REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM BEFORE: HON. JUSTICE R. MWONGO J

CIVIL APPEAL NO. 72 OF 2016

ELIZAPHAN MAKORI SIRINGI.....APPELLANT

-VS-

SAMSON MAMWACHA.....1ST RESPONDENT

DAKIANGA DISTRIBUTORS LIMITED.....2ND RESPONDENT

(Being an appeal from the Ruling of the Hon. P. Gesora (CM)

delivered on the 30th September, 2016 in Naivasha CMCC No. 515 of 2010)

JUDGMENT

Background

1. This appeal was filed on 2nd November, 2016. There was no movement in the matter until 10th January, 2019 when the Deputy Registrar notified the appellant that the lower court record had been received, and he should file the record of appeal.

2. In the meantime on 4th June, 2019 the Deputy Registrar issued a Notice to Show Cause why the appeal should not be dismissed for want of prosecution. Upon formal arguments thereon, this court ruled on 9th July, 2020 that the Notice to Show Cause was improperly issued. It granted the appellant a timeframe within which to file their submissions on the substantive appeal.

3. Although the record indicates that both parties filed submissions in the appeal, the only submissions actually on record are those by the Respondent filed on 17th July, 2020. The appellant's submissions on record are in respect of the prior Notice to Show Cause dated 13th January, 2020. Nevertheless, as the Memorandum of Appeal is self-explanatory I will proceed to determine the present appeal.

4. The substantive appeal in this matter challenges the trial court's Ruling of 30th September, 2016 wherein the suit was dismissed for want of prosecution. The learned magistrate found that there was no evidence that the court file had gone missing; that there was no communication by the appellant (respondent to the application for dismissal) to the court complaining of the file disappearance; nor any confirmation from the court that the file had indeed gone missing.

5. The grounds of appeal are as follows:

> *1) The Learned Chief Magistrate erred in law and in fact in dismissing the Appellant's case for want of prosecution without any basis in law.*
>
> *2) The Learned Chief Magistrate erred in law and in fact in failing to properly direct his mind to the peculiar circumstances and thereby wrongly exercised his discretion by dismissing the suit for want of prosecution.*
>
> *3) The Learned Chief Magistrate erred in law in finding that failure to take a hearing date for a period of one year amounted to inordinate delay.*
>
> *4) The Learned Chief Magistrate erred in law and in fact in failing to find that the delay was not prolonged and therefore excusable.*

5) The Learned Chief Magistrate erred in law and in fact in failing to find that justice demanded that the Appellant's case ought to have been sustained for hearing on merit.

6) The Learned Chief Magistrate erred in law and in fact in deciding the Appellant's case on technicalities as against merit.

7) The Learned Chief Magistrate erred in law and in fact in failing to take into account the overriding interests are enshrined in the constitution and the civil procedure Act.

8) The Learned Chief Magistrate misdirected himself when he applied wrong principles in determining the application before him for dismissing the suit for want of prosecution.

6. The Notice of Motion in the lower court for dismissal of the suit was brought under **Order 17 Rule 2 (3)** of the **Civil Procedure Rules**, and **Section 1B** of the **Civil Procedure Act**. The provision reads:

"2 (1) 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 should not be dismissed and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1." (Emphasis supplied)

7. In this case, the application impugned by the defendant raises the question whether or not a step had been taken in the suit for one year. This can easily be resolved by perusing the record and file of the lower court.

8. The suit, a personal injuries case concerning an accident that took place on 3rd November, 2009 along Maai Mahiu Narok Road, was filed on 14th January, 2010. Appearance and defence were filed by the defendant on 16th September, 2010 and 17th September, 2010, respectively. On 23rd March, 2011 the matter was fixed for mention. On 9th August, 2011 the matter was stood over generally.

9. On 19th April, 2013 plaintiff's counsel fixed a mention for 8th May, 2012 (sic 2013). On 8th May, 2013 the Plaintiff's counsel did not attend the mention but defendant's counsel did. The matter was again stood over generally until 21st February, 2014 when both counsel in the registry fixed the matter for hearing on 22nd April, 2014. On 22nd April, 2014 the parties consented that a pre-trial conference be held on 6th May, 2014. It appears that no pre-trial conference was held but on 27th November, 2014 both counsel appeared in the registry and fixed the matter for hearing on 17th February, 2015.

10. On 17th February, 2015 the plaintiffs and their counsel did not appear in court. The matter was stood over generally. On 20th April, 2016 the matter was fixed for hearing on 27th June, 2016. The plaintiff did not appear on 27th June, 2016.

11. In the meantime, the application for dismissal for want of prosecution was filed on 20th April, 2016. Service thereof is shown to have been effected via affidavit of service for hearing on 27th June, 2016. The plaintiff/appellant defended the application through submissions filed on 10th August, 2016.

12. In the affidavit in support of the motion, the defendant/applicant averred inter alia that:

"1. ……..;

2 THAT the plaintiff has failed to list the suit for hearing since 17th February, 2015.

3. THAT a period of over 1 year has expired since the suit was fixed for hearing.

4. THAT it is clearly evident that the plaintiff is not willing to prosecute the suit expeditiously.

5. THAT the inaction on the part of the plaintiff is highly prejudicial to the defendant.

6. THAT it is the policy of the court that litigation must come to an end."

13. In the Replying Affidavit the plaintiff/respondent stated, inter alia:

"4. THAT the plaintiff filed this suit 3rd March 2010 against the defendant.

5. THAT it is not true that the plaintiff is not interested with this case.

6. THAT we have been consistently taking hearing dates from the time we filed this case in 2010 only that for one reason of

another it has not been heard.

7. THAT as acknowledged by the defendants, this case was coming for hearing on 17th February, 2015 when the same could not proceed as the court was not sitting.

8. THAT after 17th February, 2015, the court file went missing and our severally attempts to take a date have been fruitless until 29th April when we received the current application from the defendants.

9. THAT we are willing to take a hearing date of our case anytime.

10. THAT it is in the interest of justice that this application by the defendants be dismissed so that the plaintiff's case can be heard on merit."

14. There is no evidence to support the plaintiff's argument that the court file went missing from February 2015 until April 2016. That was a period over one year and it is the period in respect of which the application for dismissal was filed. Even after being served on 31st May, 2016 with the hearing date for the application, the plaintiff merely filed a Replying Affidavit but did not show up for the hearing of the application on 27th June, 2016.

15. I have already noted that prior to April 2016, dates for hearing the suit had been fixed as follows:

- 21st February 2014 by both counsel for hearing on 22nd April, 2014. The hearing was scuttled by a consent for pre-trial conference.

- 11th June, 2014 by the plaintiff for 6th August 2014. The hearing did not take off with both parties merely acknowledging compliance.

- 6th August, 2014 by both counsels for hearing on 17th February, 2015. The hearing was scuttled by non-appearance of plaintiff and his counsel.

- 20th April, 2016 by defendant (Mr. Mburu Advocate was present) although the record incorrectly states that there was no appearance for defendant). Matter fixed for hearing on 20th May, 2016. The hearing did not take place due to non-appearance of plaintiff.

16. Most of these instances demonstrate a pattern of failure or lack of readiness by the Plaintiff to prosecute the case. In the circumstances the gap of one year between 17th February, 2015 and 20th April, 2016 when there was no movement at all on the file on the part of the plaintiff, and no explanation having been given, the trial court was entitled to exercise its discretion to dismiss the suit for want of prosecution. I agree with the trial court's determination and see no reason to criticize it, given that the material on record establishes a good case for the judicious exercise of his discretion, as he did.

17. I note the position of Newbold P in **Mbogo & Another v Shah** [**1968**] **EA 93** that:

"…… a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his 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 whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

18. I am also aware that dismissal of a suit is a draconian measure and that a court of justice will not ordinarily shut out a litigant from the seat of justice.

19. Further I have in mind the principles for dismissal of a suit set out by the Court in **E.T. Monks & Company Limited v Evan [1985] KLR 584** where Kneller J. said:

"1. Whether an application for dismissal of suit for want of prosecution should be allowed or not is a matter for the discretion of the Judge who must exercise it judicially. The Court shall among other things, consider whether the delay was lengthy, whether it has rendered a fair trial impossible and whether it was inexcusable. However, each case will turn on its own facts and circumstances.

2. If an action is dismissed for want of prosecution, a Plaintiff may sue his advocate for negligence unless such Plaintiff has caused or consented to the delay which led to the dismissal of the action.

3. The delay in this case was inordinate and inexcusable and a trial would be prejudicial to the Defendants, as important witnesses may no longer be traced."

20. In the present case the delay was prolonged, inexcusable and unexplained. The appellant opted for a start-stop-start-stop approach and finally there was no real effort to prosecute. That appears to persist even after the said determination.

21. For all the above reasons the appeal is hereby dismissed with costs to the Respondent. The lower court's decision is upheld.

Administrative directions

22. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

23. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

24. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 8th Day of December, 2020.

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R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. No Representation for the Appellant

2. Mburu F.I. for the Respondent

3. Court Clerk - Quinter Ogutu