



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CIVIL APPEAL NO. 5 OF 2018

MARTIN MURIUKI.....APPELLANT

VERSUS

ROSEMARY KANAMBIU.....RESPONDENT

J U D G M E N T

1. This appeal arises from the ruling of Senior Principal Magistrate delivered on 25/01/2018 dismissing **Siakago PMCC No. 69 of 2015** for want of prosecution.
2. The grounds of appeal may be summarized as follows: -
 - a) *THAT the ruling disregarded the reasons given as to why the suit had not been prosecuted.*
 - b) *THAT the magistrate erred in failing to appreciate that there was a consent recorded in PMCC No. 45 of 2015 on 25/02/16 staying the matter pending determination of liability which was binding.*
 - c) *THAT the suit PMCC No. 45 of 2015 having been dismissed, it would have served no purpose to fix this suit for hearing.*
 - d) *THAT the court erred in disregarding the fact that there was a pending appeal Embu HCA No. 26 of 2017 against the judgment in PMCC No. 45 of 2015.*
3. By consent the parties argued this appeal by way of written submissions which were filed through their respective advocates on record herein. Messrs Khan & Associates represented the appellants while Messrs Kinyanjui & Co. were for the respondents.
4. The appellant stated that the reasons for delay in prosecuting the suit presented before the magistrate during the notice to show cause were not taken into consideration. The learned magistrate proceeded to dismiss the suit on grounds that no steps have been taken for the last five (5) years to prosecute the suit.
5. It is further argued that the lodging of the appeal no. 26 of 2017 against the lower court judgment is in fact a step in prosecution of the suit that should have been considered in hearing of the notice to show cause. The appeal was lodged in a file HCA No. 26 of 2017 that is related to PMCC No. 69 of 2015 and as such, one year as prescribed under **Order 17 of the Civil Procedure Rules** cannot be said to have elapsed.
6. The appellant urges this court to reinstate the suit pending the disposal of the appeal.
7. I have perused the submissions of the respondent which indicate the correct HCA number as no. 5 of 2018. However, the contents of the submissions seem to refer to the judgment of the same appeal against the judgment of Hon. T. Nzioki SPM on liability in a road traffic accident damage claim case which was dismissed.
8. I am at a loss because the appeal before me as shown by the record of appeal and the submissions of the appellant is against the ruling the magistrates' ruling dismissing PMCC No. 69 of 2015 for want of prosecution. The authorities attached to the submissions, also relate to the subject of proof of liability which is relevant to this appeal. In effect the respondent has basically not opposed this appeal.
9. I will proceed to look at the ruling of the learned magistrate with a view of evaluating the material that was presented to the court for preparation of the ruling.

10. It was held in the case of **Associated Motor Boat Co. [1908] E.A.** that the duty of the first appellate court is to evaluate the evidence afresh and make its own conclusions.

11. The suit in issue was filed in court on 25/10/2015 as a fast-track claim. A memorandum of appearance, statement of defence and the list of witnesses were filed on 19/04/2016. Thereafter. The record shows that no action was taken until 21/12/17 when the matter coming up for notice to show cause why the matter should not be dismissed for want of prosecution.

12. The court noted that the appellants counsel Mr. Ogwenyo had filed a replying in relation to the notice to show cause. The court prepared its ruling and delivered it on 25/01/18 as scheduled. The suit was dismissed with no order as to costs which gave rise to this appeal.

13. In the replying affidavit, the appellant's counsel on 17/12/2017, stated that the suit in issue PMCC No. 69 of 2015 was filed together with others as follows: -

i. PMCC No. 46 of 2015 Nathan Ngari Vs Rosemary Kanambui

ii. PMCC No. 47 of 2015 Grace Kanini Vs Rosemary Kanambui

iii. PMCC No. 44 of 2015 Muthoni Njiru Vs Rosemary Kanambui

iv. PMCC No. 43 of 2015 Juliana Njeru Vs Rosemary Kanambui

v. PMCC No. 42 Jane Ngithi Vs Rosemary Kanambui

vi. PMCC No. 41 of 2015 Jane Gatiri Vs Rosemary Kanambui

vii. PMCC No. 80 of 2015 Niceta Wakuthii Vs Rosemary Kanambui

14. It is deposed that pleadings in the nine (9) cases PMCC No. 69 of 2015 inclusive closed on 06/06/2016. In a consent recorded by Hon. Makau on 25/02/2016 it was agreed that file No. PMCC No. 45 of 2015 be the lead file in which liability would be determined and the judgment be applicable to all the files listed herein whose claims arose from the same traffic accident.

15. The outcome of the case was that the claim in CMCC No. 45 of 2015 was dismissed which led to the appellant filing an appeal in Embu High Court No. 26 of 2015.

16. The appellant further stated that the appeal is yet to be determined and as such the other files have to await the outcome of the appeal for the parties to decide on the way forward.

17. The counsel prayed that the suit No. 69 of 2015 be stayed pending the outcome of the appeal.

18. The notice to show cause was issued under **Order 17 Rule 2(1) of the Civil Procedure Rules** which provides: -

(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.

19. As I stated earlier, there was no action taken or any application filed in the suit for over two (2) years since the pleadings closed. Assuming that there was no appeal filed against the sister file No. 45 of 2015, one year as stipulated by Order 17 Rule 2(1) had lapsed and unless sufficient cause was shown, the suit was ripe for dismissal.

20. I take into consideration that the eight (8) suits relating to similar actions arising out of the same accident had virtually been dismissed in terms of the judgment in PMCC No. 45 of 2015, and an appeal against the judgment lodged. This appeal affected all the other pending suits for PMCC No. 45 of 2015 was the test suit. The outcome of the appeal therefore is destined to affect all the suits either positively or negatively.

21. The applicant had annexed to his replying affidavit the pleadings, the judgment of PMCC No. 45 of 2015 as well as the memorandum of appeal for HCA No. 26 of 2017 bearing the High Court Civil registry official stamp showing that the appeal was filed on 23/05/2017. The fact that there existed an appeal against the judgment in the test suit had been demonstrated.

22. It was therefore incumbent that the magistrate ought to have considered the existence of the pending appeal and the orders for stay of all the suits as a sufficient cause under Order 17 Rule 2(1). If more supporting documents were required, the court ought to have directed that they be availed before he prepared his ruling.

23. I have perused the ruling of the learned magistrate and note that despite acknowledging that an affidavit had been filed by the appellant's counsel who appeared in court to show cause, the court did not mention of the affidavit. The contents of the affidavit were the substance of the appellant's material to show cause why his case should not be dismissed.

24. The court had a duty to deal with the matters deposed in the said affidavit. Courts must be cautious to dismiss cases especially where the

plaintiff has shown good cause. If the cause shown is not sufficient, then, the court has a duty to say so and give reasons for his decision.

25. It is my finding that the magistrate erred in failing to take into consideration the reasons for the delay in prosecuting the suit. The appellant had a duty to move the court to have the files tied together with each bearing a copy of the order for stay. I note that this was not done and it gave an impression that the appellant had never taken any action in his case since the pleading closed.

26. The principles governing dismissal of a suit for want of prosecution are that delay must be inordinate, the inordinate delay is inexcusable and the Defendant is likely to be prejudiced. Chesoni, J. (as he then was) applied these principles in the case of **Ivita v. Kyumbu [1984] KLR, 441**. He stated as follows: -

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the Plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the Plaintiff’s excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

27. Also, in **D.T. DOBIE & COMPANY (KENYA) LTD . VS. JOSEPH MBARIA MUCHINA, CA NO. 37 OF 1978**, the Court of Appeal stated that: -

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit has shown a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

28. Consequently, I find the appeal successful and allow it with no orders as to costs. The suit Siakago PMCC no. 69 of 2015 stands reinstated.

29. I hereby direct the appellant to fix the suit for mention within 30 days with a view of the progress of HCA No. 26 of 2015.

30. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF JANUARY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Maroko for Ogwenyo for Appellant