REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 91 OF 2016

JUSTINE WANJE (suing as the legal

representative of the Estate of the late

EUNICE SAMINI NGANA).....APPELLANT

VERSUS

T.S.S EXPRESS LIMITED.....RESPONDENT

(Being an Appeal from the Ruling of D.N Ogoti Chief Magistrate in Mombasa delivered on 30 June 2016 in Mombasa Civil Suit No. 1235 of 2010)

JUDGMENT

1. The Appellant herein, filed a **Fatal Accident** suit before Chief Magistrate's Court, Mombasa whereby she sued the Respondent herein for the fatal injuries sustained on **14th August, 2008** while walking on the side walk off **Kambi Waya Malindi –Lamu Road**, when the Respondent's motor vehicle registration **No.KAZ 681L** which was being carelessly and/or negligently driven veered off the road hit and knocked down the deceased and fatally injured her. The Respondent filed a defence in which he denied the Appellant's claim.

2. When the aforesaid suit came up for mention for purposes of taking a hearing date on **11th October, 2011**. The suit was stood over generally because there was a moratorium and that the Defendant's insurance had been placed under receivership.

3. The Defendant filed an Application dated **31st August, 2015**, which was dispensed with via written submissions, and vide a **Ruling** delivered on **30th June, 2016**, the Plaintiff's suit against the Defendant was dismissed for want of prosecution.

4. The Appellant was aggrieved by the dismissal order hence he preferred this Appeal and put forward the following grounds in his memorandum:

> ***a) The Learned trial Magistrate erred in law and in fact as failing to consider the moratorium declared by the statutory manager of Standard Assurance Company Limited.***
>
> ***b) That the Learned trial Magistrate erred in law in failing to consider the Plaintiff's submissions.***
>
> ***c) That the Learned trial Magistrate erred in law and in fact in finding that the Plaintiff failed to prosecute his case and was guilty of latches.***
>
> ***d) That the Learned trial Magistrate erred in law and fact in finding that there was no requirement in the moratorium stopping policy holders of Standard Assurance Company limited either from being sued or suits pending in Court being stayed.***
>
> ***e) That the Learned trial Magistrate erred in law and in fact in finding that the Plaintiff has lost interest in prosecuting the suit occasioning inexcusable delay.***

5. This Court admitted the Appeal for hearing and directed that the same be dispensed with via written submissions. The Appellant filed his submissions on **5th March, 2020**, while the Respondent filed theirs on **14th September, 2020**.

Analysis & Determination

6. In considering the instant Appeal, I have evaluated the application dated **31st August, 2015** together with the arguments for and against it, made before the trial court. I have also taken into account the rival submissions by the parties in this Appeal. The record shows that the Respondent filed the Application dated **31st August, 2015** and stated that it had always been ready to defend the suit but the Plaintiff was certainly not interested in prosecuting the same and therefore sought for the suit to be dismissed with costs. In opposing the **Motion** via **Replying Affidavit** dated **31st August, 2015**, the Appellant stated that when the Defendant's insurer was placed under receivership, a moratorium was issued by the High Court which was extended severally. That it is due to the said extensions of the moratorium that his advocates halted pursuing the claim till the moratorium was lifted. The appellant beseeched the trial court not to dismiss his case, as the deceased estate will suffer great injustice.

7. Upon taking into consideration the competing arguments, the Learned Chief Magistrate when dismissing the suit noted that there was no requirement in the moratorium stopping policyholders of Standard Assurance Kenya Limited either from being sued or from suits pending in Court being stayed. Further, in the suit before court, the trial Magistrate noted that **Standard Assurance Kenya Limited** had not been sued and that it was the Respondent, which was a limited liability company that had been sued. Consequently, the Court found the Appellant to have been indolent and not eager to prosecute his case. Therefore, the delay was inexcusable.

8. The court's discretion to dismiss a suit under **Order 17** of the **Civil Procedure Rules**, must however be exercised on the basis that it is in the interest of justice, regard being had on whether the court is satisfied that the party instituting the suit has lost interest in it; that the delay has been inordinate, intentional, unreasonable and contumelious, or inexcusable; and is likely to cause serious prejudice to the defendant on account of that delay, either as between the defendant and plaintiff or between each other or between them and a third party. (See **Halsbury's Law of England VOL. 37 paragraph 448).** In the case of **Ivita Vs Kyumba [1984] KLR 441,** the court was categorical that:

> ***"The test applicable for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court."***

9. Similarly, in the case of **Agip (K) Ltd vs Highlands Tyres Ltd [2001] KLR 630,** Visram J as he then was stated as follows:

> ***"Where a reason for delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. The court must also consider whether the Defendant has been prejudiced by the delay".***

10. Applying the above principles to this case and from the background that I have provided to this suit, it is not in dispute that in this particular case, the Appellant was emphatic that a moratorium had been placed over the Insurer and no proceedings could be commenced against the Defendant or its Insurer.

11. I have perused what the Appellant referred to as the moratorium order which prevented the hearing of the suit, and I find that what was annexed to the affidavit is not the actual moratorium but an excerpt from a newspaper and several Court orders extending the moratorium to the month of **March, 2016**. Since the actual moratorium is not annexed, it is not possible for this court to tell what it was all about and whether it ordered stay of proceedings in claims filed in court against policy holders of the aforesaid insurance company.

12. Not many counsel would want to conduct a hearing of a case and obtain a decree they can never enforce. However, that is not a sufficient excuse in this case as the Respondent herein is a corporation capable of paying any damages that may be awarded. It is noteworthy, that it is the mistake of the Appellant's advocate that resulted into the delay in prosecution of the suit as Counsel was waiting for the moratorium to be lifted. In this regard I would restate the words of Apaloo, JA in the case of **Philip Chemowolo & Another v Augustine Kubende, [1982-88] 1 KAR 103** that:

> ***"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 heard on merit ... the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."***

The Appellant advocate must be aware of that.

13. In the case of **In the Matter of Concord Insurance Company [2014] eKLR**, albeit in different circumstances, it was stated that:-

> ***"Section 67C (10) of the Insurance Act was not intended to deny legitimate suitors of their right to institute proceedings for relief against an insured of an insurance Company under receivership for tortious acts of or breaches by the insured. The said section is intended to allow the manager to discharge his duties in relation to the revival of the insurance Company. In my own view, I think, the protection offered by the moratorium and court orders attendant thereto is to the Company from payments by the insurer (Company) of its policy-holders and other creditors, and not necessarily to the policy-holders or other creditors against liability from third parties." (Emphasis added)***

14. Be that as it may, in the case of **Ivita vs. Kyumbu** (supra) 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. However, in this instant case, the Defendant did not state that it would suffer any prejudice because of the delay by the Appellant in prosecuting the said suit. Therefore, there was no tangible proof that any of the Respondent's witnesses had since left its employment or died; or even that any of the documents it purposed to rely on herein have since been destroyed; and it cannot be gainsaid that costs of litigation are costs that are recoverable. Indeed, with regard to irreparable or

insurmountable trial prejudice, Lenaola, J had the following to say in the case of **Joshua Chelelgo Kulei vs. Republic & 9 others [2014] eKLR**, which I entirely agree with:

> ***"Irreparable prejudice must refer to something more than the disadvantage caused by the loss of evidence that can happen in any trial. Thus irretrievable loss of some evidence, even if associated with delay, is not determinative of irreparable trial prejudice. Irreparability should not be equated with irretrievability."***

15. Accordingly, this Court would takes the view that, in the circumstances hereof, no prejudice would befall the Respondent, which cannot be remedied by an award of costs, and that to the contrary, it is the plaintiff who would be greatly prejudiced by being driven from the seat of justice without a hearing, were his application to be dismissed. The foregoing being this Court's view of the matter, the order dismissing the Appellant's suit is vacated and the same is hereby reinstated. Further, in the interest of justice and considering that, this is an old matter, I do order that the suit be prosecuted within **120 days** from the date of this **Judgment**, failing to which it shall stand dismissed.

16. In the circumstances of this Appeal, I am convinced that with regard to costs it is only fair to order that each party bears its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 3rd day of December, 2020.

D. O CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020,** this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court.