



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO. 151 OF 2010**

**MUMBE KISILU.....APPELLANT**

**VERSUS**

**EXPRESS KENYA LIMITED.....RESPONDENT**

***(An appeal from the original ruling and order of Hon. J. Ragot (P.M.) delivered on 20<sup>th</sup> April, 2010 in Milimani Commercial Civil Suit No. 3200 of 2006)***

**JUDGMENT**

1. In this appeal, the Appellant has set out the following grounds against the ruling of the lower court delivered on 20<sup>th</sup> April, 2010:-

- i. *The learned magistrate erred in law and in fact in failing to find that the Respondent's application dated 11<sup>th</sup> November was bad in law and fatally incompetent and tantamount to being an abuse of the court process.*
- ii. *The learned magistrate erred in law and in fact in failing to find out that the said Respondent's application amounted to an abuse of the court process.*
- iii. *The learned magistrate erred in law and in fact in failing to appreciate that the orders sought lacked merit as a similar application had previously been dismissed with costs and the said orders had not been appealed from or set aside.*
- iv. *The learned magistrate erred in law and in fact in failing to appreciate that the matter already has a hearing date being 4<sup>th</sup> November, 2010, a date which was taken by consent of both parties.*
- v. *The learned magistrate erred in law and in fact in allowing the suit to proceed ex-parte of counsel for the Appellant who had expressed readiness to proceed with the same.*

2. The background of the Appeal is that the Respondent filed a Notice of Motion in the lower court dated 11<sup>th</sup> November, 2009 seeking the dismissal of the Appellant's suit for want of prosecution. The application was supported by the affidavit of Zehrabanu Janmohamed sworn on the same date. She averred that a memorandum of appearance and defence were filed on behalf of the Respondent on 28<sup>th</sup> April, 2006 and 5<sup>th</sup> May, 2006. That the suit was fixed for hearing on 9<sup>th</sup> August, 2007 but was adjourned because the Appellant could not be reached by his counsel. She alleged that the Appellant did not make any effort to fix the matter for hearing occasioning the filing of an application dated 17<sup>th</sup> July, 2008 seeking the dismissal of the suit for want of prosecution. In the circumstances she urged that the suit be dismissed for want of prosecution.
3. In response thereto, the Appellant filed grounds of opposition that; the application filed was fatally incompetent and bad in law; the orders sought are not tenable and lack merit, as a similar

application dated 17<sup>th</sup> July, 2008 had been previously dismissed with costs on the 26<sup>th</sup> September, 2008 and that the Respondent's application was tantamount to an abuse of the court process.

4. After considering the applications and submissions of Counsel, the trial court was of the view that the Appellant's delay in fixing the matter for hearing was evidence that he was no longer interested in prosecuting the matter. The trial court also noted that Appellant had failed to file a Replying Affidavit to the application and explain the delay and therefore dismissed the suit for want of prosecution. It is that ruling that is the subject of this Appeal.
5. The Appeal was canvassed by way of written submissions. The Appellant submitted that the existence of the application dated 17<sup>th</sup> July, 2008 was not disclosed to the trial court; that in the subordinate court, dates are normally taken during a period that the court allows which time is at the end of the year but that before the Appellant could fix the case for hearing, the Respondent filed another application in the year 2009 further clogging the matter. The Appellant contended that by the time the application dismissing the suit was heard and determined, the suit had been fixed for hearing on 4<sup>th</sup> November, 2010.
6. It was submitted that the suit should not have been dismissed since it was likely to be disposed of in the month of November, 2010. To buttress his case, the Appellant cited **Victory Construction Co. v. Duggal (1962) E.A. 697** and **Justina Auma Angoro v. Nelson Yabesh Bichanga & Another (2008) KLR**. The Appellant argued that the application ought to have been dismissed for being res judicata since a similar application had been filed and dismissed. He cited **Civil Appeal No. 36 of 2006., Uhuru Highway Development Ltd v. Central Bank of Kenya & 2 Others** and **Lilian M'mbone Ababu v. Nairobi Aviation Ltd & 3 Others (2014) eKLR**. In support of his submissions. The Appellant urged that justice should be administered without undue regard to procedural technicalities in line with Article 159 of the Constitution.
7. The Respondent opposed the Appeal and submitted that the trial court's decision was in accordance to the provisions of Order 17 Rule 2(3) of the Civil Procedure Rules, 2010. It was submitted on behalf of the Respondent for the period between 26<sup>th</sup> September, 2008 and 11<sup>th</sup> November, 2009 the appellant had not set down the suit for hearing; that the facts occasioning the filing of the two applications for dismissal for want of prosecution were not similar. Section 7 was relied on the submission that applications within a suit even if they seek the same orders should not be construed to mean the same as filing different suits with the same issues and facts after litigation of one of them. The Respondent submitted that due to the Appellant's conduct he was found not to be interested in prosecuting his suit and the suit was properly dismissed. The Respondent relied on the cases of **Ivita Vs Kyumbu (1984) KLR 441**, **Nilani v. Patel (1969) EA pg 341** in support of its submissions and concluded that the Appellant's remedy may lie in suing his counsel for negligence for failure to secure his interest.
8. I have re-evaluated the application dated 11<sup>th</sup> November, 2009, and the submissions of the parties. It is my view that the following issues fall for this court's determination:
  - a. The effect of hearing the application dated 11<sup>th</sup> November, 2009 ex-parte.
  - b. Whether the application dated 11<sup>th</sup> November, 2009 was res judicata.
  - c. If (b) above is answered in the negative, whether there was inordinate and inexcusable delay in prosecuting the suit.
9. The following facts emerge from a reading of the trial court's record of proceedings. Upon the filing of the application dated 11<sup>th</sup> November, 2009, the same was fixed for hearing on 14<sup>th</sup> December, 2009. On that day, Mr. Magia who was holding brief for Mr. Kabiru for the Appellant prayed for an adjournment on grounds that Mr. Kabiru was unable to proceed with the application since he was appearing before the High Court. Mr. Mutiso for the Respondent objected to the application for adjournment but the adjournment was granted. When the application came up again on 7<sup>th</sup> April, 2010, Ms. Ondari appearing for the Appellant and Mr. Onyango for the Respondent were present. The application was stood over to 13<sup>th</sup> April, 2010 for hearing. When the matter came up on 13<sup>th</sup> April, 2010, counsel for both the Appellant and the Respondent were present and the application was given the time allocation of 9.30 a.m. Later on at 9.40 a.m., Counsel for the Appellant did not appear while the Respondent's Counsel appeared and the application was heard ex parte. From the foregoing, it is clear that although the Appellant's

counsel was present at the time the matter was allocated a hearing time for 9.30 a.m. he failed to attend court when the matter was called out at 9.40 a.m. The procedure is set out under Order 12 whereby if a party fails to attend on the hearing date, the court is at liberty either to dismiss the suit, or application (by virtue of Section 89 of the Civil Procedure Act), or allow the same as the case may be. In the instant case, the matter was set down for hearing at 9.30 a.m. in the presence of all counsel. When it was called out at 9.40 a.m., neither the Appellant nor his Counsel was present. The court in my view was entitled to proceed ex parte as it did.

10. The second ground is that the application was res judicata. The Appellant cited the case of **Justina Angoro Vs. Nelson Yabesh (supra)** wherein Mwera J found a subsequent application to a dismissed one to be res judicata. I have considered that authority and note that in that particular case there were earlier applications similar in nature to that which the court was dealing with, i.e. the application for injunction. The earlier applications in that case had been dismissed before being heard on merit as in this appeal. Justice Mwera held that bringing subsequent applications, even if the previous ones had not been heard on merit, amounted to an abuse of the court process.
11. The provisions of Section 7 equally applies to applications as it does to suits. This was established in the case of **Uhuru Highway Development Limited v. Central Bank of Kenya & 2 Others (1996) eKLR** wherein it was held:

***“Wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation”***

*In any event, Section 89 of the Civil Procedure Act provides that the procedure in suits under the Act applies in all proceedings of a civil nature. This in my view includes applications.*

12. In view of the foregoing, it follows that a party who is dissatisfied by a ruling of a court in one application cannot go on filing subsequent applications on the very same issue as it is barred by the rule of res judicata. The question then is, whether or not the res judicata rule applies in the instant case. The essentials of res judicata are that there has to be an earlier decision on the issue, a final decision on the merits and the involvement of the same parties. Although the application dated 17<sup>th</sup> July, 2008 sought the same prayers as the one dated 11<sup>th</sup> November, 2009, it was dismissed for non-attendance and was obviously not heard and determined on its merit. That however did not mean that it had not been determined. Once a suit or an application has been dismissed for non attendance in my view, it acts as issue estoppel. One cannot bring a similar application or suit on the same grounds. He can only apply under the rules to re-instate the same. However, in the circumstances of this case, the Respondent could not bring another application on similar grounds. The grounds had to be different.
13. The application of 17<sup>th</sup> July, 2008 was dismissed on 29/6/08. Its basis had been that the suit should be dismissed as no action had been taken for a period of over one year as at the date of its filing. The second application was filed on 13/11/2009 more than one year and five months later (1 year 5 months). There was lapse of at least one 1 year in terms of the former Order XVI Rule 5 of the Civil Procedure Rules. Accordingly, I find that the application was not res judicata in that the provisions of the law under which it was brought required the Respondent only to show that between the dismissal of the earlier application and the filing of the subsequent one, a period of one year had lapsed and no action had been taken.
14. On the final issue, I reiterate the holding in **Utalii Transport Company Limited & 3 Others v NIC Bank & Another [2014] eKLR** where it was held as follows:-

***“When the Applicant states and correctly so, 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’. Then exhorts that ‘Over one year has lapsed without the Plaintiffs taking any step to progress their case’. And makes a strong conclusion that ‘The Plaintiffs’ inertia runs contra to the overriding objective of the court stipulated in section 1A, 1B and 3A of the CPA’. The first intuitive***

*feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party. But, the law prohibits a court of law from such impulsive inclination, and requires it to make further enquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the plaintiff from the judgment-seat. It is, therefore, a matter of discretion by the court."*

15. The Appellant contended that by the time the application was heard and determined, there was already a hearing date fixed. I note from the record that the said issue was only raised in the submissions. The Appellant did not file any Affidavit in the lower court to bring this fact to the attention of the court. In any event, I note that the hearing date was taken away after the application for dismissal had been filed. Clearly, the date was taken in reaction to the application. As it were, the allegations of delay were not contradicted or denied on oath.

16. As to whether there was inordinate delay, I find the pronouncement in the case of **Ivita v Kyumbu [1984] KLR 441** to be applicable in the circumstances of this case. In that case it was held that:-

***"The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."***

17. It was upon the Appellant to explain to this court the cause of the delay. However, this was not done instead, the explanations were made in the submissions which to me amount to evidence from the bar. There were allegations on oath in the application that there had been delay, that the delay was inexcusable and the suit should be dismissed. The Appellant chose not to respond to those facts that were made on oath. In the circumstances, the trial court was left with no alternative but to presume the averments in the affidavit in support to have been true and therefore hold that the delay was inordinate. That being the case, I find it difficult to fault the trial court and I find the Appeal to be without merit.

18. The upshot of it is that the appeal is without merit and the same is dismissed with no order as to costs.

Dated, Signed and Delivered at Nairobi this 05<sup>th</sup> day of June, 2015.

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**A. MABEYA**

**JUDGE**