REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 145 OF 2014

BILHA NGONYO ISAAC.....PLAINTIFF/APPELLANT

-VERSUS-

KEMBU FARM LTD & ANOTHER....1ST DEFENDANT/ RESPONDENT

THE HON. ATTORNEY GENERAL...2ND DEFENDANT /RESPONDENT

(Being an Appeal arising from the Ruling of Hon. J. Nthuku, Senior Resident in Nakuru Civil Suit No 281 of 2008)

JUDGMENT

1. The appellant's primary suit was filed on the 27th March 2008 as CMCC No. 281 of 2008. Pleadings were closed on the 27th May 2010 when a reply to the 1st Defendant's Defence was filed.

The court record of proceedings show that the suit was fixed for hearing on the 23rd April 2013 when due to the plaintiff's indisposition it was taken out.

2. On the 2nd August 2013 when it once again came up for hearing, the plaintiff was absent reason given that the plaintiff was in South Sudan. It was adjourned.

On the 14th March 2014, a date taken by the plaintiff's advocates on the 13th January 2014, the plaintiff was not in court and the reason given by his advocate was that he was still in South Sudan and could not make it to court. I have looked at the day's proceedings. Mr. Kahiga Advocate holding brief for Kibet for the plaintiff did not give any reason why the plaintiff could not make it to court.

The adjournment was opposed by the 1st defendant but the 2nd defendant had no objection. However, the court in its discretion disallowed the adjournment and allocated time for hearing at 10.30 a.m.

At 10.30 a.m, the plaintiff's and his advocates failed to turn up in court. The trial magistrate therefore proceeded to dismiss the suit with costs to the defendants for non-attendance.

3. By a notice of motion dated **4th July 2014** and brought under **Order 17 Rue 2 of Civil Procedure Rules,** the plaintiff sought an order for setting aside the dismissal order and reinstatement of the suit for hearing.

Upon considering the history of the suit as analysed above and previous conduct of the plaintiff and upon her discretion dismissed the application on the 3rd October 2014. This ruling is the subject of this appeal filed on the 10th May 2014.

4. Parties filed written submissions on the issues raised in the Memorandum of Appeal, that are best summarised as follows:

(1) Discretion in dismissing a suit for non-attendance and inordinate delay in prosecution of the suit.

(2) Whether sufficient cause was shown to the trial Magistrate to persuade sustaining of the suit rather than dismissing it.

(3) Whether the trial Magistrate erred in law and fact in dismissing the application for reinstatement of the suit.

(4) Costs.

The issues are intertwined.

5. A chronology of the events leading to the suit's dismissal have been stated above. It is trite that a litigant who files a case is under a duty to take positive steps at all times to progress the same. The trial court case was six years old at the time of its dismissal having been fixed for hearing on two previous occasions during which the plaintiff/appellant failed to attend court.

6. Under **Order 12 of Civil Procedure Rules** consequences of non- attendance by a party to a suit are stated.

Rule 13 is specific that when only the defendant attends and admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.

7. On the 14th March 2014 when the suit was dismissed, the Advocate holding brief for Kibet, advocate for the plaintiff told the court that:

> ***"Mr. Kibet is not ready to proceed because his client stays in Southern Sudan and she could not make it to court. He prays for another date.."***

No specific reason was given and no further clarification as to why the plaintiff could not make it to court was given.

8. The appellant in his application dated 4th July 2014 sought an order to set aside the dismissal order and reinstatement of the suit. In his written submission he cited **"unavoidable circumstances"** being that

> ***"She had travelled to South Sudan for business purposes, that she was unable to travel back due to the ongoing ethic conflict in South Sudan, that her absence was occasioned by the above unavoidable circumstances."***

9. Looking at the day's proceedings that I have cited, no where was any reason given for the plaintiffs failure, save that she was in Southern Sudan. The reasons stated in Paragraph 8 were not brought to the trial court's attention.

I agree with the trial court's findings in the ruling that on two previous occasions,the suit was adjourned on the instance of the plaintiff, and that the hearing date was taken by the plaintiff in January 2014. A court is not expected to fill in gaps by a party/Advocate by imagination as to what could have made the plaintiff not attend court.

10. In the case **Shah -vs- Mbogo & Another (1967) EA 1116,** the court stated on the matter of its discretion, that

> ***"The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberatively sought whether by evasion or otherwise to obstruct or delay the course of justice.***"

11. A Court's discretion to set aside its ruling/Judgment is not restricted but should be so exercised not to cause injustice to the opposite party. It is incumbent upon the party seeking the court's favour to adduce sufficient and plausible reasons that are demonstratable and persuasive to the court.

12. Other than stating that failure by the appellant to attend court was due to ethnic strife in Sudan, nothing was placed before the court to demonstrate that she could not travel to Kenya. This was not brought to the court's attention at the material time.

A court's discretion must be exercised judiciously based on facts and the law. The party seeking to reinstate the suit must also demonstratable good faith the case, what unavoidable circumstances meant. Had the matter been brought up then, may be, the result would have been different, once again, in the court's discretion.

13. I find the 1st Respondent's submissions quite persuasive that for the 3rd time the appellant failed to attend court thus causing unreasonable and inordinate delay in the finalisation of the case thus causing prejudice to the respondents. Citing **Utalii Transport Co. Ltd and 3 Others -vs- N.I.C. Bank** and **Another (2014) e KLR**, the court held that:

> ***"It is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court."***

14. I am minded that for over a period of six years, this case dragged on and whenever fixed for hearing, the appellant would not attend court. This no doubt caused the respondents prejudice having to keep carrying the case burden on their shoulders - **Ivita -vs- Kyumbu (1984) KLR 441.**

The trial Magistrate in her ruling deliberately considered the appellants past conduct over the six years period and even after considering her affidavit and the reasons advanced was not persuaded to exercise her discretion in the appellants favour.

15. For an appellate court to interfere with the discretion of a trial court, it must be satisfied that the trial court's findings on facts were based on no evidence or is a misapprehension of the evidence – See **Selle & Another -vs- Associated Motor Boat Board Co. Ltd – (1968) EA & Sumaria & Another -vs- Allied Industries Ltd (2007) e KLR.**

I have also considered the **Shah -vs- Mbogo case (Supra)** on court's discretion.

16. As a whole, I am not satisfied that the trial court misdirected itself in the exercise of its discretion. To the contrary, I find that the decision to disallow the application for reinstatement of the suit was well thought out and reasons for the decision stated therein, those that were placed before the court on the material date. There would be no misjustice to a party who for three consecutive times would fail to attend court for hearing of her case, and no satisfactory reasons are given when the court fails to hear him out, then states that she is prejudiced by an order of dismissal. In the circumstances, it is the respondents who were prejudiced by the appellant's failures to prosecute the case without unreasonable delay.

17. Pendency of a case in court when it is obvious that the plaintiff is not interested to prosecute it costs time and money to the defendants not to mention mental anguish of having a burden of the case over their shoulders for an unnecessary period of time. In the process, the court becomes the punching bag, leading to lose of confidence with the judicial system due to delays in fanalising cases, when in effect and in most of the cases, it is the parties, mostly the plaintiffs, who would take the earliest opportunity to delay finalization by requesting for unnecessary adjournments without clear and convincing reasons. A court should desist from allowing parties to have joy rides over their cases to the prejudice of other parties including the courts.

18. I am minded that dismissal of cases upon summary procedure may be draconian but when the occasion calls for such action, the court should not shy away from taking such measures - **Kenya Power & Lightning Co. Ltd -vs- Alliance Media Kenya Ltd (2014) e KLR.**

By allowing three consecutive adjournment by the trial Magistrate, it is a clear demonstration that the said court considered all relevant facts and pondered over prejudices that the dismissal would occasion to the parties.

19. I am therefore clear in my mind that the impugned ruling dated the 3rd October 2014 and subject of this appeal was proper and well deserved.

I find no reason to interfere with the trial court's discretion in that regard.

20. The appeal is without merit and is dismissed with costs to the Respondents.

Dated, signed and delivered this 19th Day of July 2018

J.N. MULWA

JUDGE