REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 430 OF 2018

DORISTER MULOKO MAKAU.....APPELLANT

-VERSUS-

STEPHEN GACHIMU.....1ST RESPONDENT

JOSPHAT KARIMI MWOSA.....2ND RESPONDENT

(Being an appeal from the ruling and order of D.O. Mbeja (Mr.) (Senior Resident Magistrate)

delivered on 14th August, 2018 in Civil Suit No. 5200 of 2010)

JUDGEMENT

1. The appellant, being also the plaintiff in CMCC no. 5200 of 2010, instituted the said suit against the 1st and 2nd respondents herein vide the plaint dated 7th July, 2010 claiming both general and special damages, future medical expenses and costs of the suit plus interest thereon for injuries sustained in a road traffic accident involving motor vehicle registration number KAP 358P allegedly owned by the 1st respondent and being driven by the 2nd respondent at all material times.

2. Upon entering appearance, the 1st and 2nd respondents put in their joint statement of defence dated 21st September, 2010 and amended on 15th July, 2011 to resist the appellant's claim.

3. When the matter came up for hearing before the trial court on 5th May, 2017, the trial court dismissed the suit for want of prosecution noting that no action had been taken by any of the parties for one (1) year. Subsequently, the appellant's advocate filed the application dated 23rd April, 2018 seeking to reinstate the suit and which application was opposed by the respondents.

4. Following written submissions by the respective parties on the Motion, the trial court through its ruling of 14th August, 2018 moved to dismiss the said Motion with costs.

5. The abovementioned ruling has triggered the filing of this appeal. The appellant put forward the following grounds in his memorandum of appeal:

> ***i. THAT the learned trial magistrate erred in law and in fact in failing to consider the appellant's evidence, submissions and authorities cited.***
>
> ***ii. THAT the learned trial magistrate erred in law and in fact in failing to accord the appellant the opportunity to be heard.***
>
> ***iii. THAT the learned trial magistrate erred in law and in fact by elevating procedure in the stead of serving substantive justice.***
>
> ***iv. THAT the learned trial magistrate erred in law and in fact by dismissing the appellant's application despite the respondents not suffering any prejudice with its being granted.***

6. This court gave directions for the appeal to be canvassed by way of written submissions. The appellant stated in her submissions that the learned trial magistrate did not appreciate the fact that the appellant had provided a reasonable and excusable explanation for failing to prosecute her case owing to the inadvertence of her former advocates.

7. It is the appellant's submission that the courts ought to uphold a party's constitutional right to a fair hearing pursuant to the provisions of Article 50 of the Constitution and that the learned trial magistrate ought to have granted her an opportunity to be heard as opposed to dismissing her suit.

8. The appellant cited the case of **Egal Mohamed Osman v Inspector General of Police & 3 others [2015] eKLR** in which the court expressed itself as follows:

> ***"…in The Management of Committee of Makondo Primary School and Another v Uganda National Examination Board, HC Civil Misc Applic No.18 of 2010, the Ugandan Supreme Court stated as follows regarding the rules of natural justice:***
>
> ***"It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing."***

9. It is also the submission of the appellant that courts ought to exercise their discretion in the interest of justice even where there has been an omission or inadvertence of some sort on the part of an advocate.

10. The appellant has cited the case of **Philip Kiptoo Chemwolo & another v Augustine Kubende [1986] eKLR** where the Court of Appeal acknowledged that whereas mistakes may be made, this does not automatically mean that a party's right to have his or her case heard on merit should be impeded on that basis alone.

11. In her conclusion, the appellant contends that the learned trial magistrate did not assess the prejudice she stands to suffer as a result of the dismissal order vis-à-vis the prejudice, if any, that would befall the respondents should the suit be reinstated.

12. In their submissions the respondents argued that the appeal should be dismissed for because the appellant did not offer a plausible explanation to justify the reinstatement of the suit and that there has been inordinate delay in the prosecution of the suit.

13. The respondents further argued that they will be greatly prejudiced in the event that the suit is reinstated and that it is the duty of the courts to ensure the expeditious disposal of matters. The respondents further cited the case of **Fran Investments Limited v G4S Security Services Limited [2015] Eklr** in which the court expressed itself in part as follows:

> ***"…Such delay is not inadvertent as alleged by the Applicant; it is deliberate as a party is expected to prosecute their cases without delay. The delayed has not been satisfactorily explained and is a source of prejudice to the Respondent as well as to the fair administration of justice. These are sufficient reasons to refuse to reinstate a suit and let it lie in peace in judicial grave. The amount of time which has passed by will not allow any and is not conducive to having a fair trial in this matter…"***

14. For all the foregoing reasons, the respondent urges this court to dismiss the appeal and to uphold the ruling of the learned trial magistrate.

15. I have carefully considered the rival submissions and the authorities cited. I have also perused the documents and proceedings placed before the trial court and the resultant ruling.

16. By and large, the four (4) grounds raised on appeal are co-related in the sense that they revolve around the subject of dismissal and reinstatement of suits; I will therefore address them contemporaneously.

17. The Notice of Motion dated 23rd April, 2018 set out among its grounds that the erstwhile advocate for the appellant had not been updating the appellant on the progress of the suit and that by the time she instructed a different firm of advocates to take over the matter, the suit had already suffered a dismissal and without notice to her erstwhile advocate.

18. The above sentiments were echoed in the supporting affidavit of the appellant, save to add that prior to the dismissal of the suit, she had made follow ups with her former advocate to no avail.

19. In her replying affidavit, Pauline Waruhiu, General Manager at Directline Assurance Company Limited who is the insurer for motor vehicle registration number KAP 358P, stated that the Motion is an afterthought since the suit was last in court on 24th September, 2015 before its dismissal by the court on its own motion and that the delay has caused the respondents to suffer risk to a fair trial and prejudice.

20. The above arguments were reiterated by the parties' respective advocates at the hearing of the Motion. The learned trial magistrate outlined in his ruling that both the appellant and her advocate were not keen on prosecuting the suit and that there must be an end to litigation. The learned trial magistrate also took into account the overriding objective which requires the just and expeditious determination of matters with efficiency and in a timely manner.

21. The typed proceedings attached to the record of appeal indicate that the suit was last in court on 24th September, 2015 on which day the trial court allowed an application for enjoinment of a third party, brought by the respondents.

22. It is apparent from the typed proceedings that the suit was dismissed by the trial court on 5th May, 2017 on its own motion and in the absence of the parties and pursuant to the now **Order 17, Rule 2(1)** of the **Civil Procedure Rules, 2010** which stipulates as follows:

> ***"In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit dismissed, and if cause is not shown to its satisfaction, may dismiss the suit."***

23. From the foregoing provision, it is clear that the learned trial magistrate was enabled to exercise his discretion as he deemed fit in deciding whether to dismiss the suit for want of prosecution.

24. It is noteworthy that once a court applies its discretion in dismissing a suit, the same can only be set aside under reasonable circumstances and where justice would be achieved.

25. It is also noteworthy that 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.

26. It is clear that the appellant is essentially faulting her former advocate for inadvertence which led to the dismissal of her suit to begin with.

27. The circumstances of this case, now on appeal, portray a classic example of inadvertence on the part of the appellant's former advocate, with the appellant urging this court to consider previous court decisions that a party ought not to be automatically punished as a result of a mistake or inadvertence.

28. As a general rule, the inadvertence of an advocate ought not to befall the client. To buttress this position, I will cite the case of **Philip Kiptoo Chemwolo & another v Augustine Kubende [1986] eKLR** relied upon by the appellant and in which the Court of Appeal rendered itself as follows:

> ***"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 merits."***

29. That notwithstanding, the overall circumstances surrounding the case will determine whether such inadvertence was the sole reason for the dismissal.

30. From the trial court's record and proceedings, it is clear that no action was taken in the suit for close to two (2) years prior to its dismissal. As earlier noted, the appellant explained this away by stating that her former advocate kept her in the dark.

31. The legal position is that it is ultimately the responsibility of a party to follow up on his or her case. This position was reaffirmed by the Court of Appeal in the case of **Rajesh Rughani v Fifty Investments Limited & another [2016] eKLR** when it held that:

> ***"In Habo Agencies Limited -v- Wilfred Odhiambo Musingo [2015] eKLR this Court stated that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. In Mwangi - v - Kariuki (199) LLR 2632 (CAK) Shah, JA ruled that mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude."***

32. In the event that the appellant felt that her former advocate was not effectively representing her interest in the suit, she ought to have demonstrated the steps taken in following up on her case, but did not. In the circumstances, I find that both the appellant and her former advocate are to blame for the delay in the suit. To this extent, I agree with the reasoning adopted by the learned trial magistrate where the court emphasized on the importance of a party to follow up on his or her case.

33. It is apparent that following the dismissal of the suit, a period of close to one (1) year lapsed before the appellant filed the Motion for reinstatement through her current advocate and yet she stated that she received her client's file from her former advocate on 12th May, 2017. I am not convinced that the appellant has made attempts to adequately explain the delay occasioned in between.

34. Having perused the trial court's record and proceedings, there is nothing to indicate that a notice to show cause was given to the parties prior to the dismissal order, to enable them attend the court for that purpose. Having taken into account that this issue was raised by the appellant in her Motion before the trial court, I am of the view that the learned trial magistrate ought to have considered it and make a determination on it.

35. Upon weighing the arguments presented by the parties regarding the prejudice they stand to suffer, I find the arguments by the appellant on the one part to be reasonable in light of the existing constitutional right of a party to be heard on merit. On the other part, I am of the view that the respondents have not demonstrated by way of evidence the prejudice they stand to suffer should the suit be reinstated. I think an award of costs would constitute adequate compensation.

36. In the case of **Ivita v Kyumbu [1975] eKLR** as cited in the case of **Jim Rodgers Gitonga Njeru v Al-Husnain Motors Limited & 2 others [2018] eKLR** it is stated in part as follows:

> ***"…it was made explicit that it is the duty of the defendant to demonstrate the prejudice alleged by it. The defendant must satisfy***

the court that it will be prejudiced by the delay by showing that justice will not be done in the case due to the prolonged delay on the part of the plaintiff."

37. Though litigation must come to an end, courts must consider the circumstances of each case uniquely in determining whether to order a dismissal or not.

38. In the present case the learned trial magistrate ought to have taken into account the principles on prejudice; substantive justice and the absence of evidence to show that a notice to show cause had been served upon the appellant. In the premises, I think I am entitled to interfere with the dismissal order.

39. The upshot is that the appeal is allowed and the following orders are made consequently:

a) **The order dismissing the Motion dated 23rd April, 2018 is set aside and is substituted with an order allowing the Motion and consequently, reinstating the suit.**

b) **The reinstated suit to be heard on priority basis by another magistrate of competent jurisdiction other than Hon. D. O. Mbeja.**

c) **The 1st and 2nd respondents shall have costs of the appeal.**

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 6th day of November, 2020.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

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