REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.219 OF 2017

PHILIP CAVINE OCHIENG.....APPELLANT

VERSUS

SECUREX AGENCIES LIMITED.....RESPONDENT

(Being an Appeal against the Ruling and Orders of the Honourable D.W. Mburu, Principal Magistrate dated 21st April, 2017 in CMCC No. 7071 of 2009)

JUDGMENT

The Appeal herein arises from the ruling delivered on the 21st April,2017 in CMCC Number 2017 of 2009. The ruling was made pursuant to an application dated the 17th day of August 2016 in which the Appellant herein who was the plaintiff in the lower court, had sought the setting aside, review and/or variation of the orders made on 1st February, 2016. The applicant had also sought for the reinstatement of the suit and the costs of the application.

The application was premised on the grounds that vide a court ruling delivered on the 23rd October, 2013, the applicant was ordered to fix the matter for hearing within (3) months failure to which it shall stand dismissed. The Applicant/Appellant was unable to comply with that condition and the suit stood dismissed on the 24th January, 2014.

The plaintiff/Appellant made a certificate of urgency to have the orders made on 23rd October, 2013 set aside and/or reviewed but the same was dismissed.

In the supporting affidavit, the Appellant states that the Respondent herein/defendant made an application dated 6th day of May 2016 seeking to dismiss the plaintiff's/Appellant's suit for want of prosecution. The application was heard and the learned magistrate ordered the Appellant/Applicant to pay throw away costs of Kshs.5,000 within 14 days.

That the court made a further order that the suit be fixed for hearing within three months from the date of the ruling failing which it would stand dismissed.

The Appellant contends that after the ruling was delivered, the court file got misplaced in the registry and despite seeking the assistance of the Executive Officer, the same could not be traced and the matter was eventually dismissed on the 24th January, 2014. Which according to the record which was three days before 26th October 2013 when the 3 months would lapse. That even after dismissal, the file could still not be traced until the 12th day of June, 2014 when the file resurfaced and the appellant was given a hearing date for the 28th July 2014 only to be notified that the suit was dismissed.

The Appellant further averred that he made an application dated 7th August, 2014 seeking to vary and/or review the orders made on the 23rd October, 2013 but the ruling was not delivered until 1st February, 2016. That the said application was dismissed and being dissatisfied with that ruling, he has appealed to this court vide a memorandum of Appeal dated the 7th day of May 2017 which sets out 11 grounds of Appeal which can be condensed into following grounds;

(1) The learned trial magistrate erred both in law and in fact by failing to consider the three months period within which the matter would stand dismissed.

(2) The learned magistrate erred both in law and in fact by dismissing the matter before the lapse of three (3) months issued.

(3) The learned magistrate erred both in law and in fact by dismissing the entire suit when there was an error on the face of the court record.

(4) The learned magistrate erred in law and in fact by failing to consider the reasons given by the Appellant for failure to comply with the court order.

The Appeal proceeded by way of written submissions which the court has taken due consideration of. In his submissions, the Appellant contended that he was not able to comply with the court order made on 23rd October, 2013 because the court file could not be traced at the registry. He averred that he wrote several letters to the executive officer which letters have been attached to his Notice of Motion dated the 8th August, 2014.

It was his contention that after the dismissal of the suit, he filed an application dated 8th August, 2014 to extend time within which the suit was to be prosecuted but it was also dismissed. Counsel for the Appellant averred that if there was any mistake, it was on the part of the registry as the file was missing and if there was any, that could be attributed to counsel, the same should not be visited upon an innocent litigant who barely understands the court processes. He has sought to rely on Section 3A of the Civil Procedure Act. He has quoted the case of **Burhani Decorators & Contractors Vs. Murmy Foods Limited and Another (2012) Nairobi CA** where the Court of Appeal stated that;

"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is not less pardonable because it is committed by a senior counsel. Though in the case of a junior Counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate".

The applicant also relied on the case of **Professor S. Kaimenyi Vs. The A.G. & another. HCCC No. 720/2009** in which the court reinstated a suit that had been dismissed while holding that:

"But before I close, I will re-state the acceptable tests is that

"when the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties – the plaintiff; the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties".

Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;

Whether the delay has been intentional and contumelious (2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court process (3) whether, the delay is

inordinate and inexcusable (4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendants and (5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties"

The Appellant submitted that he has been keen to prosecute the matter and even though there was delay, the same was sufficiently explained and no prejudice shall be occasioned on the Respondent if the application is allowed and the suit reinstated. He urged the court to rely on Article 159(2) of the Constitution.

On the part of the Respondent, it was submitted that the Appeal is preferred against a ruling dismissing an application dated 17th August 2016 for a review of an order made on review.

That the application was filed in breach of Order 45 rule 6 of the Civil Rules and it was res judicata. The said order provides thus;

"No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained"

The Respondent relied on the case of **A.N. Vs. B.K. 92015) eKLR** where the Judge stated

"The provision of Order 45 Rule 6 of the Civil Procedure Rules is mandatory that a second application for review shall not be entertained. It is my view and finding that the trial magistrate acted wrongly in entertaining and proceeding to allow the second application for review after the first application had been dismissed by Mr. J. Ndubi, Senior Resident Magistrate as he then was."

The Respondent also relied on the case of **Mburu Kinyua Vs. Gachini Titi (1976-80) 1 KLR 790** cited in the case of **Nuruman Limited Vs. Jan Bonde Nielson (2014) eKLR** in which, the appellant filed an application to set aside an exparte judgment which was dismissed. He filed a second application explaining that his defence raises triable issues and in dismissing the second application, the court held;

"**That the second application was res judciata since the facts on which it was based were known to the appellant at the time when he made the first application….that, although the Judge had not referred in his ruling to the first application, the appropriate mode of testing the Judge's decision on that application was to appeal against his ruling other than make another application to set the judgment aside"**

The court held that when an application has been heard and determined, an aggrieved person cannot have the court re-hear a similar application. Such an application will be dismissed as res-judicata. The Respondent submitted that the Appellant's second application was res-judicata and the learned magistrate was right in dismissing the same and thus the Appeal has no merits.

The Respondent contended that the suit was not dismissed in the ruling dated the 21st day of April, 2017 but the Appellants' failure to comply with the court order triggered the dismissal of the suit. Counsel for the Respondent relied on the case **Hytec Information Systems Limited Vs. Council of City of Coventry (1996) Evoca City 1099** in which the England and ales Court of Appeal considered the nature of "unless orders" as hereinunder;

"the court may and ought to exercise such powers as it possesses under the rules to make the plaintiff pursue his action with all proper diligence, particularly where at the trial the case will turn upon the recollection of witnesses to past events. For this purpose the court may make peremptory orders providing for the dismissal of the action for non-compliance with its order as to the time by which a particular step in the proceedings is to be taken. Disobedience to such an order would qualify as "intentional and contumelious" within the

meaning of the first principle laid down in Allen Vs. McAlphone"

The Respondent further submitted that there was no error apparent on the face of the record as alleged by the Appellant. Counsel relied on the case of **Nyamogo and Nyamogo Advocates Vs. Kogo 92001) 1 E.A 173** in which the court held thus;

> **"There is a real distinction between a mere erroneous distinction and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there was conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."**

The Respondent averred that the reasons given by the Appellant for failing to prosecute the suit were not plausible as there was nothing to show that the court file was missing after the delivery of the ruling and those reasons were considered by the learned magistrate in her ruling.

The court has considered all the material before it. The Appeal is against the lower court's ruling delivered on the 21st April 2017 following an application dated 17th August 2016 seeking to review the order made by the learned magistrate on the 1st February 2016 in which he dismissed the Appellant's application dated 7th day of August, 2014. The grounds in support of that application are that following a ruling dated 26th July, 2013 the applicant was ordered to set down the suit for hearing within three months from the 26th July 2013 failing which it would stand dismissed. He did not comply with those orders as a result of which the suit stood dismissed on the 28th October, 2016.

The Appellant made an application under Certificate of Urgency dated 7th August 2014 to vacate/review the court orders made on 23rd October 2012 but that application was dismissed. It was after the dismissal of the said application that he filed the one dated 17th August, 2016 which is the subject of this Appeal.

The court has noted that the orders that were sought in that application are similar to the ones sought in the application dated 7th August, 2014 being orders for setting aside and review.

As rightly submitted by Counsel for the Respondent the learned magistrate in her ruling dated the 21st April 2017, dealt with the reasons given by the Appellant for failure to prosecute the suit as ordered in the ruling dated 23rd October, 2012 and made a finding on it. The Appellant in bringing a similar application to the one dated 7th August, 2014 abused the court process as the second application is Res-judicata. It is on that basis that the learned magistrate dismissed the application dated the 17th August 2016 as the same did not have any merits. Going by the reasoning of the court in the case of **Mburu Kinyua Vs. Gachuhi Tuti (1976-80) 1 KLR 790,** (supra) I find and hold that the appellant's application dated 17th August, 2016 was res-judicata and the learned magistrate was right in dismissing it. In fact it was an abuse of the court process.

In the end, I find that the Appeal has no merits and it is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated, signed and delivered at **NAIROBI** this **14th** day of **February, 2019.**

L. NJUGUNA

JUDGE

In the presence of:

……. for the Appellant

……. for the Respondent