



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 246 OF 2017

ABBAS ABDI ABBAS.....APPELLANT

VERSUS

PRIME FUELS KENYA LIMITED.....RESPONDENT

(An appeal from the ruling and order of Honourable H. NYAKWEBA, Principal Magistrate in Mombasa CMCC No. 2091 of 2013 between ABBAS ABDI ABBAS suing through his mother and next friend HALUYA AHMED HAJI –VS- PRIME FUELS KENYA LIMITED made on 31st October 2017)

JUDGMENT

1. This appeal arises from the lower court's decision made on 31st October 2017 dismissing the appellant's application dated 6th April 2017 in which the appellant had sought orders to revive and/or set aside the orders made on 20th December, 2016. The background of the case is that following filing of the primary suit being (Mombasa CMCC 2091 of 2013) in which the appellant sued the respondent seeking damages arising out of a road traffic accident that took place on 21st December 2011, the matter went through the normal preparations before a hearing date was fixed for 20th December, 2016. The case did not however proceed for hearing as scheduled as the appellant sought an adjournment. In allowing the appellant's application for an adjournment, the trial court specifically directed that the suit be heard and finalized within 90 days from 20th December, 2016 in default of which the suit would stand dismissed for want of prosecution. The case was thereafter listed for hearing on 28th February, 2017 when, once again, it did not proceed as the plaintiff's counsel sought an adjournment on the basis that the plaintiff was reportedly unwell.

2. On 6th April, 2017, the applicant filed an application to set aside the courts orders of 25th December, 2016 limiting the time within which his case should be heard and concluded. On 31st October, 2017, the trial court considered the application filed on 6th April, 2017 and dismissed it on the grounds that following the courts orders of 20th December 2016, the entire suit stood dismissed on 19th March 2017. The said ruling triggered the instant appeal in which the appellant has set out the following grounds of appeal in the Memorandum of Appeal:-

(a) **THAT** the Learned Trial Magistrate erred in Law and Fact in failing to allow the Appellant's application dated 6th April, 2017

(b) **THAT** the Learned Trial Magistrate erred in Law and fact in failing to properly exercise his discretion in favour of the Appellant thereby arriving at a decision that resulted in unnecessary hardship and prejudice to the Appellant.

(c) **THAT** the Learned Trial Magistrate erred in both law and fact in dismissing the application on the ground that there was no Medical evidence to show that the Plaintiff was indisposed on 28th February, 2017 when it was not a consideration in determining the application for extension of time.

(d) **THAT** the Learned Trial Magistrate erred in law and fact in failing to find that the Appellant had infact complied with Orders made on 20th December, 2016 when she fixed the Suit down for hearing on 28th February, 2016.

(e) **THAT** the Learned Trial Magistrate erred in law and fact by finding that the Appellant have Failed to comply with the Orders made on 28th February, 2017 to pay Court Adjournment Fees and Defendant's Costs when such compliance could only have been possible after the Suit had been revived and was alive.

(f) **THAT** the Learned Trial Magistrate erred in law and fact by arriving at a decision that is contrary to the Principle that a Court should always aim at sustaining a Suit and determine

any dispute before it on merit as opposed to dismissing suits on technicalities.

(g) THAT the Learned Trial Magistrate erred in law and fact by arriving at a decision that is contrary to principle of the overriding objective as envisaged under Article 159 of the Constitution 2010 and the Civil Procedure Act Cap 21 Laws of Kenya.

(h) THAT the Learned Trial Magistrate erred in law and fact by failing to consider the grounds and reasons relied on by the Appellant in his Application and instead relied on extraneous and irrelevant matters.

3. In his written submissions to the appeal, the appellant argued that the trial court did not exercise its discretion properly when it declined to extend the time for the hearing and determination of the suit and that the trial magistrate would have observed the oxygen principle enshrined under Article 159 of the Constitution and Sections 1A, 1B and 3A of the Civil Procedure Act which enjoins the courts to lean more towards sustaining suits rather than dismissing them on technicalities.

4. It was submitted that the trial magistrate unfairly condemned the plaintiff/appellant by denying them an opportunity to be heard on merit when he appellant had already taken steps to ensure that the case proceeds expeditiously by seeking to introduce evidence of a judgment in a related case emanating from the same accident that would have had the effect of expediting the hearing of the case. The respondent filed written submissions in opposition to the appeal wherein it argued that the trial court correctly exercised its discretion in dismissing the application dated 6th April, 2017.

5. It was submitted that the trial magistrate also observed that application dated 6th April 2017 was filed one (1) month after the suit automatically stood dismissed for want of prosecution and that the application in question ought to have been instituted before the expiry of the 90 days period ordered by the court on 20th December, 2016. It was further submitted that extension of time is not an automatic right of a party, but is an equitable remedy that is only available for a deserving party at the court's discretion.

6. I have considered the Record of Appeal and the rival submissions made by the parties together with the authorities that they cited. The main issue for determination is whether this court can interfere with the trial court's exercise of its discretion in dismissing the application dated 6th April, 2017 seeking the extension of time within which the appellant's case should be heard.

7. A determination of this issue will require a relook into the proceedings that were taken by the trial court up and until the time when the impugned ruling that is the subject of the instant appeal was rendered. Section 95 of the Civil Procedure Act stipulates as follows;

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired”

8. In the instant case as I have already stated in this judgment the appellant sought the review and setting aside of the orders made on 20th December 2016 so as to extend time within which the case should have been heard. When exercising his discretion in dismissing the said application, the trial court stated as follows:

“It must be noted that when the case was adjourned on 28.02.2017, the plaintiff was condemned to pay court adjournment fees which appear not to have been paid to date. He who wants the court to exercise its discretion in his /her favour must first comply with the orders of the court in full. The plaintiff has not fully complied with the conditions upon which the case was adjourned on 28.02.2017.

Secondly, the reason given to seek an adjournment was that the plaintiff had fallen ill and had gone to seek medical attention. If this was so and the plaintiff wants the court to rely on it to set aside its orders of 20.12.2016 and extend time within which to have the case heard and finalized, nothing would have been easier than to attach to the application medical evidence to this effect. Failure to do so means that there are no medical evidence and the advocate did not tell the court the truth about it.

Lastly, the orders whose extension is being sought lapsed way back on 19.03.2017 when the suit automatically stood dismissed for want of prosecution. This application was filed on 07.04.2017 after the orders of 20.12.2016 had taken effect. Clearly, there was as at 07.04.2017 when this application was filed no subsisting orders capable of being extended by this application. This application should have been filed before the said orders took effect. The plaintiff is guilty of indolence and she cannot be able to benefit from the discretion of the court.”

9. From the above reasons advanced by the trial court, the question that arises is whether in the circumstances of this case, the discretion of the trial court can be said to have been exercised wrongly, arbitrarily or that the court misdirected itself by acting on matters it should not have acted upon or failed to take into account matters which should have considered. The answer to the above question is to the negative. The trial court went out of its way to enumerate the reasons for declining to make orders in favour of the appellant and I find that the said reasons are plausible.

10. My finding is that notwithstanding the reasons that prompted the trial court to put a ceiling on the time within which the appellant's case should be heard and determined, the 90 days period was not challenged by the appellant who fixed the matter for hearing on 28th February 2017 when the matter was not heard, yet again, at the instance of the appellant who sought an adjournment. It is crystal clear from the proceedings of the lower court that the appellant did not make any step to list the case for hearing after the adjournment of 28th February 2017 and only woke up in April 2017 long after the suit stood dismissed. It is noteworthy that the order of 20th December 2016 was clear on what would happen if the case was not finalized within the 90 days' timeline.

11. It was not in dispute that the days lapsed on or about 20th March, 2017, when the dismissal of the suit for want of prosecution was actualized. My take therefore is that as at 6th April 2017 when the applicant filed the application that is the subject of this appeal, there was no suit upon which the application for review of orders of 20th December 2016 would have been premised. I am therefore unable to find that this is a proper case in which this court can interfere with the trial court's exercise of discretion. I further find that the appellant had ample time to apply for extension of time which time he squandered and did not comply with.

12. For the above reasons I find that the instant appeal is not merited and the order that commends itself to me is to dismiss it with no orders as to costs.

Dated and signed at Nairobi this 29th day of October 2019

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court at Mombasa this

14th day of November 2019

ERIC OGOLA

JUDGE

In the presence of:

Mr. Awino for respondent

No appearance for appellant

Mr. Kaunda – Court Assistant