Faima Ventures Limited & 2 others v Kenya Orient Insurance Limited (Civil Appeal 110 of 2019) [2024] KECA 1228 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1228 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 110 OF 2019

DK MUSINGA, MSA MAKHANDIA & SG KAIRU, JJA

SEPTEMBER 20, 2024

BETWEEN

FAIMA VENTURES LIMITED ..... 1ST APPELLANT

FAITH NJERI MATHIA ..... 2ND APPELLANT

PATRICK KIMANI MATHIA ..... 3RD APPELLANT

AND

KENYA ORIENT INSURANCE LIMITED ..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court at Nairobi (Mbogholi, J.) dated 21st June 2018 in HC Suit No. 521 of 2016)

JUDGMENT

1. By a plaint dated 16th September 2013, the appellants were sued by the respondent in the Chief Magistrates' Court at Nairobi for goods sold and services rendered but not paid. Though the appellants entered appearance to the suit on 6th February 2014, they however failed, neglected, or refused to file a defence. The respondent successfully applied for entry of interlocutory judgment in default of defence. The suit was thereafter set down for hearing and proceeded ex-parte. Judgment was thereafter rendered on 25th April 2014 in favour of the respondent. The appellants then filed an application to set aside the ex-parte judgment on 16th September 2015, which application was dismissed for want of prosecution on 27th October 2015. This did not stop the appellants as they made yet another application to have the dismissed application reinstated, which was allowed on condition that thrown away costs of Kshs. 10,000 be paid by the appellants to the respondent's advocates within 14 days from the date of the ruling, failing which the application would stand dismissed. The order was however not honoured by the appellants. The appellants went back to court again on 29th February 2016 with an application seeking extension of time within which to pay the thrown-away costs as ordered. However, after hearing the application interpartes, the court dismissed it on 22nd July 2016. In dismissing the

application, the trial court stated that: "Court orders cannot be made in vain, allowing breach will occasion injustice to the other party affected by the failure or delay. Failure to comply and bringing an application for extension of time without sufficient reason is an abuse of the process. I see no reason to allow this application. I do dismiss it with costs to the plaintiff. The application dated 16th September 2015 stands dismissed as earlier ordered."

2. The appellants moved to the High Court on appeal, complaining that the trial court had misdirected itself as to the principles of extension of time and had improperly exercised its discretion by dismissing the application: that the trial court failed to consider the length of the delay and the reasons for the delay hence arriving at a wrong decision; and that the trial court failed to consider all relevant factors, including the decree of prejudice occasioned to the appellants by its decision.

3. The appeal was opposed by the respondent, whose case was that the order that was being appealed from was a dismissal order and thus not appealable given that it was a negative order. Further, that the appellants had not met the threshold as required by the law, and especially Order 42 of the Civil Procedure Rules. Finally, that the trial court properly exercised its discretion in refusing the application.

4. Mbogholi, J. in dismissing the appeal stated:

> "When the appellants filed the application for extension of time, they were invoking the court's discretion to do so. The appellate court may interfere with the discretion of the lower court, but only when it is shown the lower court acted on wrong principles in denying the offended party the order sought.
>
> It must also be shown that the lower court misdirected itself and arrived at the wrong decision leading to injustice. See Mbogo & Another vs. Shah (1968) EA 93. I have looked at the pleadings, the reasons advanced in the motion seeking the extension of time and the submissions of the parties. I have come to the conclusion that the lower court did not proceed on wrong principles, neither can it be faulted for any mistake on the record. That discretion was applied judiciously and I have no reason to differ with the lower court.
>
> This appeal must therefore fail and the same is dismissed with costs to the respondent."

The appellants being dissatisfied with the judgment and decree of the High Court have now approached this Court on a second and perhaps last appeal on the same grounds argued in the High Court. We need not therefore rehash them.

5. The appeal was canvassed by way of written submissions, with limited oral highlights. The appellants through Mr. Ochieng Ogolla, learned counsel, submitted that the dismissal of the application was unmerited as the delay in the payment of thrown away costs was just four days. That the appellant had even tendered the amount to the respondent but it refused. They thus asked the court to exercise its discretion and allow appeal.

6. The respondent through Mr. Kiplagat, learned counsel, submitted that there was no point of law that had been raised by the appellants to merit this Court's interference with the judgment and decree of the High Court. That all the issues raised by the appellants in the appeal are all matters of fact which divests this court of jurisdiction. The question was not the length of the delay but the conduct of the appellants before the subordinate court, which informed the High Court's decision that the appellants did not deserve discretion to be exercised in their favour. That the appeal turns on the exercise of discretion, such that the question for determination is whether the High Court misdirected itself in some matter and as a result arrived at a wrong decision, or whether the trial court was clearly wrong in the exercise of discretionary power and as a result there was mis-justice. Counsel relied on the cases of

Mbogo & Another vs. Shah (1968) EA 93 and Rose Detho vs. Ratilal Automobiles Ltd & 6 Others [2007] eKLR, to argue that the court took into consideration relevant factors in the exercise of judicial discretion. That having interrogated the appeal, the learned Judge did not find any fault on the part of the subordinate court in the manner in which it exercised its discretion. Counsel therefore urged us to dismiss the appeal.

7. We are aware of the age-old legal adage that an appellate court should rarely interfere with a discretion exercised by a trial court. This rendition by Madan, J.A. (as he then was) in United India Insurance Co. Ltd vs. East African Underwriters (Kenya) Ltd [1985] E.A, is apt:

> " 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."

8. A Judge or Magistrate exercising judicial discretion bears the burden of accounting for their decision and in order to discharge this burden, the Judge or Magistrate ought to explain the basis of their decision. The reasons why the trial court dismissed the application were clearly stated by the trial court in the extract we have reproduced elsewhere in this judgment.

9. We have similarly reproduced the reasoning of the High Court in dismissing the appeal. Having looked at the reasons advanced by the two courts below in their determinations, we see absolutely no reason why we should interfere with the concurrent findings of those two courts. We reiterate that both courts below exercised their discretion properly in dismissing the application as well as the appeal. The two courts neither misdirected themselves in law nor misapprehended the facts or took into account considerations of which they should not have taken account, or failed to take account of considerations of which they should have taken account. See the cases of Mbogo & Another vs. Shah and Rose Detho vs. Ratilal Automobiles Ltd & 6 Others (supra).

10. It is also not lost on us that this is a second appeal and as such, we can only consider matters of law. See the case of Otieno Ragot & Company Advocates vs. National Bank of Kenya Limited [2020] eKLR. We agree with counsel for the respondent that all the issues raised by the appellants in the appeal, save for the ground of exercise of discretion are all matters of fact, which divests this Court of jurisdiction to entertain them.

11. That said, we find the appeal devoid of merit and dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR