



IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 25 OF 2018

IHWAGI GAKINYA.....1ST APPELLANT

VERSUS

DAVID K. MUHERIA.....1ST RESPONDENT

FRANCIS KIRIMI.....2ND RESPONDENT

JUDGMENT

FACTS

1. A brief overview of the case is as follows; the appellant filed a suit *on*10/05/2012 *against the respondents seeking general damages for injuries* sustained from a road traffic accident; on the 1/08/16 the respondent filed an application for dismissal of the suit for want of prosecution and the trial court in its ruling of 29/03/2017 and directed the appellant to take steps to prosecute the suit within ninety (90) days;

2. The appellant submits that it was never made aware of the ruling delivered of the 29/03/2017; that on the date given by the court for ruling which was set for the 22/03/2017 the appellant was absent whereas the respondent was present; it was incumbent upon the respondent to serve the appellant with a Ruling Notice;

3. Upon the lapse of the ninety (90) days the suit stood dismissed; the appellant filed for substitution of the plaintiff and also applied for extension of time; the application was dismissed; and the appellant herein being dissatisfied with the decision delivered on the 4/04/2018 by the Honourable E. Michieka Principal Magistrate in PMCC No.56 of 2012 sought redress by filing its Memorandum of Appeal on the 2nd May, 2018; hereunder is a summary of the appellant's grounds of appeal;

- i. The trial magistrate erred in law and in fact in disregarding the pleadings of the appellant.
- ii. The trial magistrate erred in law and in fact in finding that the appellant had not filed the application for substitution within sufficient time.
- iii. The trial magistrate erred in law and in fact in holding that the appellant filed the application out of the ninety (90) days given for prosecution of the suit.

4. The appeal was canvassed through written submissions later highlighted by the parties' respective advocates. Mr Kinuthia appeared for the appellant and Mr Muthee appeared for the Respondents. A brief summary of the submissions is as follows;

APPELLANTS CASE

5. Mr Kinuthia submitted that the appeal was against the lower court's ruling delivered on 4th April 2018 which dismissed the appellant's application for substitution because it was filed out of time, 90 days, as indicated in an earlier order of the court dated 29th March 2019;

6. Counsel stated that the Appellant was not given notice for the said ruling giving the 90 days ultimatum; he attended court on 15th February 2017 and the ruling was reserved for 22nd March 2017; it was however not issued on the said date but deferred to 29th March 2017; on the said date the court directed that steps be taken within 90 days to substitute the appellant who was deceased in the absence of the appellant's advocate;

7. The application for substitution was therefore filed out of the time indicated in the said ruling for lack of notice; the appellant is still keen to pursue the suit; the suit is meritorious and not vexatious; the appellant seeks for an opportunity to ventilate the case on its merits and is ready to abide with any conditions to fast track the case; counsel invoked Article 159 of the constitution for substantive justice to be done as

turning away a litigant would be draconian; counsel's failure to file the application within 90 days should not be visited on the appellant;

8. Counsel urged the court to allow the appeal so that the matter could be heard on merits;

RESPONDENTS CASE

9. Mr. Muthee in response stated that the impugned ruling dated 4th April 2018 is fair, just, merited and proper; the appellant is indolent and guilty of laches; it is not keen on prosecuting the suit or applying for substitution;

10. The delay in applying for substitution was inordinate; the application dated 17th August 2017 was filed out of time with no good reasons; stating that the appellant was not aware of the ruling dated 29th March 2017 is lame; if indeed it was not aware it would have stated so in its said application dated 17th August 2017; the appellant ought to have followed up on the case since it was aware that there was an application for dismissal of its suit;

11. The plaintiff died in 2014 hence the appellant had enough time to apply for substitution; the grant ad litem to enable the appellant apply for substitution was given in 2015; the appellant is not keen on prosecuting the suit and it cannot be allowed to take advantage of such delay at the expense of the Respondent; the appellant has the onus to prosecute its suit expeditiously without inexcusable delays;

12. The delays are prejudicing the respondent who continues to suffer costs and a litigation hanging over his head; in any event the suit abated upon the demise of the plaintiff; counsel urged the court to dismiss the appeal with costs to the respondent;

REJOINER

13. The plaintiff or its advocates are entitled to be informed through a notice on the ruling date and be present when delivered; neither the appellant nor the respondents were informed; this is the reason that the appellant filed an application for substitution out of time indicated in the said ruling; counsel urged the court to allow the substitution on behalf of the deceased plaintiff whose death was unforeseen;

14. The delay in filing the application for substitution is not inordinate; failure of an advocate should not be visited on the client; as for the abatement of the suit this should not be considered as there is no cross-appeal by the respondents seeking those orders; counsel urged the court to find that the impugned ruling was erroneous, set it aside and allow the appellant to ventilate its case;

ISSUES FOR DETERMINATION

15. After hearing the oral submissions of the parties and upon reading their respective written submissions this court has framed the following issue for determination;

- i. Whether there are sufficient reasons for setting aside the orders made on the 29/03/2017 and 4/04/2017;

ANALYSIS

16. This court as an appellate court has a duty not to interfere with the decision of a trial court unless it is satisfied that the court misdirected itself and arrived at a wrong decision; or it is manifestly clear from the case as a whole that the trial court decision was wrong and as a result there has been injustice; there is also no limitation or restriction governing the exercise of setting aside a ruling provided it is exercised to avoid hardship, injustice resulting from inadvertence or excusable mistake or error;

17. The appellant herein had been given ninety days in which to prosecute the suit and upon the lapse of that period the suit stood as having been dismissed for want of prosecution; the appellant contends neither the advocate nor the appellant had notice of the ruling date which date had been given in their absence;

18. The appellant being unaware of the orders given on 29/03/2017 filed an application for substitution of the plaintiff who had passed away and also prayed for enlargement of time; the application was opposed by the respondent on the grounds that time had lapsed; the trial court dismissed the application on the grounds that the lifeline set on the 29/03/2017 had expired;

19. Upon perusal of the court record it is noted that the record reflects that on the 15/02/2017 the trial court gave the date for ruling as the 22/03/2017 and the record confirms that this date was given by the court in the presence of the respondent/defendant and in the absence of the appellant/plaintiff; the record reflects that no Ruling Notice was served upon the appellant's counsel notifying them of the same; on the 22/03/2017 no ruling was delivered and the date of delivery is indicated as 29/03/2017 yet the court record does not reflect any such date;

20. The trial court that issued the order leading to the dismissal of the main suit upon changing the date for ruling from the 22/03/2017 to the 29/03/2017 ought to have satisfied itself that a Ruling Notice had been served upon the firm of advocates acting for the appellant; and would have been entitled to proceed as he did after he had been satisfied that the Ruling Notice had been served and that neither the appellant or his advocate had attended court when the order and directions were given;

21. It is not in dispute that the ruling of 29/03/2017 as opposed to the 22/03/2019 was delivered in their absence and it therefore follows that the appellant was unable to comply with the orders within the time given leading to the dismissal of the suit;

22. The main concern of this court is to do justice to the parties and in particular to the appellant; from the court record it is manifestly clear

that the trial court was clearly wrong in shifting the ruling date to another date without giving any form of communication to the parties in this instance in the form of a Ruling Notice;

23. It is this court's considered view that there was grave injustice and the hardship occasioned to the appellant by the trial court's failure to communicate the date of the ruling; and is satisfied that it would be just and reasonable to set aside the order of 29/03/2017 and order that the main suit be reinstated so as to pave way for the prayers sought in this instant appeal;

24. The nature of the main suit has been taken into consideration; also the irregular manner in which the ruling of 29/03/2017 was delivered has also been considered; the delay or inconvenience occasioned to the respondent can be compensated by costs; but the most important factor to be considered is only as a last resort a party should never be denied a chance to have his case heard and its merits determined;

25. Having taken into consideration the material factors and circumstances prior to and leading to the order of 4/04/2017 in which the subsequent application was dismissed and which forms the basis of this appeal this court is satisfied for the foregoing reasons that it would be just and reasonable to set aside this ruling made on the 4/04/2018 upon terms to be imposed;

FINDINGS AND DETERMINATION

26. In the light of the foregoing reasons this court makes the following findings and determinations;

i. The appeal is found to have merit and it is hereby allowed;

ii. The order of dismissal of 29/03/2017 is hereby set aside and the main suit is hereby re-instated with costs to the respondent; the trial court's order made on the 4/04/2018 dismissing the appellant's application for substitution is hereby set aside with costs to the respondent;

iii. The case is hereby remitted back to the magistrate's court for hearing and determination of the application for substitution; the appellant to have the application listed for hearing within ninety (90) days from the date hereof; in default the main suit herein shall stand as dismissed;

iv. The respondent shall have costs of this appeal.

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 5th day of December, 2019

HON. A. MSHILA

JUDGE