Bandali t/a Shimoni Enterprises v Wills

REPUBLIC OF KENYA

Court of Appeal, at Mombasa

August 29, 1991

Hancox CJ, Gachuhi & Cockar JJ A

Civil Application No NAI 12 of 1991

(Application for leave to appeal out of time in an intended appeal from a

Judgment of the High Court of Kenya at Mombasa (Mr Justice Shields)

dated 31st August, 1990 in HCCC No 934 of 1979)

Civil Practice and Procedure – *dismissal of suit for want of prosecution – whether court has power to set aside order dismissing suit for want of prosecution – order XVI rule 6 Civil Procedure Rules.*

Civil Practice and Procedure – *leave to appeal – application to show presence of grounds which merit serious consideration.*

The applicant unsuccessfully sought leave to appeal against a judgment of Superior Court (Shields J). The application before the Superior Court was for an order that the dismissal of the suit in the Superior Court for want of prosecution be set aside. The learned judge while setting aside the dismissal order declined an application for leave to appeal without assigning any reasons.

In setting aside the dismissal order, the learned judge of the High Court observed that there was no special provision in the Civil Procedure Rules allowing the courts to set aside the order under order 16 rule 6. He accordingly exercised his discretion under section 3A of the Civil Procedure Act.

In opposing the application, the applicant relied on the Ugandan case of *Sangs Bay Estates Ltd v Dreder Bank AG* [1971] EA 17 in which Spry J observed that leave to appeal will normally be granted where *prima facie i*t appears that there are grounds of appeal which merit serious judicial consideration but where the order from which it is sought to appeal was made in exercise of a judicial discretion, a rather stronger case will have to be made out.

The Appellate Court observed that the reason for Spry J's reasoning was because the Uganda Civil Procedure Act contained the words "and from no other orders" which were not present in the Kenyan Civil Procedure Act.

Held:

1. There is inherent power to restore a case for hearing after it has been dismissed under order 16 rule 6.

2. In an application for leave to appeal the applicant must show that there are grounds of appeal which merit serious consideration but where the order from which it is sought to appeal was made in the exercise of a judicial discretion, a stronger case is required.

Application dismissed.

Cases

1. *Sango Bay Estates Ltd v Dresdner Bank AG* [1971] EA 17

2. *Kalsi v Ekori* [1958] EA 450

3. *Rawal v Mombasa Hardware Ltd* [1968] EA 392

Statutes

1. Civil Procedure Rules (cap 21 Sub Leg) order XVI rule 6; order XLII rule 1(2)

2. Civil Procedure Act [Uganda] section 77(1)

3. Civil Procedure Act (cap 21) sections 3A, 75(1)

Advocates

*Mr Juma f*or the Applicant

Mr C B Gor for the Respondent

August 29, 1991, the following Judgement of the Court was delivered.

This is an application before us for leave to appeal against the judgment of Shields J dated 31st August, 1990, in HCCC (Mombasa) 934 of 1979.

The application then before Shileds J was that an order dismissing a suit for want of prosecution under order 16, r 6 of the Civil Procedure Rules should be set aside so that the action could be reinstated for hearing.

It so happened that Shields J decided another case, HCCC 4 of 1980, between the same defendant and one Abdallah Ramzan at about the same time, and he accordingly gave the decision in this case in the same way as he had in HCCC 4 of 1980.

After setting aside the order dismissing the suit an application for leave to appeal was made, presumably under order 42, r 1(2). This was refused by the judge, as Mr Juma, for the applicants, complained without any reasons being given. Indeed that was the main plank in Mr Juma's application before this Court.

We asked Mr Juma to elect before us on which application to proceed, namely Civil Application Nai 12 or Nai 13 of 1991, because only one application was listed before us. He elected to proceed in this case, Civil Application Nai 12, in which Mrs Wills was the original plaintiff. The application for leave to appeal against Shields J's decision was opposed by Mr C B Gor, the advocate for the respondent and original plaintiff.

Mr Juma referred us to Sango Bay Estates Ltd v Dresdner Bank AG [1971] EA 17 at 20 in which Spry V P said:

> "I turn to the application itself which can, I think, be disposed of very briefly . As I understand it, leave to appeal from an order in civil proceedings will normally be granted

> where *prima facie* it appears that there are grounds of appeal which merit serious judicial considerations but where, as in the present case, the order from which it is sought to appeal was made in the exercise of a judicial discretion, a rather stronger case will have to be made out."

The reason which motivated Spry VP to give this ruling was the wording of the corresponding Uganda section 77(1) of the Uganda Civil Procedure Act. This differs in one respect from our section 75(1) because the words 'and from no other orders' do not appear in our section and the Vice President felt that that negative provision (although para (h) was identical to the Kenya para (h)had the effect that the earlier case o*f Gurbacan Singh Kalsi v Yowani Ekori* [1958] EA 456 was wrongly decided, because in the earlier case it had been assumed that leave to appeal would be granted automatically.

The quotation above shows us that this is not so and that the applicants must show that there are grounds of appeal which merit serious consideration; if it is a matter of discretion, a stronger case is required. In the instant case, Shields J said that there was no special provision in the Civil Procedure Rules allowing the Court to set aside the order of dismissal under order 16, r 6. He accordingly exercised his discretion under section 3A in the Civil Procedure Act.

In doing this, Shields J followed *Rawal v Mombasa Hardware [*1968] EA 392 where Law J A said (at 392):

> "Mr Doshi, who appeared for the appellant, relies in great measure on an unreported decision of the High Court in *Kanti & Co v British Traders Insurance Co Ltd (*Civil Case 314 of 196) in which a very similar position was considered by Rudd,J. A suit, or several suits had been dismissed under o 16, r (6) without notice to the parties, who then applied for the suits to be restored; and the learned judge decided that although o 16, r 6 provided a remedy he was nevertheless satisfied that there remained an inherent power to set aside the dismisals if the requirements of justice so demanded the exercise of that power, as for instance of limited rendered the prescribed remedy futile.
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> Mr Inamdar, with his usual clarity of expression and persuasiveness, has cited various Indian cases in support of his proposition that where in a rule the procedure to be adopted for a remedy is excluded, except in relation to the procedure laid down in the rule; in other words, the Court has no jurisdiction to use its inherent powers to override the express provisions of the law.
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> I have no reason to doubt that those cases were correctly decided in relation to the provisions of the Indian Code and Rules with which they were concerned. But the provision with which we are concerned, ie o 16, r 6, is a very special provision which finds no counterpart in India. Mr Inamdar has referred us to other instances, for instance under o 9, in which the remedies open to a party whose suit has been dismissed are laid down. In all those cases the party affected had notice of what was done; in the case now under consideration he had so such notice and that is why o 16, r 6, stands in a very special position."

It follows from this quotation that there is an inherent power to restore a case for hearing after it has been dismissed under order 16, r 6. In his reply, Mr Gor touched on the history of all these old cases, which relate to some plots of land in North Mombasa. Briefly, Mrs Wills the then plaintiffs had slept on their rights because they were awaiting the decision in HCCC 815 (OS) of 1979 between one Peter Salai and the present applicants. That case had been dismissed under the same rule without any notice to the respondent.

In our opinion, Mr Gor's firm was unwise in not following up the position with regard to Civil Case 815. They were also at fault in failing to oppose Mr Juma's application for leave to appeal before Shields J in the instant case.

Nevertheless, having considered Mr Juma's argument, and particularly grounds 5 an 6 of the proposed

memorandum of appeal which state:

> "It was wrong in principle to have set aside the dismissal when a fresh action was already barred by limitation, and the policy of the Courts, being to strike out the original suit and not to allow it to proceed (and a portion to be reopened) after limitation has expired. After such inordinate delay the appellant was entitled to assume, the revival of suit (not attempted before expiry of limitation) had been abandoned and to regulate his affair of suit or to develop the same."

We consider that the judge exercised his discretion correctly. The position is covered by the second part of the quotation from Spry V P. The judge gives reasons for exercising his discretion and it has not been shown that he was in any way exercising it unjudicially, or, indeed, that he was wrong.

We take account of Mr Juma's point that his clients will not have an opportunity of being heard in the appeal if leave is refused. But they will be heard in the High Court when the restored case comes on for hearing and, no doubt, in any subsequent appeal.

For these reasons we would refuse the leave to appeal sought in the applicant's notice of motion filed in this Court on 13 September 1990. We would make no order as to the costs of this application.