REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO.22 OF 2017

SAMUEL O. NYAUKE.....APPELLANT

VERSUS

AIRTEL NETWORKS KENYA LIMITED.....RESPONDENT

(Being an appeal from the Ruling of Hon. N. Kariuki,

RM, in Homa Bay SRMCC No.5 of 2012

delivered on 15th May, 2016)

JUDGEMENT

1. The Appellant (**SAMUEL NYAUKE**) had sued **AIRTEL NETWORKS KENYA LIMITED** (Respondent) seeking special and general damages on grounds that he had bought two airtime scratch cards each worth Kshs.50/= but upon feeding the numbers into his mobile phone, the same were rejected by the respondent.

2. The suit was instituted on 10th January 2012 for a cause of action which arose on 2nd October, 2011. The matter never proceeded to hearing, and on 26/05/2014, the respondent moved the court by a Notice of Motion dated 26th May 2014 seeking dismissal of the suit for want of prosecution under **Order 17 Rule 2 (1)** and **(3)** of the **Civil Procedure Rules (2010)**.

The respondent's contention then, was that the suit had not been prosecuted since July 2012, nor had the appellant taken any steps towards listing the matter for hearing.

3. The appellant had opposed the prayer arguing that the court should instead exercise its powers to enlarge time for the ends of justice as there were triable issues which should not be barred by

technicalities. That no directions had been given except for payment of court adjournment fees which demonstrated that the appellant was ready to prosecute his claim.

4. The trial magistrate was satisfied that the prayer for dismissal was merited taking into account that the suit had been hanging in abeyance since 24th August 2012 when a consent was recorded between the appellant and the respondent, setting aside an ex-parte judgment dated 17th April 2011.

5. The trial magistrate took into account that the appellant had paid court adjournment fees as ordered but held that it was **"not in itself an active effort to substantively prosecute the suit."**

6. On the issue of substantive justice versus procedural technicalities, the trial magistrate while acknowledging the provisions of **Article 159** of the **Constitution of Kenya** pointed out that it was in relation to strict adherence of rules of procedure or parts of law which would prevent achieving substantive justice. Further that the same ought to be considered alongside the overriding objectives envisaged by **Section 1A (1)** of the **Civil Procedure Act** which is the just, expeditious, proportionate and affordable resolution of civil cases.

7. She was of the view that **Order 17 Rule 2 (1)** of the **Civil Procedure Rules** was geared towards ensuring the expeditious disposal of cases and is a tool intended to give life to **Section 1A (1)** and **(2)** of the **Civil Procedure Act**, and does not amount to a technicality.

As concerns the issue of giving directions, the trial magistrate pointed out this was done on 24/08/2012 when the court stated that

the matter would proceed in the normal way through exchange of pleadings so the appellant was expected to make reasonable efforts by listing his suit for hearing. It was held that the appellant had not provided any reasons for failing to prosecute the suit and the same was dismissed as prayed.

8. The appellant was aggrieved by these findings on grounds that the trial magistrate erred in law, and in any event delivered the ruling in his absence and without any justification.

The trial magistrate was faulted as having misdirected herself in holding that the suit had been hanging in abeyance since 24th August 2012 yet there had been various obstacles towards progression of the suit, caused by application made by the respondent.

That the suit had infact been kept alive by dint of those applications and the dismissal was prejudicial to the appellant.

9. The appellant further stated that the trial magistrate misinterpreted the provisions of the Civil Procedure Rules regarding dismissal of suits for want of prosecution and urged this court to allow the appeal by setting aside the ruling and directing the Civil Suit No.5 of 2012 be reinstated. He also prays for costs of the appeal.

10. The appeal was canvassed through written submissions where the appellant while acknowledging that dismissal of suit is at discretion of the court, submitted that the court ought to take into account whether there was inordinate delay, and whether such delay was prejudicial to the parties, and in so doing strike a balance. The appellant listed the following issues for consideration.

(A) **Whether there was inordinate and inexcusable delay to warrant dismissal**.

(i) It was contended that the appellant had given reasons for the delay as being the plethora of applications filed by the respondent, and that his payment of court adjournment fees was adequate demonstration of a sense of keenness to prosecute the matter. He pointed out that as at the date of dismissal the matter had been inactive for less than one year 5 months, starting from 24/08/12 when the matter was last active.

(ii) He urged this court to be guided by the decision in **UTALI**

TRANSPORT COMPANY LIMITED & 3 OTHERS –VS- NIC BANK & ANOTHER (2014) e KLR which stated that:-

"... whereas there is no precise measure of what amounts to inordinate delay, and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case ... caution is advised for courts not to take the word inordinate in its ordinary meaning ..."

11. The appellant argued that the courts through a legion of decisions have stated that a lapse of one year does not ***per se*** qualify as inordinate delay. It is contended that although the cause of action arose from sale of a scratch card worth Kshs.50/= and which may appear insignificant, it is the principle of consumer protection which is in issue and must not be wished away and should be accorded some seriousness.

12. Further that same form of leniency should be exercised by the court as was stated in the case of **IVITA –VS- KYUMBA (1984) KLR 441** that:-

"The test applied by courts in the 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 be done despite the delay. Thus even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time ...."

13. In opposing the appeal, the respondents argue that there is no competent appeal as the present appeal offends **Order 42 Rule 13 (4)** of the **Civil Procedure Rule 2010** because the record of appeal does not bear the pleadings, notes made by the trial magistrate at the hearing, all affidavits placed as evidence before the trial court, and the judgment, order or decree appealed from.

14. On this ground counsel cited the case of **FLORIS PIERRO & ANOTHER –VS- GIANCARLO FALASCONI** (as the administrator of the estate of **SATUZZA BILLOTI alias MEI SANTUZZI [2014] eKLR** which stated that:-

"an appeal that fails to include the extracted order and or decree appealed from is incurable and the only recourse available is to strike it out, as the order or decree appealed from is a primary document in terms of Rule 87(1) (h) of this Courts Rules and must form part and parcel of the record of appeal."

It is submitted that **Order 42 Rule 13 (4)** is couched in mandatory terms and failure to comply renders it fatally defective and cannot be cured by **Article 159** of the **Constitution of Kenya**.

15. Of course I had difficulty in making out what exactly transpired in the lower court because the record of appeal left out a lot of history. I wondered, how many times the matter went to court prior to its being rendered inactive? What sort of applications were made by the respondent as alluded to by the appellant? When were these applications made? Certainly the notes by the trial court giving a history of all that is alluded was most desirable.

16. Indeed in the case of **LAW SOCIETY OF KENYA –VS- THE CENTRE FOR HUMAN RIGHTS AND DEMOCRACY & 12 OTHERS – PETITION NO.14 OF 2013** the Record of Appeal is the complete bundle of documentation including the pleadings, submissions and judgment from the lower court, without which the appellate court would not be able to determine the appeal before it....."

17. I cannot fault the argument raised by counsel on this matter, yet I think in the present situation the blame lies squarely with me. I say this because **Rule 42 13(4)** of the **Civil Procedure Rules** places the duty on the appellate court to ensure the record is complete before admitting the appeal or give directions. It provides thus:-

> **"Before allow the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:-**
>
> **a) The memorandum of appeal;**
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> **b) The pleadings;**
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> **c) The notes of the trial magistrate made during the hearing;**
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> **d) The transcript of any official shorthand, typist notes, electronic recording.... made at the hearing;**
>
> **e) All affidavits, maps and other documents whatsoever put in evidence before the magistrate;**
>
> **f) The judgment, order or decree appealed from and where appropriate the order (if any) giving leave to appeal;**

Provided that –

> **(i) ....**
>
> **(ii) The judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a) (b) and (f).**

18. I concur with the respondent's counsel that a strict application of the rule would mean that this appeal ought never to have been admitted for hearing nor should directions ever have been taken. That omission was on my part and the buck stops with me. I therefore decline to strike out the appeal and must consider it on its merits rather than that omission of a procedural requirement albeit a very critical one. In this I am emboldened by **Article 159 (2) (d)** of the **Constitution** but only to the extent that the concerned omission on a matter of procedure was due to an oversight by the court.

19. **Article 159 2(d)** of the **Constitution** provides that a court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. In this present case hearing the merits of the application is in my view substantive and must override the procedural/technical omission by the court which ought to have declined admission of the appeal.

20. As to whether the trial magistrate erred in dismissing the suit for want of prosecution, the respondent urged this court to be guided by the guidelines laid down in the case of **BIRKET –VS- JAMES (1978) A.C. 297** which includes whether there has been inordinate delay in prosecuting the case. It is submitted that the case in the magistrate's court was not prosecuted for 2 years which is a period longer than what is envisaged under **Order 17 Rule 2 (1) Civil Procedure Rules**.

Order 17 Rule (2) (1) and (3) provide that:-

> **"2 (1) in any suit in which no application has been made or steps taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.**
>
> **(3) Any party to the suit may apply for its dismissal as Provided in sub-rule 1."**

21. The court had given directions on how the matter was to proceed on as indicated in the directions of 24th August, 2012. That was certainly over one year before the appellant was nudged into action by the notice seeking dismissal. If there were other applications between 24th August 2012 and 26th May 2014 when the respondent filed the application for dismissal, then this has not been supported by any record made available.

Indeed the appellant has carefully omitted the nature of the application alluded to, and when they were filed, so as to assist this court in verifying whether the respondent contributed to the delay by default.

22. Secondly, I think one can only have a single bite at the cherry – that bite was witnessed by the consent entered into where the ex-parte judgment was set aside by court.

23. Again I am unable to make out whether the judgment then was in favour of the appellant or against him – whatever the case, once that judgement was set aside, I agree with the trial magistrate that the appellant had a duty to set things in motion by having the matter mentioned either to fix a hearing date or inviting the respondent to attend the court registry to take a mutual hearing date.

Another bite at the cherry would be unwarranted indulgence and equity only aids the vigilant not the indolent.

There was inordinate and inexcusable delay as the appellant failed to give any reasonable explanation.

(3) <u>Whether party shall be prejudiced</u>

24. The appellant argued that in dismissing the claim the court missed the bottom line which was consumer rights protection and therefore a public interest litigation and thus the prejudice bar weighs more heavily against the appellant.

25. On the other hand it is argued that the respondent will not be prejudiced by the reinstatement of the suit as it has not been exposed to any hardship which cannot be compensated by the appellant.

26. The respondent argues that to allow the appeal will only be entertaining a frivolous suit which has been pending in court for a long time yet the appellant had lost interest in the suit.

27. Was this a public interest litigation? Without the complete record of appeal it is really very difficult to determine this and it would appear to first be a situation of making a huge mountain out of a very miniscule – ant-hill.

28. No prejudice or substantial loss of a total of Kshs.100/= can persuade me to think otherwise and I find that the dismissal was merited. I therefore decline to interfere with the trial magistrate's decision and the appeal be and is hereby dismissed with costs to the respondent.

Delivered and dated this 6th day of June, 2018 at Homa Bay

H.A. OMONDI

JUDGE