



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAPENGURIA
CIVIL APPEAL NUMBER 1 OF 2017

DAVID EYANAE EKAI APPELLANT

VERSUS

ABDIGANI OMAR MOHAMED 1ST RESPONDENT

MOHAMMED IBRAHIM SANTUR 2ND RESPONDENT

SULEIMAN MBUGUA CHEGE 3RD RESPONDENT

JUDGMENT

This suit was initiated by the plaintiff/appellant on 24.5.2010. Remarkable events in it are that on 28.7.2011 the parties recorded a consent on liability of 90% to 10% in favour of the plaintiff. On 18.8.2011 they indicated to court that they were waiting for a second medical checkup and then settle the matter. **File number 67/2010** was held as the holding file in the other related matters. On 19th of November, 2013 the defendants filed a Notice of Motion dated 6th November 2014, seeking leave to amend their defence. This application was given a date of hearing on 20.3.2014, of 27.3.2014. On 22.5.2014 the parties informed the court that they were negotiating and requested a mention date of 12.6.2014. On 25.2.2016 the defendants/respondents, filed an application seeking dismissal of the suit for want of prosecution, vide Notice of Motion dated 11.1.2016. On 25.2.2016 the plaintiff was absent in court while the defendants/applicants were present. The application was listed for hearing on 24.3.2016. There is no indication as to what happened on 24.3.2016. The matter was mentioned on 22.4.2016 in the registry where defendants were represented and not the plaintiff. The application was listed for hearing on 19.5.2016. That day the advocate for the plaintiff was aswell absent. It was given the date of 2.6.2017 in the civil registry. The application was heard on 2.6.2016 and was disallowed. The matter was fixed for hearing on 16.6.2016. On this date it was adjourned to 30.6.2016. On this date the plaintiff was absent and was given a last adjournment. Matter was given the hearing date of 15.9.2016. On this date, MsMbugua for the defendant informed the court that she had called Mr. Gacathi and informed him that she intended to amend the defense and so he should inform the plaintiff not to attend. The court disallowed the application for adjournment and relying on its order of 4.8.2016, directed the case proceeds. MsChebet for the plaintiff was unable to proceed as the plaintiff was not present. The court then dismissed the suit for want of prosecution under section 17 of CPR.

On 10.10.2016, following the dismissal of the suit, the plaintiff made an application for its reinstatement. The said application was dismissed with costs to the respondents on 9.3.2017, prompting this appeal.

The appeal is based on the grounds that:-

- 1. The learned magistrate erred both in law and fact in dismissing the plaintiff's suit and**

application without considering the court record that the suit was adjourned severally due to the absence of the trial court and in particular on 19.5.2016, 2.6.2016, 30.6.2016 of which days the appellant attended court.

2. The learned magistrate erred in both law and fact in failing to consider the grounds adduced on why the appellant did not attend court on 15th September, 2016 and particularly that he was clearly informed by his advocate not to attend court as the respondents counsel would be filing an application to amend defense, a fact that was not denied by the respondents.

3. The learned magistrate erred both in fact and law by failing to take into account all material and relevant facts as to the several aspects of the case and in particular that the appellant and his witnesses reside in Lodwar and were ready to attend court on 15th September, 2016 as scheduled were it not for the instructions of his counsel.

4. The learned magistrate erred both in fact and law by failing to take into account all material and relevant facts of the case and in particular that it would have been futile and very expensive for the appellant and his witnesses to travel all the way from Lodwar and finally fail to proceed on 15th September, 2016.

5. The learned magistrate erred in law and facts by putting into consideration irrelevant factors and ignoring relevant factors, thus arriving at wrong findings.

6. The learned magistrate erred in law and fact by punishing the appellant on acting on instructions of his advocate and thus punished for the mistake of his advocate.

7. The ruling and decree of the learned magistrate is in the circumstances unfair and unjust and irregular and should not be allowed to stand.

The Appellant filed written submissions in support of the appeal, pointing out that the last adjournment was applied for by the counsel for the Defendants and that the Appellant was punished for reasons that his counsel chose to rely on the word by the Defendants counsel. That the learned magistrate decided to punish the Appellant for reasons that he chose to rely on the word by the Respondent / Defence Counsel. He opined that dismissing the suit and the application to reinstate the suit was a higher risk of justice. Counsel cited various decided cases in support of his case and further submitted that the Respondents only filed grounds of opposition in response to the application to reinstate the suit but they did not file any affidavits meaning that they did not dispute the contents of the supporting affidavit. The parties had also entered a consent on liability on 28/07/2011 and they had listed the matter severally for mention on settlement before they finally fixed it for hearing. He further pointed out that the trial court had also occasioned the delay and specifically on four dates that he stated the court was not sitting. He submitted that the Trial magistrate failed to consider all the material facts and several aspects of the case. He also urges the court to put into account the overriding objectives as per **Section 1A and 1B of the Civil Procedure Code**. The Respondent sought an application and the Court turned on the Plaintiff and punished him. He urges the court to exercise its discretion and reinstate the suit without punishing the appellant for the mistakes of his advocate. Counsel for the Respondents did not file any submissions.

In deciding this matter I have considered that there was an agreed test suit to it, **file number 67 of 2010**, of which was indicated as the holding file. This would mean that the proceeding in related matters were to be held in **file number 67 of 2010** and not in this particular file. I have also considered that there was a pending application to amend the defence, dated 6.11.2014 and filed in court on 19.11.2014. This application was given a hearing date as would be expected but was never heard. When the suit was dismissed on 15.9.2016 it was not clear whether it is the application which was to be heard or the suit. If it was the application, it could have proceeded without the plaintiff. However though the application was still pending, the suit was dismissed. On this day it was made clear by the defendants advocate that she is the one who had advised that the plaintiff not to travel as she wished to amend the defence.

There is evidence that the plaintiff was commuting from Lodwar to attend the case. It was sensible given the scenario for his advocate to do so and in my opinion it should have been easy for the trial court to understand and allow him a chance to be heard. Court's discretion must be exercised upon reasons and judiciously. It should be exercised in a manner that ensures that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. The court held so in the case of ***Lucy Bosire versus Kehancha Div. Land Dispute Tribunal and 2 others [2013] e KLR***. It's unfair for the defendants to be the beneficiary of a court's decision arising out of an advice given by their advocate to the advocate of the plaintiff, which made the plaintiff not attend court's hearing on 15.9.2016.

This is a matter which had shown indication that the plaintiff had a prima facie case. There was already a consent judgment entered by court on liability in his favour, and there was strong indication to court that parties were about to consent on damages. The dismissal caused the appellant an injustice given the circumstances which led to it and the already established positions.

It is on the grounds I do find the appeal merited. It is granted in terms of prayer (a) and (b) in the memorandum of appeal. Each party to bear their own costs as the mistake was of the court.

1.2.2018

M/S Chebet holding brief for Mr. Kairu for the Respondent.

The appellant is not represented today.

Judgment read and delivered in the open court, this 1st day of February, 2018.

S. M. GITHINJI

JUDGE

1.2.2018