



Governor Balloon Safaris Limited v Skyship Company Limited & another (Civil Appeal 261 of 2014) [2024] KECA 117 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KECA 117 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 261 OF 2014
MSA MAKHANDIA, S OLE KANTAI & PM GACHOKA, JJA
FEBRUARY 9, 2024**

BETWEEN

GOVERNOR BALLOON SAFARIS LIMITED APPELLANT

AND

NAROK COUNTY GOVERNMENT 1ST RESPONDENT

SKYSHIP COMPANY LIMITED 2ND RESPONDENT

(An appeal against the Ruling and Order of the High Court of Kenya (Mabeya, J.) dated 22nd November, 2013 in Milimani HC Commercial & Admiralty Division Civil Case No. 461 of 2018)

JUDGMENT

1. The genesis of this appeal is that the appellant instituted in the High Court a suit against the respondents jointly and severally for an alleged inducement and procurement of breach of a 33-year agreement dated 1st August 2000, between the appellant and the 2nd respondent. It was alleged by the appellant that the said Agreement conferred on it exclusive rights to carry on the business of Air Services for passengers using hot air balloons within a certain area in the Maasai Mara. In the amended plaint dated 17th November 2008, the appellant prayed for an injunction to restrain the 1st respondent from interfering with or causing the 2nd respondent to breach the appellant's contractual rights in the said agreement; an injunction to restrain the 2nd respondent from licensing or in any way authorizing the 1st respondent to set up, establish or operate a hot air balloon safaris business in the exclusive zone contained in the said agreement; mandatory injunction to compel the 2nd respondent to perform its obligations under the agreement and remove the 1st respondent's hot air balloon establishment located in the area within the said exclusive zone; declaration that the contract dated 1st March 2007 entered into between the 1st and 2nd respondents was null and void; and lastly, damages for breach of the agreement.



2. The respondents filed an amended defence in response thereto. Besides the defence, the 2nd respondent also filed a counterclaim. The appellant thereafter filed a reply to the 2nd respondent's defence and counterclaim signaling the close of pleadings on 9th December 2008. On 21st November 2008, the appellant filed an application to have certain paragraphs of the 2nd respondent's defence and counterclaim struck out, dismissal of the said counterclaim and entry of judgment in its favour as against the 2nd respondent. When the application came up for inter partes hearing on 28th April 2009, it was adjourned generally on the application of the Counsel for the 2nd respondent. The appellant did not thereafter take any steps to prosecute the application or the suit. By an application dated 31st March 2010, the 1st respondent sought the dismissal of the suit for want of prosecution under Order XVI, rule 5 of the former Civil Procedure Rules, on the basis that the appellant had failed to prosecute the suit since 28th April 2009, when pleadings were closed. Further, that it had failed to timeously make discovery as required by the mandatory provisions of Order X Rule 11 of the Civil Procedure Rules. Though the application was strenuously opposed by the appellant, Mabeya, J nonetheless found it merited and allowed it with the consequence that the suit was dismissed for want of prosecution.
3. Aggrieved by the said ruling and order, the appellant has moved to this Court by way of an appeal on a plethora of grounds which can be collapsed into three to wit: wrong exercise of discretion, computation of time, and costs.
4. The appeal was heard by way of written submissions with limited oral highlights on a virtual platform. We however hasten to add that most of the appellant's extensive grounds of appeal and submissions thereto were irrelevant to the issues for determination in this appeal. We shall therefore confine ourselves to the submissions that we deem relevant to the resolution of the issues in dispute.
5. When the appeal came up for hearing on 11th October 2023, the appellant through Mr. Oyatsi, learned counsel, submitted that the court ought not to have dismissed the suit for want of prosecution as it wrongly found that there was a delay of over one year by the appellant to take any further steps in the suit. Further, holding that the application for dismissal of the suit was filed in the High Court on 30th April 2010, contrary to the court record which showed that it was in fact filed on 16th April 2010, less than a year from the time when the appellant last took steps in the suit. Learned counsel, also faulted the trial court in its appreciation and or application of the law when it found and held that a delay to take any steps in the suit from 28th April 2009 upto 16th April 2010, was too inordinate and inexcusable; and in the circumstances of this case, where the court record easily proved that from inception of the suit in 2008 upto April 2010, the appellant was actively prosecuting various applications in the court. That the trial court ought to have found that it was necessary for 1st respondent as the applicant to prove that it had been prejudiced by the delay. It was submitted that the trial court failed to apply the proper test in the determination of the application, namely, whether justice could still be done in the case despite the delay; dismissing the suit against the 2nd respondent in the absence of a similar application by it. Further, that the counterclaim ought to have been dismissed too. He further submitted that the court would be applying double standards by dismissing the suit and not the counterclaim by the 2nd respondent.
6. It was further submitted that the contract between the respondents caused the litigation between the respondents in Kisii High Court being HCC no 182 of 2008 ("the Kisii case"), and in holding that the case did not concern the appellant was a misdirection. That further, the holding that the Kisii case was between the respondents only, the appellant having not been a party to the said contract and under the doctrine of privity of contract, did not have any rights or obligations from it, was also an error. That it was necessary the Kisii case be resolved first before the appellant could prosecute its suit, as the two suits were closely intertwined, hence its inability to prosecute its suit in the interim. On costs, it was



submitted that the appellant ought not to have been burdened with costs regarding the 2nd respondent, since it was a non-existent legal entity.

7. The 1st respondent did not file written submissions.
8. In opposition to the appeal, the 2nd respondent through Messrs Maina Ngaruiya & Co. Advocates submitted that an appellate court will not readily interfere with the exercise of discretion by a trial court unless the exercise of that discretion was erroneous in law. While relying on the case of *Mbogo & Another v Shah* [1968] EA 93, it was submitted that the trial court correctly set out considerations for granting orders dismissing a case for want of prosecution, which include, that should there be inordinate delay, the delay be inexcusable, and that the respondents were likely to suffer serious prejudice by the delay. It was further submitted that the trial court exercised its discretion properly in applying the principles which were enunciated in the case of *Ivita v Kvumbu* [1984] KLR.
9. It was further submitted that in every civil suit, it is the party who is in pursuit of a remedy that should take all the necessary steps at its disposal to achieve an expeditious determination of its claim. That the dispute prompting this appeal had been wholly compromised by a consent order recorded before Ochieng, J on 25th August 2014, by which, the appellant gave effect to the decision it seeks to appeal against and proceeded to have the counterclaim dismissed. It further submitted that the pendency of this appeal is an abuse of the court process and a collateral attack on the appellant's own application dated 25th August, 2014 and the said consent order. That the consent recorded before Ochieng, J was after the filing of this appeal, which fact had not been brought to the attention of this Court. Secondly, the application for dismissal was filed pursuant to Order XVI, rule 5 of the repealed Civil Procedure Rules, which provided that the plaintiff was required to set down the suit for hearing within 3 months after the adjournment of the suit generally or close of pleadings. That the trial Court, in making its determination, set out conditions for the grant of orders dismissing a case for want of prosecution as already stated. It further submitted that the trial court noted that a delay of almost 1 year was inordinate, inexcusable and was prejudicial to the respondents, and therefore, the court was right to dismiss the suit on that basis.
10. On the issue as to whether the trial court erred in holding that Kisii case did not affect the appellant, it was submitted that the Kisii case emanated from a dispute over an agreement solely between the respondents and did not involve the appellant. That therefore, the trial Judge was right to hold that the appellant was excluded from the proceedings in the Kisii case by virtue of the doctrine of Privy of Contract. In any event, the appellant did not seek to be enjoined in the said suit so that it could vindicate its rights.
11. Lastly, as to whether the trial Judge erred by awarding costs to the 2nd respondent, it submitted that the 2nd respondent was rightfully entitled to costs by the trial court since the awarding of costs lies purely in the court's discretion, and in any case, they follow the event.
12. We have considered the grounds of appeal, the written submissions, the authorities cited and the law. The issues for our determination are the same as the narrowed grounds of appeal. We shall not however deal with them individually but globally.
13. The appeal is against the exercise of discretion by the trial court in dismissing the appellant's suit for want of prosecution. Thus, in determining the issue, we have to be satisfied that the trial court properly exercised its discretion and applied the laid down principles for dismissal of suits for want of



prosecution. On the aspect of discretion, this Court in *Mbogo & Another v Shab* [1968] EA 96 stated as follows:

“it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion...”

14. The 1st respondent filed the application for dismissal of the suit for want of prosecution under Order XVI Rule 5 of the repealed Civil Procedure Rules which provided, *inter alia*:

“If within three months after-

- a. the close of pleadings; or
- b. the removal of the suit from hearing list; or
- c. adjournment of the suit generally the Plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the Defendant(s) may either set the suit down for hearing or apply for its dismissal.”

15. It is clear that under the said order and rule, it was up to the defendant in the suit to either set down the suit for hearing or have it dismissed, and each option does not outweigh the other. The 1st respondent opted for the latter option, and who can blame it?

16. The test for dismissing a suit for want of prosecution, was set out in the case of *Salkas Contractors Limited v Kenya Petroleum Refineries Limited* [2004] eKLR thus:

“The principle that pervades these decisions (*Ivita v Kyumbu (supra)* and *Allen v Sir Alfred McAlpine (supra)*) is that the court has to be satisfied that the inordinate delay is excusable and if so satisfied, then the court has to consider whether justice can still be done to the parties notwithstanding the inordinate delay. If the court is satisfied that justice can still be done, then it will, in the exercise of its discretion, refuse the application for dismissal for want of prosecution. It follows that if the court is not satisfied that the inordinate delay is excusable, then it will, again in its discretion, allow the application and dismiss the suit for want of prosecution.”

17. This Court again in the case of *Ecobank Ghana Limited v Triton Petroleum Co Limited & 5 Others* [2018] eKLR observed that:

“...it is well settled that in considering whether to dismiss a suit for want of prosecution the courts will consider the following guiding principles; whether the delay is inordinate, and if it is, whether the delay can be excused and lastly, whether either party is likely to be prejudiced as a result of the delay or that a fair trial is not possible as a result of the delay.” (Emphasis supplied)

18. Applying the above principles to this appeal, we are satisfied that the trial court was right in holding that the appellant’s delay in prosecuting the suit was inordinate and that no sufficient cause had been shown by the appellant for the inaction. This is because the appellant conceded that there was delay



in prosecuting the suit and the only reason it gave was that it was awaiting the outcome of the Kisii case, which it was not even a party to. Had it applied to be enjoined in the said suit, and sought stay of proceedings in either of the suits, perhaps and only perhaps, would it have been justified in not prosecuting its suit pending the outcome of the Kisii case. Without the foregoing, we are unable to appreciate how the outcome of the said case could have impacted on the appellant's duty to prosecute its case unless, of course, it was gambling with the courts. Again, how did that stop the appellant from undertaking discovery? On that, the issue that the delay was occasioned by its prosecution of several applications in between, is neither here nor there. The only application that our attention was drawn to was the one seeking to strike out some of the paragraphs of the defence and counterclaim by the 2nd respondent, dismissal of the counterclaim, and entry of judgment against the 2nd respondent. That application was scheduled for hearing on 29th April 2009 but was adjourned generally. It was never resuscitated for hearing by the time the application for dismissal of the suit was filed. These cannot therefore be valid reasons for the non-prosecution of the suit by the appellant. It was the appellant's further response that the trial court had erred in computing the days that the suit had remained dormant. In its view, the number of days were less than one year had the trial court computed time properly. However, the appellant failed to note and appreciate that the application was brought under the provisions of Order XVI, Rule 5 of the repealed Civil Procedure Rules. Those were the rules applicable at the time and not the Civil Procedure Rules, 2010 as the appellant tends to think.

19. Given the foregoing, the appellant is way off the mark in accusing the trial court for wrongful computation of time. The court under the rule was required to consider whether steps had been taken within 3 months by the plaintiff towards the prosecution of the suit following the closure of the proceedings or the suit being adjourned generally. It is obvious that the appellant did not observe this dictate. Could justice have still been served to the parties despite the delay? From the record, no evidence was adduced that the appellant had been desirous of prosecuting the suit save to file the application, and by its own admission, it was waiting for the outcome of the Kisii case. As already stated, these were not valid reasons for the delay in prosecuting the suit.
20. We are therefore not satisfied just like the trial court that the delay was excusable. Further, on the question of whether either party is likely to be prejudiced as a result of the delay, it is upon the party making the application to show the court the prejudice it would suffer as a result of the delay. In this respect, the court in the Ivita case (*supra*), found that:

“... even if the delay is prolonged, if the Court is satisfied with the Plaintiff's excuse for the delay and justice can still be done to the parties notwithstanding the delay, the action will not be dismissed but will be ordered that it be set down for hearing at the earliest available time. When the Defendant satisfies the court that there has been prolonged delay and the Plaintiff does not give sufficient reason for the delay, the court will presume that the delay was not only prolonged but it was inexcusable and in such case the suit may be dismissed.”

When dealing with the question, the trial court stated thus:

“Additionally, I have considered the fact that the Defendants did not state whether they had been prejudiced by the delay in the prosecution of this case. Whilst it was vital for the 1st Defendant to show how it has been prejudiced by the delay, I find that the court cannot allow a situation where a suit continues to

“hang” over a party due to the inaction of a Plaintiff even where the Defendant has failed to demonstrate that it is prejudiced by such delay. Even though I find that it is prudent to save a



suit if justice will be done to the parties, it must be noted that justice delayed is justice denied. Article 159 2(c) of our *constitution* requires that there be no delay in dispensing justice.”

21. From the record, it is clear that this suit was filed in 2008 and upto the time the application was filed, the same had not been prosecuted. It was upon the appellant to prosecute its suit and as provisions of Order XVI Rule 5 provided, the period had been set at 3 months only. The appellant ought to have been more prudent or keen in the prosecution of its suit.
22. The trial court rightly considered the prejudice that will be suffered by the appellant and weighed it against that which may be suffered by the respondents. The appellant who seemed uninterested in prosecuting the suit, stood to lose nothing. The delay was prejudicial to the respondent in terms of costs and the likelihood of losing its witnesses. In saying so, we revert to the case of *Ivita (supra)* where the court observed that:

“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 not easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from the lapse of time.”
23. On the issue of the costs awarded to the 2nd respondent, there was no evidence presented to show that it was a non-existent entity as suggested and submitted by the appellant. If at all it was, the same ought to have been raised in the trial court, which was not. In any event, it is the appellant who dragged the 2nd respondent in the proceedings, and therefore cannot turn around and claim that it did not legally exist. We also note that the issue was concluded by the consent recorded before Ochieng, J by the parties. In any case, costs follow the event and is discretionary. We do not discern any misdirection on the part of the trial court on this aspect.
24. In the end, we dismiss the appeal with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

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S. ole KANTAI

JUDGE OF APPEAL

.....

M. GACHOKA CIArb., FCIArb.

JUDGE OF APPEAL

