Dairycom Kenya Limited v Kenya Dairyboard & another (Civil Appeal 118 of 2019) [2024] KECA 851 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KECA 851 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 118 OF 2019

DK MUSINGA, S OLE KANTAI & PM GACHOKA, JJA

JULY 12, 2024

BETWEEN

DAIRYCOM KENYA LIMITED ..... APPELLANT

AND

KENYA DAIRYBOARD ..... 1ST RESPONDENT

KENYA TELEVISION NETWORK ..... 2ND RESPONDENT

(An appeal against the ruling and order of the High Court of Kenya at Nairobi (J. Kamau, J.) delivered on 29th January, 2019 in HCCC No. 1264 of 2004)

JUDGMENT

1. By way of background, the appellant, vide a Notice of Motion dated 24th September, 2015, sought to have HCCC No. 1264 of 2004, which it had filed against the respondents reinstated, following an order dismissing the suit for want of prosecution on 8th April, 2015. In her ruling of 29th January, 2019, the court (Kamau, J.) found that the application was devoid of merit and dismissed it with costs. The learned judge held as follows:

> "Bearing in mind the circumstances of this case and weighing the provisions of Article 50 of *the Constitution* of Kenya that provides that every person has a right to have any dispute decided in a fair and public hearing before a court vis-à-vis the provisions of Article 159 (2) (b) of *the Constitution* of Kenya, and being aware of how drastic it is to deny a party an opportunity to have his day in court, this court nonetheless found that the prejudice the 1st and 2nd defendants would suffer due to the reinstatement of the suit on account of several issues amongst them witnesses not being traced or memories of witnesses fading, far outweighed this court's discretion to reinstate the Plaintiff's suit herein.

> This court formed the opinion that this matter was not handled with the seriousness it deserves as court orders and notices were not adhered to. The Plaintiff must therefore suffer a penalty for not having been vigilant. It was its case and it ought to have followed up the matter with its advocates."

2. Against that background, the appellant has filed the present appeal. It filed a notice of appeal dated 30th January, 2019 and subsequently filed a memorandum of appeal dated 29th March, 2019 that enunciated 10 grounds impugning the findings of the learned Judge. We have taken the liberty to summarize those grounds as follows: that the learned Judge failed to acknowledge that the appellant and its counsel were vigilant in an attempt to reinstate the suit; that the appellant could not file its verifying affidavit in response to the notice to show cause in good time because the court file was missing; that it was mandatory for the appellant or its counsel to be served with the notice to show cause; that no prejudice would be occasioned upon the respondent if the suit was reinstated and; that the appellant was denied an opportunity to ventilate its merited case thereby infracting its constitutional right to be heard as set out in *the Constitution* and the *Civil Procedure Act*.

3. For those reasons, the appellant urged this Court to allow the appeal by reversing and setting aside the order issued on 29th January, 2019.

4. The appeal was heard virtually on 12th February, 2024. The appellant was represented by learned counsel Mr. Kaguri. Despite proper service of the hearing notice, the respondents were absent, but the 2nd respondent had filed written submissions. The appellant filed 2 sets of like written submissions dated 19th November, 2019 and 18th March, 2020, while the 2nd respondent filed its written submissions dated 10th September, 2020. The 1st respondent did not file its written submissions.

5. The appellant argued that it did not have all the documents it needed to prosecute its defamatory claim at the time of filing the suit. It was thus in the process of retrieving them when the case was dismissed for want of prosecution. Further, it submitted that in any event, the High Court was not issuing hearing dates between November and December 2014. In addition, it submitted that when the documents were finally obtained, the appellant attempted to file its list of documents but could not do so as the court file could not be traced.

6. For the above reasons, the appellant prepared an application for reconstruction of the file. However, it was then that they were notified that the suit had been dismissed for want of prosecution. It acknowledged that pursuant to a newspaper advert dated 5th February, 2015, the appellant drafted an affidavit sworn by its director, in response to the show cause notice but could not file it as the court file could not be traced.

7. It submitted that in the absence of service of the notice to show cause why its suit ought not to be dismissed, the High Court violated Article 48, 50 and 159 (2) (b) of *the Constitution* as well as section 1, 1A and 3A of the *Civil Procedure Act*. It cited several decisions to advance the argument that since the respondents will suffer no prejudice, the suit ought to be reinstated. It maintained that it has been a vigilant litigant and was very much interested in prosecuting its case. In addition, it argued that the right to be heard should not be taken away by the stroke of a pen since sufficient cause why the suit should not have been dismissed had been demonstrated. Finally, it submitted that the appellant's failure to attend court for the hearing of the notice to show cause did not deliberately occasion a miscarriage of justice and its non-attendance was excusable.

8. The 2nd respondent opposed the appeal. Its written submissions argued that the appellant was indolent for a period of 10 years, with no justification for the inordinate delay. It pointed out that the suit had been previously dismissed on another occasion, demonstrating that the appellant was not interested in

prosecuting its case. In addition, it argued that the appellant could not cry foul since it was aware of the listing of the matter for dismissal. It was thus estopped for alleging that service was mandatory. It submitted that it was incumbent upon it to participate in the hearing, but it elected not to do so. In that regard, the appellant was hoodwinking the trial court when it alleged that the court file was missing.

9. The 2nd respondent further submitted that the appellant did not demonstrate sufficient cause to warrant an order for reinstatement. It stated that if the suit was injected with life, the respondent would be condemned to live with anxiety occasioning prejudice upon it. Arguing that litigation must come to an end, the 2nd respondent concluded that no constitutional or statutory violations were committed by the trial court. For these reasons, the 2nd respondent urged this court to dismiss the appeal with costs.

10. We have examined the record of appeal and considered the submissions by the parties and the authorities cited. As a first appellate Court, our mandate is to re-appraise; re-assess and re- analyze the evidence on the record before us and arrive at our own conclusions on the matter and give reasons either way. (See Sumaria & Another vs. Allied Industries Limited [2007] 2 KLR 1). We are also reminded that we should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence or based on a misapprehension of the evidence or the judge had been shown demonstrably to have acted on a wrong principle in reaching the finding he/she did. (See Musera vs. Mwechelesi & another [2007] 2 KLR 159).

11. The appellant seeks to have HCCC No. 1264 of 2004 reinstated.

    The bone of contention is that the learned judge exercised her discretion injudiciously in refusing to reinstate the suit. We note that all the grounds of appeal revolve around how the judge exercised her discretion. We thus posit that it is this issue that falls for determination.

12. The record shows that by a plaint dated 19th November, 2004, the appellant filed a defamatory suit in HCCC No. 1264 of 2004 against the respondents seeking the following prayers:

    a. An apology and retraction of similar prominence as the defamatory publication;

    b. General damages;

    c. Costs of the suit.

13. Soon thereafter, several interlocutory applications were exchanged between the parties, including one filed by the appellant seeking amendment of its plaint. That application was allowed, prompting the appellant to file an amended plaint dated 23rd May, 2008 that sought the same prayers in its plaint.

14. The record shows that on 5th February, 2009 D.A. Onyancha, J. (as he then was) heard the 2nd respondent's application seeking to strike out the suit since it did not have a statutory compliant verifying affidavit. The learned judge found that it was in the interest of justice to sustain rather than dismiss the suit. Consequently, the appellant was granted leave to file a proper verifying affidavit within 7 days, failing which the suit would stand dismissed.

15. The appellant failed to comply. Consequently, it filed a Notice of Motion dated 23rd March, 2010 seeking to review, vary or set aside the orders of 5th February 2009. In the alternative, the appellant sought a prayer to enlarge time to file the required verifying affidavit. Muchelule, J. (as he then was) found that the application was incompetent since the appellant's suit stood dismissed. Resultantly, on 7th October, 2010, the application was dismissed.

16. Thus, on 14th December, 2010, the appellant filed a Notice of Motion seeking to, inter alia, reinstate the suit. It was amended on 2nd March, 2011. On 8th August, 2011, K. Rawal, J. (as she then was) reinstated the suit. The appellant was further granted leave to file its verifying affidavit.

17. It appears that a lull was exhibited in the court file until a notice to show cause why the suit should not be dismissed for want of prosecution was issued on 3rd February, 2015. The same was prepared by the court suo motu. It invited the parties to appear before the court on 23rd February, 2015 to explain why the suit ought not to be dismissed in limine. The record indicates that the said notice was placed in the Daily Nation newspaper on 5th February, 2015. It was further indicated that all matters with such notices would be listed in the daily cause list and the website of the Judiciary from 16th February, 2015. Ultimately, the suit was dismissed on 8th April, 2015.

18. The record further shows that on 10th September, 2015, the appellant, through his counsel, wrote to the Deputy Registrar, requesting for her intervention to locate the court file or in the alternative, advise whether an application for reinstatement was imminent. The appellant subsequently filed the notice of motion the subject of the appeal proceedings.

19. The law on reinstatement of suits has severally manifested in our jurisdiction. The factors to take into consideration were discussed by the Court in Ivita vs. Kyumbu [1984] KLR 441 that held as follows:

> " 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 it 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."

20. Was the court's discretion exercised injudiciously in dismissing the appellant's bid to have the suit reinstated? Firstly, we observe that on its admission, the appellant was aware of the matter being listed to show cause why the suit ought not to be dismissed. The appellant acknowledged that although it had having seen the newspaper advert, that it could not file an affidavit to show cause as the court file could not be traced. One then wonders why the appellant failed to appear during the hearing to explain its predicament. Instead, it elected to ignore, out of bold pomposity, attendance to court.

21. Secondly, while the appellant was aware that the matter was listed for show cause why the suit should not be dismissed, it never took any steps to establish the outcome of that notice to show cause. Instead, the appellant awoke from its slumber six months later, asking the Deputy Registrar to intervene and trace the court file or advise for reconstruction. Withal, it was only after those six months had lapsed that the appellant filed the application for reinstatement. While the appellant explained that it could not trace the court file, no steps had been taken during that intervening period to demonstrate good cause in attempting to trace the file.

22. The appellant's conduct and propensity demonstrate lack of respect for the laid down procedures. It failed to attend the hearing of the notice to show cause and then alleged that the court file could not be traced. In our view, the appellant never demonstrated diligence in prosecuting this matter. One is left wondering how the appellant filed a suit without proper documents, and since by its own admission it was aware of this fact, there is no explanation as to why it took years to trace the documents. It is further instructive to note that the suit had been previously dismissed, albeit for other reasons but on account of the appellant's inaction.

23. It is ostensibly clear that the appellant was not deserving of a second bite at the cherry. The trial court properly exercised its discretion to refuse to reinstate the suit. Furthermore, as rightly submitted by the 2nd respondent, the danger in reinstating the suit would occasion an injustice since witnesses and documents to be adduced in evidence would be difficult to trace. In this instance, the dictates of *the Constitution* as cited in Articles 48 and 50 cannot succor the appellant. The oxygen principles cannot further inject that suit with life since the appellant is undeserving. Those provisions did not portend to assist an indolent litigant. In fact, if they were to do so, they would in their nature negate their spirit and tenor.

24. Finally, we note that this is a case where the judge was exercising her discretionally power. As stated in the locus classicus case of Mbogo vs. Shah (1966) EA 93, this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that the 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 has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. There is nothing that has been placed before us to demonstrate that the judge exercised her discretion injudiciously.

25. Consequently, we come to the conclusion that the appeal herein lacks merit. It is hereby dismissed with costs to the 2nd respondent.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2024.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR