REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 365 OF 2009

NARENDRA KARSAN SANGHANI T/AK.B SANGHANI & SONS.....PLAINTIFF

VERSUS

P.N. MASHRU LIMITED.....DEFENDANT

R U L I N G

1. On 14/7/2017 this court dismissed the plaintiff's suit for want of prosecution after the counsel for the plaintiff in answer to notice to show cause informed the court that they had lost touch with the plaintiff.

2. On 24/10/2017, some 3 months later, the plaintiff filed the current application dated the same day and prayed that the dismissal order be set aside and the suit be reinstated for hearing on the merits.

3. The application was supported by the Affidavit of counsel, Mr. Francis Kadima, which essentially reiterated the grounds on the face of the Notice of Motion being that the plaintiff was still keen to be heard in the matter; that there had been a lapse which should not be the only basis to deny the plaintiff the right to have his dispute presented to court for determination on the merits and that no prejudice will be visited upon the defendant incapable of recompense by an award of costs and lastly that the plaintiff was keen to prosecute the matter expeditiously.

4. When served the defendant did not concede to the request but opposed it by the grounds of opposition dated 3/01/2018 but filed on 4/01/2018.

5. The gist of the opposition is that the application is frivolous, lacks *bona fides* and abusive of court process since the matter being a claim for damages arising out of a road traffic accident had been in court for a period of 8 years without plaintiff taking any steps to prosecute it including steps to comply with the requirements of Order 11 Civil Procedure Rules and compliance with a consent order entered on 19/11/2014 for the amendment of plaint. The defendant thus contended that it would be unfair and unjust to reinstate the suit as the cause of action arose 11 years ago and reinstatement would be prejudicial to the defendant.

6. On 13/02/2018 the court by consent directed parties to file and exchange written submissions pursuant to which order the plaintiff filed submissions dated 16/4/2018, on 17/4/2018 while the defendant/respondent did so on the 23/04/2018.

7. In their submissions, the plaintiff underscored the need to sustain a court dispute for purposes of being heard on the merits and cited to court some three decisions all for the proposition that unless a matter has been heard on the merits, the court reserves the right to re-open it and give to the parties a chance to be heard it being noted that the right to be heard has always been protected by courts [1]and lastly that merely because a blunder has occurred should not be the only reason a court of law shuts its doors to the litigant[2]. It was equally submitted that the business of the court should at all times be aimed at doing justice between parties by resolving disputes but not render that ultimate goal nugatory.

8. For that proposition, the plaintiff cited to court the decision in ***Suleiman vs Ambrose Resort Ltd [2004] 2KLR*** to the effect that the court should strive to achieve the lower risk rather than the higher risk of an injustice.

9. It was equally underscored the fact that beyond general damages Sought, there was also special damages in the sum in excess of Kshs.5,000,000/=

10. For the respondent submissions were offered that the plaintiff had shown apathy and dilatory conduct by not only taking too long to file the application but also failed to file the submissions within the timelines set by the court. It was also pointed out that even consent orders to amend the plaint were never complied with all showing that he plaintiff had lost interest in the suit and was not even prepared to comply with court orders.

11. To them the delay was not inadvertent but deliberate, intentional and inexcusable. The decision in ***Fran Investment Ltd vs G4S Security Services Ltd [2015] eKLR*** was cited for the proposition of law that where the delay is not explained to the satisfaction of the court, it prejudices the opposite side, it defeats the goal of fair trial and in such event the court cannot exercise discretion in favour of the applicant.

12. On the delay to comply with directions by the court, the defendant submitted that the plaintiff had demonstrated abuse of the court process. Reliance was placed on the decision in ***Nilesh Premchard Mulji vs MD Popal [2016] eKLR*** for the proposition that court business ought to be transacted with promptitude. The defendant then sought to distinguish the cases cited by the plaintiff as being inapplicable because:-

a) ***D T Dobie vs Muchina*** as having being a matter for striking out not dismissal for want of prosecution.

b) In ***Peter Ngugi vs Esther Waigari Githinji*** was on possessory rights over land which could not be decided without hearing when in this matter the cause of action was a road traffic accident.

c) In ***Richard Ncherpic vs IEBC*** the dismissal was due to failure to comply with time lines set while here the dismissal was due to want of prosecution.

13. On those grounds, the Defendant prayed that the application be dismissed and the matter rested.

Analysis and determination

14. This court proceeds from the learning that where a matter has been decided not on the merits but on account of default the court reserves an unfettered discretion to set the default order aside for the sole purpose of having the dispute between the parties heard on the merits. However, that right to be heard must be weighed against the litigant's duty to help the court meet its overriding objectives. But the overriding objectives are themselves the ethos that should drive justice and not an impediment to it. The court ultimately exist for the purpose of determining the dispute between the parties. The need for promptitude should not overly overshadow the right to give the parties their right to be heard.

15. That is the law I see enunciated by the Court Of Appeal and even Other superior courts to the effect that the right to be heard is paramount and that the court should do everything to give the parties their day in court noting that a default, misstep or blunder should not be the only basis to drive a party from the seat of justice. In the case of ***Pater Ngugi vs Esther Wangari (supra)*** the Court of Appeal said:-

> **"Practical and substantive justice dictate that it is prudent that the dispute between the parties be resolved and determined through full hearing on the merits"**.

16. Long before the introduction of overidding objectives of the court, and even the new constitution, which shuns overreliance on technicalities, the Court of Appeal, Apaloo JA, had expressed the need to do justice as the primary purpose of the court when the judge said in ***Chemwolo vs Kubende [1982 – 1988] KAR 103***:-

> **"Blunders will continue to be made from time to time and it doesn't follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court is often said to exist from the purpose of deciding the rights of the parties not for purpose of imposing discipline".**

17. Here I note that the plaintiff suffered some very serious personal bodily injuries for which he seeks both general and special damages in not so insubstantial sums. I have looked at the record and responses filed and I cannot discern a prejudice to be visited upon the defendant that would outweigh the need to have the matter heard on the merits and that cannot be made right by an award of costs. Infact, I cannot see any design by the plaintiff to overreach or steal a March on the defendant. That being my finding I do set aside the dismissal order while well aware that it could appear the defendant is being kept in court for too long but that is a lesser evil than shutting out the plaintiffs from ever being heard.

18. However as there has been default by the plaintiff that cannot be denied and even thought the application has succeeded, the costs thereby incurred were the direct result of his default for which he cannot be rewarded with costs. I direct that the costs thrown away by this order, which I assess at Kshs.15,000/= be payable to the defendant within 30 days from today.

19. In order that the suit does not go back to slumber I direct that it be mentioned in court on the 3/12/2018 for directions on the way forward.

Dated, signed and delivered this 15th day of November 2018.

P J O OTIENO

JUDGE

---

[1] Utalii Transport Company Ltd & 3 Others vs NIC Bank [2014] eKLR, Peter Ngugi Kibiri vs Esther Wangari [2015] eKLR and Richard Ncharpi Leiyagu vs IEBC, CACA (Nyeri) No. 18/2013 and

[2] Chandaria Industries vs Sonal Holdings (K) Ltd [2014] eKLR citing Phillip Chemuolo vs Augustine Kubende and Samuel Mathenge Nderitu vs Martha Wangare Wanjira [2017] eKLR