Hawkind Corporation (The Owner of the MV Kairo's) v African Marine & General Engineering Co. Ltd (Civil Appeal E019 of 2021) [2024] KECA 496 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 496 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E019 OF 2021

P NYAMWEYA, KI LAIBUTA & GV ODUNGA, JJA

APRIL 26, 2024

BETWEEN

HAWKIND CORPORATION (THE OWNER OF THE MV KAIRO'S) ..... APPELLANT

AND

AFRICAN MARINE & GENERAL ENGINEERING CO. LTD ..... RESPONDENT

(An appeal against the Ruling and Order of the High Court of Kenya at Mombasa (P. J. Otieno, J.) dated 20th May 2019 in Mombasa HCCC 40 of 2008)

JUDGMENT

1. When this appeal came up for hearing on 27th November 2023, Mr. Kinyua Kamundi, learned counsel appearing for African Marine & General Engineering Company Ltd, the Respondent herein, applied to have his Notice of Motion dated 13th October 2023 seeking to strike out the appeal be subsumed in and heard together with the substantive appeal. Counsel indicated that he had filed submissions dated 23rd November 2023 on both the application and the appeal. Learned counsel Mr. Wafula, appearing for Hawkind Corporation (The Owners of 'the MV Kairos'), the Appellant herein, had no objection and informed the Court that he had filed a replying affidavit dated 19th October 2023 as well as written submissions dated 20th November 2013 in relation to the application. In addition, counsel indicated that he had also filed written submissions dated 29th August 2023 in relation to the appeal.

2. The parties being in agreement, we directed that the application be subsumed in the appeal and be heard together. This judgment therefore determines both the Respondent's application and the Appellant's appeal and, since the application seeks to strike out the appeal, we shall consider it first in view of the fact that its outcome will determine whether we shall proceed to determine the main appeal on its merits.

3. We begin with a brief narrative of the background to the application and the appeal. On 20th May 2019, the High Court of Kenya at Mombasa (P. J. Otieno, J.) delivered a ruling in Mombasa High Court Civil Case No. 40 of 2008 dismissing the Appellant's Notice of Motion dated 24th October 2018, in which it had sought orders that the substantive suit be reinstated for hearing.

4. The Appellant had filed its suit in the trial Court by way of a Plaint dated 3rd October 2008 in which it claimed that it is incorporated under the laws of Panama, and as the owner of the vessel "MV Kairos" registered in Panama, and which it used to undertake deep sea exploration activities and businesses as detailed in the Plaint. Further, that it entered into an agreement with the Respondent, who operated a dry docking facility on Mbaraki Creek in Mombasa; and that the Respondent would undertake routine maintenance of the said vessel on its dry dock for a consideration of payment of 40,000 US Dollars (USD). Pursuant to the agreement, the Appellant paid to the Respondent a sum of 15,000 USD on 19th June 2008 and presented the vessel to the Respondent's shipyard on 27th June 2008.

5. However, on 4th July 2008, a fire broke out inside the hull of the vessel while the welders employed by the Respondent were using gas welding equipment therein to cut and replace metal plate. The Appellant's case was that the cause of the fire and its effect was as a result of negligence and breach of contract on the part of the Respondent, which it particularized. The Appellant claimed damages stated it as having been incurred, which included damage to the vessel and its equipment, lost investments, and loss of profit as a result of lost charters as particularized in the plaint.

6. The Respondent filed a defence in the trial Court dated 20th January 2009, in which it admitted running the dry dock facility, and that it agreed to render certain services and repairs to the Motor Vessel 'Kairos' in June and July 2008. However, the Respondent denied that any fire broke out inside the hull of the vessel. It was their assertion that the fire broke out within the vessel's cabin; and that, while admitted that its employees were carrying out welding works on the hull of the vessel, the Respondent denied that such works either caused, or were capable of causing, the said fire, and nor did the fire originate from the space where its employees were. The Respondent denied that the fire was caused by any gas or as a result of any welding or cutting. It also denied responsibility for any loss and damage sustained by the Appellant.

7. The suit was set for hearing on 11th November 2009 when the Appellant informed the Court that they had not filed their documents. The Respondent also stated that they were not prepared for trial. The suit was mentioned several times for the parties to file various pleadings and, when it came up for hearing on 18th June 2018, the trial Court delivered a ruling noting that the directions given on 8th November 2017 were yet to be complied with, and ordered that the suit would stand dismissed in the event of failure to comply within 30 days. The Appellant subsequently filed the Notice of Motion dated 24th October 2018 seeking orders that "out of abundance of caution", the suit herein be marked as reinstated and be fixed for hearing and the cost of the application be provided for. The application was supported by an affidavit sworn on even date by Paul Ogunde, the Appellant's advocate.

8. The grounds on which the application was anchored were that the suit was dismissed for non-compliance with pre-trial orders; that the Appellant remained keen to prosecute the suit, but was unable to do so without a formal order reinstating the suit; that the Appellant had already filed witness statements, its list and bundle of documents together with certified translation for documents that were not in English; that parties had also agreed on the issues; and that there was no prejudice that would be occasioned to the Respondent if the orders sought were granted. The Appellant asserted that he would abide by any reasonable orders granted by the Court and reiterated that it is in the interest of justice that the claim, which shattered the Appellant's business, was resolved on merit as opposed to technicalities.

9. The Respondent opposed the application and filed Grounds of Opposition dated 4th February 2019 in which it was stated that the Appellant was guilty of laches and was therefore not entitled to any discretionary orders of the Court; that it had not bothered at all to explain its failures to comply with the trial Court's orders; that the Respondent would suffer immense prejudice as it had already began processes with its insurer to finalize and close their records; and that it had discharged their witnesses who were now out of the Court's jurisdiction.

10. In his ruling dated 20th May 2019 dismissing the application, the trial Judge (P. J. Otieno, J.) held that the only issue for the courts determination was whether a case has been made out for the court to set aside its orders made on 18th June 2018 by which the court marked the suit as dismissed on account of failure to comply with court orders. The learned trial Judge retraced the court orders that were not complied with from 22nd September 2015 when he took over the hearing of the suit to 17th April 2018 when the court extended time for another 30 days for the parties to comply, failing which the suit stood dismissed. The learned Judge noted that, despite indulgence by the court for over a period of more than two and a half (2 ½) years, the Appellant remained complacent and, further, that no satisfactory reason had been advanced to persuade the court to exercise its discretion in the Appellant's favour.

11. The Appellant being dissatisfied with the ruling, lodged a Notice of Appeal dated 10th August 2020 in the High Court at Mombasa on 14th August 2020, and filed a Memorandum of Appeal and Record of Appeal both dated 24th February 2021. In the Notice of Motion dated 13th October 2023 , the respondent seeks an order to strike out the appeal. The main ground for the application is that the Memorandum and Record of Appeal were filed on 1st March 2021 and should have been served upon the Respondent within 7 days as required under rule 92 of the Court of Appeal Rules, 2022. However, the Memorandum and Record of Appeal were belatedly served on the Respondent on 19th September 2023, a delay of 2 years and 6 months.

12. The application is supported by an affidavit sworn by F. Kinyua Kamundi, the Respondent's advocate, who deponed and submitted during the hearing before us that he learnt on 20th September 2023 from the Appellant's pleadings filed in this Court that the Memorandum and Record of Appeal were served via email on 1st or 2nd March 2021; that he emailed the Appellant's advocates on 20th September 2023 informing them that no such email had been received by them; that he requested the Appellant's advocates to provide evidence of service of the Memorandum and Record of Appeal; and that, on 12th October 2023, he received a phone call from the Appellant's advocates, who apologised and confirmed that his firm had not served the Memorandum and Record of Appeal.

13. The respondent contended further that, on 13th October 2023, the Appellant's advocate "manufactured" the email dated 2nd March 2021, which it purported to forward to the Respondent's advocate's firm, and that the email allegedly sent on 2nd March 2021 did not have an attachment of the Record of Appeal. The Respondent's advocate argued that, if the Appellant's advocate had served the Record on 2nd March 2021 as alleged, he would have seen the email; that, in the forwarded emails, it was possible to alter the text and address; and that, therefore, that the email allegedly sent on 2nd March 2021 and forwarded to his firm on 13th October 2023 was doctored. The Respondent's advocate reiterated that his firm was served on 19th October 2023 after calling the Appellant's advocate and asking for the Memorandum and Record of Appeal.

14. The Appellant filed a replying affidavit sworn on 19th October 2023 by its advocate, Paul Wafula, in opposition to the application. Counsel deponed and submitted that the Record of Appeal was served upon the Respondent's advocates by an email dated 2nd March 2021 through their email addressinfo@kinyuamuyaa.com. He conceded that he called the Respondent's advocate on 12th

October 2023, but that the call was made under the mistaken belief that the Record of Appeal had not been served; and that, upon review of their archived emails, the Appellant's advocates retrieved the email dated 2nd March 2021 which confirmed service of the Record of Appeal on the Respondent's advocates, and forwarded the email to the said advocates on 13th October 2023 .

15. Learned counsel submitted that the Respondent's advocates filed a Notice of Address of service dated 20th August 2020 indicating their email address for purposes of service as info@kinyuamuyaa.com. Reliance was placed on section 2 (2) of the *Evidence Act* for the submission that the foregoing facts led to the inescapable conclusion that the Respondent was served with the Record of Appeal on 2nd March 2021, and on the principle of law enunciated in *Mohammed & Another vs. Haidara* (1972) EA 166 that the facts deponed on oath without being traversed are deemed as admitted and, therefore, the Respondent was deemed to have admitted service of the Record of Appeal on 2nd March 2021; and that, having served the Record of Appeal timeously on 2nd March 2021, the Appellant complied with Rule 90 of the Court of Appeal Rules, 2010. Counsel submitted that the application was without merit.

16. The law on striking out of an appeal as set out in Rule 86 of the Court of Appeal Rules, 2022 is settled. Any person affected by an appeal may apply to strike out a Notice of Appeal or Appeal on the ground that no appeal lies, or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. The proviso to Rule 86 requires that such an application be brought before the expiry of thirty (30) days from the date of service of the Notice of Appeal or the Record of Appeal as the case may be. The step alleged by the Respondent not to have been taken by the Appellant was that of service of the Record of Appeal, which under rule 92 of the *Court of Appeal Rules*, 2022 (and previously under rule 90 of the *Court of Appeal Rules*, 2010) was required within seven (7) days of its lodging. The main contest in this regard is the veracity of the email dated 2nd March 2021, which was annexed to the replying affidavit of the Appellant as evidence of service of the Record of Appeal.

17. Rule 17 of the *Court of Appeal Rules*, 2010 which was then applicable (and which is similar to rule 17 of the 2022 Rules), provided as follows on the service and transmission of documents:

    1. Where by these Rules any document is required to be served on any person, service may be effected in such way as the Court may in any case direct, and in the absence of any special direction shall be made personally on the person to be served or any person entitled under rule 22 to appear on his behalf or by any other recognized mode of service as provided under Order 5 of the *Civil Procedure Rules*, 2010.

    2. Where any document is required to be served on the appellant or on the respondent and two or more appellants or respondents, as the case may be, are represented by one advocate, it shall be sufficient if one copy of that document is served on that advocate.

    3. For the purpose of this rule, service on a partner or a clerk of an advocate at the office of the advocate shall be deemed to be service on the advocate.

    4. Proof of service may be given where necessary by affidavit, unless in any case the Court shall require proof by oral evidence: Provided that in the case of a person in prison, a letter purporting to be signed by the officer in charge of the prison certifying that the document was delivered to the prisoner on a specified date may be accepted as sufficient proof of service.

    5. Where any document is required to be sent to any person, the document may be sent by hand, a licensed courier service provider approved by court or by registered post to that person or to any person entitled under rule 22 to appear on his behalf.

6. Notice of the date fixed for the hearing of an application or appeal or for the delivery of judgment or the reasons for any decision may be given by telephone or telegram or other electronic means approved by the court.

18. Under Order 5 rule 22B of the *Civil Procedure Rules*, 2010, as well as the Practice Directions On Electronic Case Management gazetted by the Chief Justice on 4th March 2022 in Gazette Notice No. 2357, and the Court of Appeal (Electronic Case Management) Practice Directions, 2021 dated 25th March 2021, the service of pleadings by electronic means is allowed, including by email. Order 5 rule 22B specifically provides for service by Electronic Mail Services (e-Mail) and a record of appeal or other pleadings can therefore be served by sending it to the Respondent's last confirmed and used e-mail address. Under the rule, service shall be deemed to have been effected when the sender receives a delivery receipt. In addition, under Order 5 rule 16 when there is any allegation that a pleading has not been properly served, the court may examine the serving officer on oath and may make such further inquiry in the matter as it thinks fit and thereupon declare the pleading to have been duly served, or order such service as it thinks fit.

19. In the present application, the Respondent's advocate did not dispute that the Record of Appeal was lodged on 1st March 2021 or contest the averments made by the Appellant's advocate that info@kinyuamuyaa.com was his email address, and had been provided as his address of service, which notice was also on record. Therefore, having been served with an affidavit attaching a copy of an email showing delivery of the record of appeal to that email address, which is prima facie evidence of service under Order 5 rule 22B of the Civil Procedure Rules, 2010, the burden then shifted to the Respondent to show the contrary. In particular, if the Respondent was disputing the email's authenticity, it was required to make the necessary application for an examination of the Appellant's advocate, or for expert forensic audit of the email. Mere statements denying receipt of the email by the Respondent's advocate without any other corroborating evidence is not sufficient in the circumstances in light of the evidence that the email was sent to the Respondent's email address on record.

20. We therefore find that, the Appellant having presented evidence of service of the Record of Appeal on the Respondent's advocates by email on 2nd

March 2021, which was one day after the filing of the said Record of Appeal, the said Record of Appeal was served within time. The Respondent's application dated 13th October 2023 is therefore not merited, and is hereby dismissed.

21. Turning to the substantive appeal, the Appellant has raised the following grounds of appeal in its Memorandum of Appeal:

1. The Learned Judge erred and failed to exercise his discretion properly.

2. The Learned Judge erred in law and in fact by turning his decision on matters that were neither raised nor canvased by the parties

3. The Learned Judge failed to appreciate that even where a litigant has failed to comply with an order for discovery; he ought not to be prevented from pursuing his claim unless the failure to comply was due to wilful disregard of the Court orders.

4. The Learned Judge erred in law and in fact in disregarding the provisions of Article 159 (2) (b) of the *Constitution* of Kenya, 2010 ad sacrificing the ends of Justice at the altar of procedural technicalities

5. The Learned Judge erred in law and in fact in disregarding the Principle of law that the decision to strike out a pleading ought to be taken as a measure of last resort.

22. This being a first appeal, the duty of this Court is reiterated in the decision of *Selle & Another vs. Associated Motor Boats Co. Ltd & Others* (1968) EA 123, namely to reconsider the evidence, evaluate it and draw our own conclusion of the facts and law, and we will only depart from the findings by the trial Court if they were not based on evidence on record, or where the Court is shown to have acted on wrong principles of law as was held in *Jabane vs. Olenja* (1968) KLR 661, or where discretion was exercised injudiciously as held in *Mbogo & Another vs Shah* (1968) EA.93

23. After detailing the history of the hearing of the suit in the trial Court, the Appellant's counsel submitted that the ruling dated 20th May 2019 dismissing the application for reinstatement of the suit drove the Appellant out of the seat of justice and denied it the right to pursue its claim of significant value against the Respondent. Counsel identified five issues for determination tailored along his grounds of appeal. Our examination of the issues reveal that they are more in the nature of the reasons that justify interference with the exercise of discretion by the learned Judge of the trial Court, which is the sole issue in this appeal.

24. In this regard, the grounds upon which we can interfere with the exercise of the learned trial Judge's discretion were set out in *United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co. Ltd vs. East African Underwriters (Kenya) Ltd* [1985] eKLR as follows:

> " The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.
>
> The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

25. The first reason advanced by the Appellant's counsel is that the finding by the learned trial Judge on the conduct of the parties, namely that despite indulgence by the trial Court, the Appellant maintained a steady complacency, was a matter that was neither pleaded or canvassed by the parties. That in so finding, the learned Judge denied the Appellant an opportunity to submit and be heard on the alleged complacency. The Appellant's counsel submitted that there was no such complacency, as the Appellant had duly confirmed to the Court that they had complied with the Court's directions on filing the documents and witness statements on 21st February 2018 and 18th June 2018.

26. The second related reason advanced by the counsel, who, while citing the decision by this Court in the case of *Eastern Radio Service vs. Tiny Tots* (1967) EA 392 , submitted that a litigant who failed to comply with an order for discovery should not be precluded from pursuing his claim and setting up his defence, unless his failure to comply was due to a wilful disregard of the order of the Court. Counsel reiterated that, at the time the Appellant was filing the application dated 24th October 2018, it was pleaded, and not disputed, that it had already filed its documents and witness statements and that parties had agreed on issues. Accordingly, this Court was duty bound to intervene in the manner sought to safeguard the Appellant's right to a fair trial.

27. Thirdly, counsel submitted that the learned trial Judge disregarded the provisions of Article 159 (2)(b) of the *Constitution* under which the trial Court was enjoined inter alia to administer justice without undue regards to procedural technicalities, and that the pre-trial directions were procedural rules that assisted the Court in the administration of its business. Therefore, it was inimical to the ends of justice to permit procedural rules to derive a party from the seat of justice, especially where a party had complied. Reliance was placed on the case of *Richard Ncharpi Leiyagu vs. Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR for the submissions that it was an injustice and not proportional to dismiss the Appellant's application where the Appellant had complied with the pre-trial directions. Lastly, counsel contended that the Learned trial Judge disregarded the principle of law that the decision to strike out a pleading ought to be taken as a measure of last resort. The Appellant relied on the case of *Uchumi Supermarket Limited & Sidhi Investment Limited* [2019] eKLR where it was held that striking out a pleading is a draconian act, which may only be resorted to in plain cases.

28. It was the Appellant's case that there was no clear case to warrant striking out the Appellant's suit, which essentially drove the Appellant away from the seat of justice when the Appellant had complied with the order to file witness statements and documents, and in light of the fact that the parties had agreed on issues. In addition, counsel submitted that there was no apparent prejudice that could have visited the Respondent; that the Appellant was willing to abide by any conditions imposed by the Court on reinstatement of the suit in the trial Court, including payment of thrown away costs to the Respondent; and that, given the colossal sums involved in the suit, coupled with the fact that the Appellant deponed that it had filed its documents and statements, it was wrong to dismiss the application to reinstate the suit.

29. On his part, counsel for the respondent's submitted that the learned trial Judge "leaned backwards" on six separate occasions to accommodate the Appellant's "tardiness" in preparing the suit for trial, but to no avail. The counsel made reference to the account of the proceedings as set out in the ruling by the trial Court and, in particular, the consent orders recorded on 8th November 2017. It was counsel's claim that there was a clause in the consent was that all documents and witness statements that had been filed by that date be discarded. He submitted that, from 8th November 2017, there were no witness statements, lists and bundle of documents on record as none had been filed and, therefore, the Appellant's application to reinstate the suit on the basis of compliance with directions were anchored on perjury. Counsel submitted that this appeal is a ploy by the Appellant to set aside the consent orders that it had failed to comply with, and that this Court had no original jurisdiction to set aside the consent orders in issue. Further, that there being no Notice of Appeal against the substantive orders made on 18th June 2018, this Court did not have jurisdiction.

30. We will commence our determination with the last submission by the Respondent's counsel on our jurisdiction. It is notable in this regard that this appeal is against a ruling dated 20th May 2019 by the trial Court declining to reinstate a suit which it had deemed dismissed for non-compliance with its directions against which there is on record a notice of appeal dated 10th August 2020 and lodged on 14th August 2020. This appeal is therefore properly before this Court, and we are seized of jurisdiction. Contrary to the Respondent's counsel's assertions, there is no appeal before us seeking to set aside the consent orders of 8th November 2017 nor the ruling of 18th June 2018 and, accordingly, the Respondent's counsel submissions to this extent are misplaced.

31. In this regard, after giving a chronology of events leading to the dismissal of the suit, the learned trial Judge in the impugned ruling dated 20th May 2019 found as follows:

> " 13. That history point the manner in which the plaintiff, as the person who filed the suit, has performed in its obligations to court under Section 1 of (3) of the *Civil Procedure Act*. It is to be noted that despite indulgence by the court, over a period of more than two and a half (2 ½) years, while prodding the parties to move the matter forward the plaintiff maintained a steady complacence.

13.

> (sic) To this court, all attempts at introduction of the oxygen principles and even the need to file witness statements and documents beforehand, were all endeavours towards achieving the objective of expediting resolution of court disputes as a core principle and dictate of the *Constitution* that justice should not be delayed. In this matter it is not deniable that counsel and client had not served the court towards meeting and achieving the overriding objectives.
>
> 14. The length of delay cannot be removed from the description of a litigant not keen to prosecute his matter once filed in court. By the time the matter was being dismissed it had acquired for itself a career of some ten years of very uneventful stay in court. When the application was filed, even the words deployed were themselves not warranted at all or just wanting in candour. When the prayer says that the suit be reinstated out of abundance of caution, one wonders on what account the court had to caution itself. Is it that repercussions would befall the court if the matter was not reinstated?"

32. Section 1A (3) of the *Civil Procedure Act* places an obligation on all the parties in civil proceedings or their advocates to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court, and to comply with the directions and orders of the Court. We note that the Appellant in the application for reinstatement, pleaded that it had complied with the directions and its advocate deponed as follows:

> " 3. On the 19th of June 2018, counsel holding brief for me in the matter informed me that the direction that was given when the matter was mentioned on the 18th of June 2018 was that there had been non- compliance with pre-trial orders and the suit stood dismissed.
>
> 4. As the Plaintiff had already filed witness statements, list and bundle of documents together with certified translations for documents that are not in English and parties had also agreed on the issues, the position appeared perplexing and I sought to have the court file perused."

33. We have perused the Court record and note that the suit in the trial Court came up for directions on ten occasions between 22nd September 2015 and 18th June 2016, both dates inclusive. It is notable that, on the first pre-trial conference set for 17th May 2016, the Appellant's counsel indicated that he had complied, and had filed documents and a separate list of issues. On four of those occasions, namely 22nd September 2015, 17th May 2016, 3rd May 2017 and 8th November 2017, the parties agreed by consent to adjourn the matter so as to file their respective documents and settle on the issues in contention. On one occasion, namely 25th July 2016, both parties were not present and the matter was stood over generally. On another occasion, namely 28th June 2017, the Appellant had not responded to the issues sent by the

Respondent's advocates. On two other occasions, namely 13th September 2017 and 21st February 2018, the matter could not proceed because of the non-appearance by the Respondent's advocate. Lastly, on the date of dismissal on 18th June 2018, the Appellant's counsel indicated that it had prepared its bound and paginated documents, whereupon both parties sought to have the default clause postponed to enable them comply.

34. As regards the length of delay, it is notable that there was an interlocutory application pending hearing and determination before 22nd September 2015 and a ruling was delivered thereon on 8th November 2017. As pointed out by the Respondent's counsel and by the Court in the impugned ruling, it was agreed that the documents already filed stood discarded, and fresh directions for compliance were agreed upon. A new date for case conference was set on 21st February 2018 when there was no appearance by the Respondent's advocate, and whereupon the Appellant's advocate noted that the Respondent's advocate had not filed its documents, and that the parties had not settled on the issues. Therefore, the period of delay material to this case was between 8th November 2017 and the date of the dismissal of the suit on 18th June 2016.

35. In view of the foregoing, we find that there is no legal basis or evidence on record to support the findings that the Appellant was complacent or otherwise to blame for the delay notwithstanding the fact that, by the time the matter was dismissed, "it had acquired for itself a career of some ten years of very uneventful stay in court". In addition, we also find that the explanation offered by the Appellant's advocate of efforts at compliance was indeed borne out by the record.

36. This Court (differently constituted) when faced with similar circumstances in *D. Chantulal K. Vora & Co. Limited vs Kenya Revenue Authority* (2017) eKLR, voiced the following sentiments, which we are in agreement with:

> "No doubt the appellant or its representatives should have been more prudent or keen in the prosecution of its suit. However, as at 3rd February 2012, the appellant was still inviting the respondent to fix a hearing date and showing attempts to prosecute the suit. This was before the suit's dismissal on 10th February 2012. In our view, there cannot be said to be an inordinate delay in the scenario as such. The attempts to set the suit down for hearing ought to count for something and it was wrong for the High Court to brush them off as inconsequential. To avoid injustice to either party in the circumstances of this case, and to prevent prejudice to one party, justice behooves this Court to allow this appeal."

37. From our analysis of the record, it is apparent that the Appellant was interested in pursuing its suit and did take steps in this regard. It is also noteworthy that it is not disputed that the suit in the trial court involved a ship, which is an asset of considerable value, and that it is in the interests of substantive justice that it be heard on merit. These are relevant considerations that the trial Court ought to have taken into account in the application for reinstatement of the suit.

38. We are satisfied that this appeal has merit and justify our interference with the trial Judge's exercise of discretion for the foregoing reasons. We accordingly allow the appeal and hereby set aside the ruling and orders given by the trial Judge on 20th May 2019 in Mombasa High Court Civil Case No. 40 of 2008. We accordingly grant the Appellant the prayer sought in its Notice of Motion dated 24th October 2018 filed in the trial Court with the result that the Appellant's suit in Mombasa High Court Civil Case No. 40 of 2008 is hereby reinstated for further hearing before a Judge other than P.J. Otieno J.

39. We also order that each party bears its own costs of this appeal and of the Appellant's application dated 24th October 2018 at the High Court. The order on costs is informed by the observations we have made as regards the conduct of the parties in the proceedings leading to the impugned ruling.

40. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF APRIL, 2024

P. NYAMWEYA

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR