



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 73 OF 2009

JAPHET MONGARE NGOTA.....1ST APPELLANT

DHOKIA TRANSPORTERS LIMITED2ND APPELLANT

-VERSUS-

RAIPLY WOODS (K) LIMITEDRESPONDENT

JUDGMENT

1. The Respondent filed a suit CMCC No. 2012 of 2003 before the subordinate court seeking judgment for the sum of Kshs. 658,652/- plus other costs which it claimed were for damages and costs it incurred following a road accident. The Appellants filed a defence denying that the accident was caused as a result of negligence on their part. The Respondent did not prosecute the case after the pleadings were closed. On 24th May, 2005, the Appellants filed an application pursuant to the then **Order XVI Rule 5** of the **Civil Procedure Rules** seeking to have the Respondent's suit dismissed for want of prosecution. The Respondent opposed the application. After considering the merits of the application, the trial court ruled in favour of the Respondent. At page 27 of the Memorandum of Appeal, the trial magistrate had this to say in his ruling:

“what emerges herein is that each case is to be looked at in its own, under its own circumstances. When did the pleadings close? Has the matter been set down for hearing? Was the Plaintiff ready to go on with this case?..... There is also explanation by the Plaintiff. Does it satisfy the court? The plaintiff's advocate states that the mistake is his since he failed to list the matter. That position is understandable..... After looking at the circumstances. I am of the opinion that it would be way harsh to dismiss this suit now. I will give the plaintiff a chance to list it for hearing. The plaintiff ought to keep his advocates on his toes....”

2. The Appellants were aggrieved by this decision and duly filed an appeal to this court against the said decision. In the Memorandum of Appeal, the Appellants faulted the decision on the grounds *inter alia*;

- a) **The learned magistrate erred in law and in fact in dismissing the Appellants' application dated 24th May, 2005 seeking orders to dismiss the suit for prosecution.**
- b) **The learned magistrate erred in fact and in law in disregarding that the Respondent had failed to prosecute the suit since 14th May, 2004 which was in excusable.**
- c) **The learned magistrate erred in fact and in law in disregarding that since no steps**

had been taken for over one year the suit was a fit and proper case to be dismissed for want of prosecution;

d) The learned magistrate erred in fact and in law in disregarding that no valid reasons existed for the Respondent's failure to prosecute the suit.

e) The learned magistrate erred in fact and in law in dismissing the Appellants' application whilst holding that the filing of the application was justified.

f) That the dismissal of the appellants' application is unreasonable and unjust and exposes the Appellants to substantial risk that a fair trial of the matters in controversy would not be possible.

3. The Appeal was lodged on 27th September 2011. Despite service of the Record of Appeal and the hearing notice, the matter did not attract entry of an appearance nor attendance by Counsel for the Respondent. On 4th March 2014, this court heard the arguments made by the learned counsel **Mr. Mahida** for the Appellants.

4. It was his submission that the learned magistrate was wrong in dismissing the application as no steps had been taken to prosecute the matter for over one year. According to Counsel, Order VI Rule 5 of the old Civil Procedure Rules provided for a party to file an application to dismiss the suit after three months from the date of close of pleadings. He relied on the decision in **Dipak Premchad Shah & 6 Others V. Akiba Bank Limited**, Nairobi HCCC No. 34 of 2003, **Harbinder Singh Sethi V. Republic**, Nairobi HCCC No. 314 of 2002 and **Trans East Limited V. Praxidice Wekesa**, Nakuru HCCA no. 148 of 2008.

5. Further counsel submitted that the cause of action according to the plaint arose on 6th March 2002. By the time of filing the application in the subordinate court over 3 years had lapsed and it is now more than 12 years since the cause of action arose. It was his submission that the delay makes it impossible to have a fair trial. He relied on the decision in **Bickett V. James** (1977) 2 All E.R. 801 to submit that the trial court ought to have taken into consideration when the cause of action arose when determining whether the delay was inordinate.

6. In further submission, Counsel submitted that the learned trial magistrate relied on discretion overwhelmingly in favour of the Respondent and hence the findings of the subordinate court were not supported by the evidence before it. According to Counsel, any plaintiff has a duty to pursue the advocate on the status of their cases. The delay is an in-excusable omission on their part. He further stated since dismissal of the application the Respondent had not listed the suit for hearing.

7. Counsel prayed that the appeal be allowed with costs.

ISSUES FOR DETERMINATION

8. There was no attendance by Counsel for the Respondent and the matter proceeded in his absence and upon hearing and considering the lengthy submissions of Counsel for the Appellants this court finds the following issues for determination;

i. Whether the Appellants had established enough grounds in fact and in law to support the fact that the suit warranted dismissal for want of prosecution.

ii. Whether the trial magistrate erred in disregarding the grounds.

iii. Whether the suit is a fit and proper case that can be dismissed for want of prosecution.

ANALYSIS

8. Upon perusal of the Record of Appeal this court finds that the directed itself correctly on the right

questions that determine whether or not to dismiss a suit for want of prosecution. The questions are set out in the ruling and were as follows:

- ‘...when did the pleadings close?
- ‘...has the matter been set down for hearing?
- ‘...was the plaintiff ready to go on with the case?
- ‘...the explanation by the plaintiff?
- ‘...does it satisfy the court?...’

9. In responding to the questions the trial magistrate only addressed the last question that he had posed and made the following observation;

‘...the plaintiff’s advocate states that the mistake is his since he has failed to list the matter. That position is understandable. Litigants entrust their cases to their advocates and will more often than not wait to be informed of the progress...’

10. He found that the delay was caused by the advocate and that such a position was understandable.

11. The test for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable and whether justice can be done despite such delay. The case of **Ivita V. Kyumbu (1984) KLR 441** Chesoni J (as he then was) upheld this test and went further to add;

‘...Justice is justice to both the Plaintiff and the Defendant; so both parties to the suit must be considered and the position of the Judge too, because it is no easy task for 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 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...’

12. In the case of **John Onger Mariaria & 2 Others V. Paul Matundura (2004) 2 EA 163** it was held that;

‘...Whereas it is true that the court has unfettered discretion, like all judicial discretion it must be exercised upon reason not capriciously or sympathy alone...’

13. The cumulative effect of the Appellants grounds of appeal are that the learned trial magistrate did not exercise his discretion judicially or reasonably. The advocate put the blame for the delay wholly upon himself. Nevertheless the Respondent cannot escape as it is incumbent upon the Respondent after having instructed his advocate to file suit must be vigilant and further follow up with his advocates on the way his case is being handled.

14. In this instance the court record shows that after the suit was filed the requisite plaint was filed.

FINDINGS

15. This court is satisfied that the Appellants grounds for dismissal of the suit for want of prosecution are well founded. The delay was in-excusable and that the delay has now become more pronounced and it is the courts further finding that the delay is prejudicial to both parties and that due to the prolonged delay

justice will not be done.

16. This court finds that the trial magistrate when exercising his discretion disregarded crucial facts which ought to have been taken into consideration and that his findings were unsupported by evidence.

17. For those reasons this court finds that the suit was and is still suitable for dismissal for want of prosecution.

CONCLUSION

18. The appeal is found to be meritorious and is hereby allowed.

19. The ruling dated 16th October, 2007 is hereby set aside and substituted with dismissal for want of prosecution.

20. The suit stands dismissed for want of prosecution.

21. To bring the matter to a conclusion no order is made on the issue of costs in the lower court and on appeal.

It is so ordered.

Dated, Signed, Delivered at Nakuru this 5th day of May, 2014.

A. MSHILA

JUDGE