an application by way of Notice of Motion dated 26th April, 2018. That application sought review of dismissal orders where respondent's suit had been dismissed and therefore the respondent sought revival thereof.

In the same application the respondent had sought substitution of the plaintiff, who was then deceased, with his legal representative. After considering the application, the lower court allowed the same on condition that the suit be fixed for hearing within six months from the date of the said ruling. In default the suit would stand dismissed. The appellants were aggrieved by the said ruling and filed the memorandum of appeal on 10th September, 2018.

In the memorandum of appeal, the lower court was faulted for allowing the substitution of the deceased with his legal representative which was irregular and against Order 24 of the Civil Procedure Rules. Further, the application for review and reinstatement of the suit was filed one and half years after it had been dismissed for want of prosecution, and in any case the lower court erred in reinstating the suit by way of review where the same had abated, and no leave had been sought under Order 24 aforesaid. In addition, the lower court was faulted for substituting Order 24 of the Civil Procedure Rules with Article 159 (2) (d) of the Constitution thereby occasioning injustice to the appellants.

Parties have filed their respective submissions and cited several authorities which I have considered. It is my duty to evaluate the lower court record with a view to making independent conclusions. In so doing, I must observe that in handling the application, the lower court was exercising its discretion which however is supposed to be grounded on facts that would cause no prejudice to either of the parties.

In allowing the application the lower court said as follows,

“I am satisfied that the plaintiff has been sluggish in prosecuting this case. There has been inordinate delay and lack of vigilance by the plaintiff, however the explanation by the plaintiff's advocate is credible. The Court of Appeal has held in Trust Bank Limited vs. Amalo Co. Limited (2002) e KLR that parties to a suit are to be heard on the documents presented before the court and on record. In view of the foregoing, I am inclined to allow the application before the court. On the same wavelenght the application dated 26/4/2018 is allowed with no order as to costs on condition that this suit be fixed for hearing within six months from the date of this ruling”.

Order 24 of the Civil Procedure Rules provides that the court may allow a legal representative, upon an application, to take over the case where a plaintiff dies. In the event the time to file such an application has expired, the court may **“for good reason”** extend the said time.

In the extract of the ruling cited above, there is no doubt whatsoever that the lower court had a mind the provisions of law in granting the

orders sought. In the application leading to the said ruling, the applicant gave reasons for the delay which the lower court accepted. I have also considered the nature of the cause of action and believe that, no prejudice shall be occasioned if the ruling of the lower court is upheld.

The court is enjoined by the rules of natural justice, and the drive to maintain the right to be heard, to breathe fresh air into a suit which has abated if no prejudice shall be occasioned to the other party.

Courts have observed over and over again that where a delay has been explained satisfactorily, even when such delay is prolonged, a party should not be driven from the seat of justice without a hearing.

The discretion of a court cannot be faulted where all parties will eventually have an opportunity to ventilate their respective positions. I agree that Article 159 of the Constitution may be subject to abuse by parties who, for reasons that may not be offered, have failed to comply with the relevant rules of procedure. – see **Nicholas Kiptoo Arap Korir Salat vs. IEBC & 6 others (2013) e KLR.**

At the same time, mistakes do occur and where it is possible to compensate a party by way of costs to advance the rights of the parties, then that option should be taken.

In this case, I see no serious prejudice that may be occasioned to the appellants if the suit were to proceed to full hearing. In view of the foregoing, the appeal is dismissed but the respondent shall pay the appellants all the costs occasioned by this appeal.

Dated, signed and delivered at Nairobi this 7th day of May, 2020.

A. MBOGHOLI MSAGHA

JUDGE