



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 444 OF 2015

NDANU JIMMY MAUTA

SAMMY NZUKI MAUTA (Suing as the administrators of the estate of

JIMMY MAUTA SAMMY-Deceased).....APPELLANTS

-VERSUS-

MUNYALO MARSHALL.....RESPONDENT

(Being an appeal from the ruling and order of Honourable M. Obura (Mrs.)

(Principal Magistrate) delivered on 20th August, 2015

in Milimani CMCC No. 5299 of 2011)

JUDGEMENT

1. The 1st and 2nd appellants herein instituted a suit before the Chief Magistrates Court at Milimani in their capacity as the administrators of the estate of Jimmy Mauta Sammy (“the deceased”) vide the plaint dated 27th October, 2011 and sought for general damages and special damages against the respondent plus cost of the suit and interest on the same.
2. The claim arose out of a road traffic accident involving motor vehicle registration number KAP 108N belonging to the respondent at all material times and which accident is said to have resulted in the death of the deceased.
3. The respondent entered appearance on being served with summons and filed his statement of defence on 15th February, 2012 to deny the appellants’ claim.
4. Before the suit could be heard, the respondent lodged the Notice of Motion dated 6th August, 2014 seeking the dismissal of the appellants’ suit for want of prosecution.
5. The appellants opposed the Motion by filing the replying affidavit of advocate Eric John Mutemi.
6. Upon hearing the parties on the Motion, Honourable PrincipalMagistrate Ole Keiwua vide his ruling delivered on 5th November, 2014 ordered the appellants to pay thrown away costs to the respondent in the sum of Kshs.10,000/ and to prosecute their case within 90 days therefrom failing which the suit would be dismissed.
7. When the parties later appeared before the trial court on 20th August, 2015 the court ruled that going by the abovementioned ruling and order of 5th November, 2014, the suit had already been dismissed and there was no suit to be heard.
8. Being dissatisfied with the aforesaid decision, the appellants lodged this appeal against the same vide the memorandum of appeal dated 14th September, 2015 and put forward the following grounds of appeal:

i. THAT the learned trial magistrate erred in law and fact while interpreting the orders issued by Hon. Ole Keiwua on 5th November, 2014.

ii. **THAT the learned trial magistrate erred in law and fact in failing to appreciate the fact that the appellants had taken all necessary steps to fix the suit for hearing within the 90 days ordered by Hon. Ole Keiwua.**

iii. **THAT the learned trial magistrate erred in law and fact in failing to appreciate that the appellants had no power to allocate themselves hearing dates as this was the sole prerogative of the court registry.**

iv. **THAT the learned trial magistrate erred in law and fact in misapplying a technicality to dismiss the appellants' suit even when no formal application had been made by the respondent.**

v. **THAT the learned trial magistrate failed to appreciate the fact that the appellants were in court and ready to prosecute their suit and all the respondent was asking for was thrown away costs.**

vi. **THAT the ruling is against the letter, tenor, intent and spirit of the Constitution which negates technical jurisprudence.**

9. This court gave directions that the appeal be canvassed by written submissions.

10. The appellants submit that following the ruling of 5th November, 2014 they took the necessary steps in obtaining a hearing date from the registry but that it was beyond them to secure a date that fell within the timelines set by the trial court earlier on and that in any case, the court diary had closed and a new one was only opened in March of 2015.

11. The appellants are of the view that the trial court did not take the above factors into consideration before deciding to dismiss their suit.

12. It is also the submission of the appellants that the trial court disregarded the provisions of **Article 50(1)** of the **Constitution** expressing that every person shall have the right to have his or her dispute resolved in a fair and public hearing as well as **Article 159(1) (d)** which provides that justice shall be served without undue regard to technicalities, thereby denying the appellants their constitutional right to a fair hearing.

13. In reply, the respondent argues that in dismissing the appellants' suit, the trial court acted properly and within the provisions of **Order 17, Rule 2(4)** of the **Civil Procedure Rules** which stipulate that a court may dismiss a suit where there has been non-compliance with earlier orders/directions given under that provision.

14. The respondent contends that following his application to have the appellants' suit dismissed, the trial court did not dismiss the suit but gave the appellants specific conditions to fulfil, failure to which the suit would be dismissed.

15. The respondent argues that by the time the parties attended court on 20th August, 2015 the appellants had not complied with any of the conditions given, hence the trial court's decision to dismiss the suit on that basis was correct.

16. It is the submission of the respondent that had the appellants been keen on complying with the order made on 5th November, 2014 they would have sought for an enlargement or extension of time to enable them comply with the conditions set therein but they did not, which is tantamount to sleeping on their rights.

17. The respondent addressed the subject of technicalities vis-à-vis substantive justice by submitting that in failing to act expeditiously even after being given a second chance at their case, the appellants cannot be heard to now claim that the trial court unduly relied on a technicality in dismissing their case. The respondent cited *inter alia*, the case of **Salim Sultan Moloo v Oscar Foundation & 3 others [2013] eKLR** where the court held that:

“In my view the Plaintiff's inactivity in this case has undoubtedly caused injustice and probably prejudice to the Defendants whom he dragged to this Court. Such delay goes against the overriding objective of the Civil Procedure Act.”

18. I have considered the contending submissions plus the various authorities cited. I have also re-evaluated the evidence and proceedings before the trial court.

19. It is noted that the appeal essentially lies against the decision by the trial court to dismiss the appellants' suit for non-compliance with the earlier directions of 5th November, 2014. I will address the appeal under three (3) limbs.

20. The *first* limb touching on grounds (i), (ii), (iii) and (v) of the appeal has to do with whether the learned trial magistrate's finding of non-compliance on the part of the appellants was correct.

21. Going by the lower court record and proceedings, it is not in dispute that the respondent had at the onset filed an application under the provisions of Order 17, Rules 2(3) and (4) of the Civil Procedure Rules seeking to have the appellants' suit dismissed and that the trial court delivered a ruling on that application on 5th November, 2014.

22. It is also not disputed that in the aforesaid ruling, the trial court though noting that the suit had not been prosecuted for a period of more than one (1) year, declined to dismiss the suit but issued two (2) specific conditions to the appellants which I have already set out.

23. From the record, it is on the basis of the above ruling that the learned trial magistrate dismissed the appellants' suit for non-compliance.

24. The record shows that following the ruling delivered on 5th of November, 2014 the appellants through their advocate attended the registry on 27th November, 2014 and had the suit fixed for hearing on 23rd January, 2015.

25. On the said 23rd January, 2015 the record shows that the appellants' advocate attended court before Honourable Mr. Ole Keiwua who had delivered the ruling of 5th November, 2014, at which point he certified the matter ready for hearing and directed the advocate to take a hearing date from the registry.

26. Thereafter, the appellants' advocate visited the court registry on 25th March, 2015 and obtained an ex parte hearing date for the suit on 20th August, 2015. It is on the said date of hearing that the suit was marked as dismissed by the learned trial magistrate.

27. From my study of the record, I note that following the conditions given on prosecution, the appellants took reasonable steps to have the suit set down for hearing by visiting the registry and even attending court at one point.

28. However, I note that when the appellants' advocate attended court on 23rd January, 2015 the matter did not proceed for reasons that the appellants explained as non-compliance with pre-trial directions. Suffice it to say that there is no indication that the appellants brought to the attention of the trial court the timelines set for prosecution of their case, even though the trial court equally ought to have noted from the record that it is the one that gave the timelines to begin with.

29. Instead, the appellants visited the registry almost two (2) months later to obtain fresh dates. I recall their explanation that the court diary was closed until then and that the date which they subsequently obtained was the earliest available date. Whereas this court is aware that the issuance of dates is within the purview of the court registry, the appellants ought to have at least demonstrated that they sought for an enlargement of time to enable them comply with the timelines for prosecution of their case in the event that they were unable to obtain an early date, but did not.

30. Furthermore, the record shows that at the time of appearing before the learned trial magistrate on 20th August, 2015 the appellants had equally not complied with the condition requiring them to pay thrown away costs to the respondent and the 90-day compliance period had long lapsed by then.

31. In view of the foregoing, I am satisfied that the learned trial magistrate correctly interpreted the order of 5th November, 2014 in deeming the suit dismissed since there was really no suit to be heard in the circumstances.

32. On the *second* limb to do with whether it was necessary for a formal application to be made for the suit to be dismissed in line with ground (iv) of the appeal, it is apparent from the record and as I have stated, that it is the application by the respondent that resulted in the order giving the appellants specific timelines within which to prosecute their case.

33. In the absence of compliance or extension of time or setting aside of the earlier order, the suit automatically stood dismissed and the learned trial magistrate merely restated this position in making her order. There was no need for the respondent to formally seek the dismissal of the suit.

34. The provisions of **Order 17, Rule 2(4)** of the **Civil Procedure Rules** give courts the power to dismiss a suit for non-compliance with any directions given under the said Order.

35. The *third* and final limb brought about by ground (vi) of the appeal concerns itself with the principles of technicalities vis-à-vis substantive justice.

36) I have considered the circumstances of this appeal and I am hesitant to accede to the appellants' argument that the learned trial magistrate placed undue regard on a technicality, thereby denying the appellants substantive justice.

36. In my view, the learned trial magistrate cannot be faulted for simply acting on the orders made earlier by her colleague. It fell upon the appellants to either comply with the conditions set or to seek for an enlargement of time to comply but they did not.

37. It is also noted that the suit is fairly old and it has always been the responsibility of the appellants to ensure its prosecution.

38. That notwithstanding, I cannot overlook the appellants' attempts To have the suit fixed for hearing from the time of issuance of the conditions. In the interest of substantive justice and in the absence of any evidence from the respondent to show the prejudice he stands to suffer, persuaded and convinced that the appellants should be given an opportunity to prosecute their suit.

39. In the end therefore, the appeal is allowed and the following consequent orders are made:

a) The order made on 20th August, 2015 deeming the suit as automatically dismissed is hereby set aside and is substituted with an order reinstating the suit for hearing on its merits.

b) The trial court shall at the earliest opportunity give directions on the hearing of the suit within a reasonable time considering the age of the suit.

c) The respondent shall in any case have costs of the appeal.

Dated, signed and delivered virtually via Microsoft Teams at Nairobi this 10th day of July, 2020.

J. K. SERGON

JUDGE

In the presence of:

.....for the 1st and 2nd Appellants

.....for the Respondent