



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. 112 OF 2018**

**BETWEEN**

**KATIKU MUNGUTI.....APPELLANT**

**AND**

**KAKUZI LIMITED.....RESPONDENT**

***(Being an Appeal from the Ruling, and Order in Gatundu SPMCC No. 151 OF 2007***

***by Hon. L.M. Wachira (SPM) on 20<sup>th</sup> August, 2018)***

**JUDGMENT**

1. **WILLIAM M. MUINDE** (*hereinafter referred to as Appellant*) sued **KAKUZI LIMITED** (*hereinafter referred to as Respondent*) in the lower court claiming damages for injuries suffered in the course of employment by the Respondent on 12<sup>th</sup> January, 2003 allegedly due to the negligence of the Respondent.
2. The Respondent in its statement of Defence denied the claim and urged court to dismiss it with costs.
3. The court file was destroyed when the court premises were gutted down by fire and so by a notice of motion dated 12<sup>th</sup> April, 2018, the Respondent applied for reconstruction of the court file and dismissal of the suit for want of prosecution. The application was supported by an affidavit sworn on 12<sup>th</sup> April, 2018 by Allan George Njogu Kamau, advocate for the Respondent who deposed that the pendency of the suit was prejudicial to the Respondent.
4. The application was strongly opposed and in a replying affidavit sworn on 14<sup>th</sup> June, 2018 by Stephen Mwaura Muhia, advocate for the Appellant, who deposed that the delay in prosecuting the suit was occasioned by factors beyond the control of the Appellant. It was additionally deposed that the suit was heard on 12.08.08 and 04.09.08 and that the matter was scheduled for submissions to take a judgment date on 07.10.08 but the court registry got burnt together with the file in issue. Attached to the affidavit are submissions by both parties confirming they had closed their respective cases and that the case was pending judgment.
5. The trial court heard both parties and by a ruling dated 20<sup>th</sup> August, 2018 allowed the notice of motion and dismissed the Appellant's case with costs to the Respondent.

**The Appeal**

6. The Appellant being dissatisfied with the lower court's decision filed the Memorandum of Appeal dated 12.09.18 which sets out 7 grounds which I have summarized into 5 grounds to wit: -

- 1) **The trial magistrate erred in law in finding that the Appellant's case be dismissed for want of prosecution**
- 2) **The trial magistrate erred in law and in fact in finding that the Respondent had demonstrated that it had suffered prejudice**

- 3) **The trial magistrate erred in fact in failing to find that a larger part of the delay was caused by the fire that destroyed the Court Registry**
- 4) **The trial magistrate erred in law and in summarily dismissing the Appellant's explanation that the suit had been heard and was pending judgment when the court registry was destroyed**
- 5) **The ruling of the trial was made in disregard of the Constitutional provisions that justice shall be administered without undue regard to procedural technicalities**

#### **SUBMISSIONS BY THE PARTIES**

7. When the appeal came before me on 09.09.19, both parties had dutifully filed their written submissions.

#### **Appellant's submissions**

8. Appellant faulted the trial for failing to appreciate that the case had been heard to its logical conclusion and that what was remaining was the judgment which was due for delivery before the file was destroyed.

#### **Respondent's submissions**

9. **The respondent urged the court to find that the Appellant was guilty of inordinate delay which contravened Article 159 (2)(b) of the Constitution. It was further submitted that the court properly exercised its discretion under Sections 1A, 1B and 3A to ensure that justice was done and to prevent an abuse of the court process. The Respondent placed reliance on Naftali Opondo Onyango v National Bank of Kenya Ltd [2005] eKLR and Mobile Kitale Service Station v Mobil Oil Kenya Limited & Another [2004] eKLR and urged the court to find that the delay had occasioned it prejudice.**

#### **Analysis and Determination**

10. I have considered the appeal in the light of the evidence on record and the cited authorities.

11. The trial court found as a fact that the court file was destroyed by fire that gutted the court premises in the year 2009. The trial court faulted the Appellant for not applying for reconstruction of the file for a period of 9 years since the court file was destroyed thus delaying the conclusion of the case to the detriment of the Respondent.

12. The application for dismissal of the suit was brought under section 3 of the Civil Procedure Act which provides for the saving of special jurisdiction and powers in the following terms:

**In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.**

13. The Application was also grounded on section 3A which provides for the saving of inherent powers of court in the following terms:

**Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.**

14. On 23rd July 2009 both the Civil Procedure Act and the Appellate Jurisdiction Act were amended to incorporate sections 1A and 1B in the Civil Procedure Act and sections 3A and 3B in the case of the Appellate Jurisdiction Act. All courts are required when interpreting the two Acts and the rules made under both Acts or exercising the power under both Acts and the rules to ensure that in performing both functions, the overriding objective is given the pride of place including the principal aims of the objective. (See **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009**).

15. The Court of Appeal in **Dorcas Ndombi Wasike V Benson Wamalwa Khisa & 2 Others ELD CIVILAPPEAL NO. 87 of 2004** applied Section 3A of the Appellate Jurisdiction Act which is similar to section 1A (1) of the Civil Procedure Rules and held inter alia that: -

**“The overriding objective principle has been introduced into our law by a statute and it is, inherently a principle of substantive law. .... That is to say that, the rule should also be construed in a manner which facilitates the just, expeditious proportionate and affordable resolution of the appeals.”**

16. The overriding objectives have been expressed differently and broadly to include the principle to achieve or attain justice, and fairness in the circumstances of each case; reduce cost and delay; deal with each matter in ways which are proportionate; and ensuring that the parties are on an equal footing and finally, allotting to each case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

17. I entirely agree with the trial court that 9 years had lapsed since the court file was destroyed to the time the application for dismissal of the suit was made by the Respondent.

18. Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the Court should be lenient and allow the plaintiff an opportunity to have his case determined on merit. The Court must consider whether the defendant has been prejudiced by the delay. To achieve justice, the Court must also consider the possible loss likely to be sustained by the plaintiff if his case is terminated summarily for a procedural default. The test in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can still be done despite such delay. Justice is justice to all parties to a suit and in this case to both the Appellant and the Respondent.

19. In the case at hand, the Respondent had a duty to satisfy the Court that it had been prejudiced by the delay. The Respondent also had a duty to satisfy the court that justice could possibly not be done in the case due to the prolonged delay on the part of the plaintiff before the Court exercised its discretion in its favour to dismiss the action for want of prosecution.

20. The Appellant explained that part of the delay was caused by the fire that destroyed the Court Registry and the court file in issue. It is on record that both parties had closed their respective cases, filed submissions and were awaiting judgment when the file was destroyed. With this set of facts, it cannot be said that the Respondent satisfied the court that justice could not be done in the case due to the prolonged delay on the part of the plaintiff to apply for reconstruction of the court file. Similarly, the Respondent cannot be said to have satisfied the court that it was likely to suffer any prejudice or that it would be impossible to have a fair trial of the suit both parties having closed their respective cases.

21. I am satisfied that the Respondent did not make out a good case for dismissal of the suit for want of prosecution. The trial court, ought to have exercised judicial discretion to salvage the case for the sake of justice and fairness in the case.

22. I am persuaded, in the circumstances of this case, that, in furtherance of the overriding objective, the Appeal should be allowed so that the suit between the parties herein can be effectually and completely determined.

23. For those reasons, I allow the Appeal and direct that the Appellant files an application for reconstruction of the trial court's file within 30 days from the date hereof.

24. Each party shall bear its own costs.

**DELIVERED AND SIGNED AT KIAMBU THIS. 12th DAY OF September 2019**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistants - Nancy & Morris

For the Appellant -Mr. Kimaru hb for Mr. Muhia

For the Respondent -Ms. Mbirwe