Hussein & another v Kenya Revenue Authority & another (Civil Appeal E024 of 2020) [2023] KECA 468 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KECA 468 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E024 OF 2020

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

APRIL 28, 2023

BETWEEN

HASSAN MOHAMED HUSSEIN ..... 1ST APPELLANT

SAID MOHAMED ABDI T/A WESTERN INVESTMENT ..... 2ND APPELLANT

AND

KENYA REVENUE AUTHORITY ..... 1ST RESPONDENT

KENYA PORTS AUTHORITY ..... 2ND RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Mombasa (D. O. Chepkwony J) delivered on 7th October 2020 in High Court Civil Suit No 140 of 2011)

JUDGMENT

1. On October 7, 2020, the High Court at Mombasa (D. Chepwony J.) delivered a ruling on an application filed by the 1st respondent herein dated November 4, 2019, the effect of which ruling was to dismiss the Appellants' application dated April 4, 2018 for want of prosecution. The 1st respondent's application was based on the ground that the appellants had not set the application dated April 4, 2018 for hearing for a period of over a year and one month, and as such, they had lost interest in prosecuting the said application.

2. The Appellants had in the application dated April 4, 2018, sought to set aside and vary orders dismissing their suit in the High Court, and that the said suit be reinstated for full hearing and determination on merit. Their main ground was that they were not served with a notice to show cause in the matter by the time the suit came up for dismissal for want of prosecution on July 8, 2015, and were therefore condemned unheard. They had also argued that the Respondents would not suffer any prejudice should the suit be reinstated and it was in the interest of justice that the appellants be given an opportunity to ventilate their claim.

3. The appellants reply to the 1st respondent's application dated November 4, 2019 was that a hearing date for the application dated April 4, 2018 was set for July 3, 2018 and September 17, 2018, but that the court was not sitting on both occasions. Further, that their previous advocate in the matter had failed to inform the appellants on the progress of the matter, and lost track of the file and did not fix another date for hearing. The appellants denied that they had lost interest in prosecuting the matter, and should not be punished for mistakes of their counsel.

4. After considering the submissions filed by the parties, the learned trial Judge allowed the 1st respondent's application and dismissed the Appellants' application dated April 4, 2018, on the ground that the reasons given that the delay in prosecuting the application was as a result of mistakes made by the Appellants' counsel's was not sufficient, and that the Respondents were entitled to some peace of mind, as four years had passed since the suit was dismissed for want of prosecution, and the delay in commencing proceedings made it more likely that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose. The appellants, being aggrieved with this decision, proffered this appeal and raised five (5) grounds of appeal in their memorandum of appeal dated December 4, 2020 and lodged on December 7, 2020. The said grounds faulted the learned trial Judge for failing to uphold the Appellants' right to fair hearing guaranteed by article 50 (1) of *the Constitution* and depriving them an opportunity to challenge the Respondents' case on merit at full trial. The appellants therefore prayed that the ruling of the High Court of October 7, 2019 be set aside and substituted with an order dismissing the respondent's Notice of Motion dated November 4, 2019, and the costs of the application and appeal be awarded to the appellants.

5. We heard the appeal on November 22, 2022 on the court's virtual platform. Learned counsel Mr. Omwenga appeared for the Appellants, learned counsel Mr. Nick Osoro appeared for the 1st respondent, while learned counsel Mrs. Collete Akwana appeared for the 2nd respondent. The learned counsel all relied on their respective written submissions dated February 11, 2022, March 22, 2022 and November 16, 2022. This being a first appeal, the duty of this court is reiterated as was set out in the decision of *Selle & another vs Associated Motor Boat Co. Ltd & others* (1968) EA 123 which is to reconsider the evidence, evaluate it and draw our own conclusion of facts and law, and we will only depart from the findings by the trial court if they were not based on evidence on record; where the said court is shown to have acted on wrong principles of law as was held in *Jabane vs Olenja* (1968) KLR 661, or where its discretion was exercised injudiciously as held in *Mbogo & another vs Shah* (1968) EA.

6. Mr. Omwenga submitted that the issue before the court was whether the learned Judge's refusal to set aside the orders issued on 8th July 2015 and reinstate the suit for hearing was unjust in the circumstances of the case and the demands of ends of justice in the matter. The counsel placed reliance on the Supreme Court of Kenya decisions in *Apungu Kibira vs IEBC & Omulele*, Supreme Court Petition No. 29 of 2018 and *Deynes Muriithi & 4 others vs Law Society of Kenya & another*, Supreme Court Application no 112 of 2015 [2016] eKLR, that an appellate Court may only interfere with the exercise of discretion by a Judge where it was exercised whimsically or there was plain and clear misapplication of the law. The counsel contended that the learned Judge acted whimsically and misapprehended the principles governing the exercise of the court's discretion when dealing with the application to reinstate the suit for hearing. The counsel urged that the Appellants made steps to prosecute the suit before the High Court by compliance with the pre-trial directions issued on March 5, 2014, and were awaiting for a hearing date to be issued after the court register for the year was closed.

7. Further, that the application dated April 4, 2018 was fixed for hearing on July 3, 2018; however, the court was not sitting on the said date, and on July 6, 2018, the appellants fixed the application for hearing on September 17, 2018 and the court was again not sitting, and that this among other factors affected the delay of the prosecution of the application. They placed reliance on the statement in

Halsbury's Laws of England, 4th Edition Vol. 37 at paragraph 448 that the power to dismiss an action for want of prosecution will not be exercised unless the Court is satisfied that the default has been intentional and contumelious; or that there has been prolonged or inordinate delay on the part of the plaintiff that is not possible to have a fair trial for issues in the action or such as likely to cause prejudice to the defendant.

8. It was the counsel's case that upon explaining the reason for the delay, the evidential burden shifted to the respondents to demonstrate that it would suffer substantial risk if the suit was reinstated. That the Respondents did not demonstrate any prejudice they would suffer if the suit were to be reinstated for hearing. Further, since they had not been issued with a notice to show cause before the suit was dismissed, the suit should have been reinstated as a matter of right. The counsel reiterated that the delay could not be attributed to the appellants, and the learned trial judge closed the doors to justice for the mistake of their counsel and since the court was not sitting on various occasions. They placed reliance on the decisions in *Belinda Murai & others vs Amos Wainaina*[1978] eKLR that the doors of justice are not closed because of mistakes made by counsel, and in *Peter Ngugi Kabiri vs Esther Wangari Githinji & another* [2015] eKLR that substantive justice requires the dispute between the parties to be resolved on merit through a full hearing. Mr. Omwenga also pointed us to the trial proceedings to illustrate that the Court was not sitting when its application dated April 4, 2018 came up for hearing.

9. Mr. Osoro on his part submitted that the appellant must prove that there was reasonable and excusable cause for the prolonged delay, and cited the decisions in *Ivita v Kyumbu* (1984) KLR 441 and *Utalii Transport company limited & 3 others vs NIC Bank & another* [2014] eKLR that the test is whether there is inordinate delay that is inexcusable, and, whether justice can be done despite such delay. It was the counsel's case that in the instant case there was no reasonable excuse for the delay and the delay was prolonged and inexcusable for the reason that the appellant filed the suit on May 27, 2011 and the 1st respondent filed their statement of defence and witness statements on July 5, 2011; the court on its own motion dismissed the appellants suit for want of prosecuting on July 8, 2015; the appellant filed an application to reinstate the suit on April 25, 2018 almost 4 years later and served it on the respondent on May 16, 2018; the appellants notice of motion was scheduled for hearing on July 3, 2018 and September 17, 2018 and the appellant lost interest in the application and as a result, had not set the matter for hearing since September 17, 2018 when the matter was scheduled for hearing which necessitated the 1st respondent's application dated November 4, 2019.

10. The counsel place reliance on the decision in *Shah vs Mbogo* (1967) EA 1116 for the proposition that discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertent or excusable mistake or error, but is not designed to assist a person who had deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. Therefore, that the burden to demonstrate the violation of rights lay with the person to whom the action had been taken against, in the instant case being the Appellants, who had not demonstrated and discharged its burden that indeed there was miscarriage of justice and they were denied access to justice pursuant to articles 48, 50 (1) and 159 of *the Constitution*, while the respondents were obviously prejudiced by a stagnant suit. The cases of *Shollei vs Judicial Service Commission & another* [2022] KESC 5 (KLR) and *Evans Odhiambo Kidero & 4 Others vs Ferdinand Ndungu Waititu & 4 others* [2014] eKLR were cited in this regard. Further, it was in the interest of a fair trial that disputes be resolved expeditiously and section 1A and 1B of the *Civil Procedure Act* speak strongly to the duty of parties and counsel to assist the Court to expedite justice, and it was the primary duty of the Appellants to take steps to progress their case.

11. Mrs Akwana's submissions were that the issue for determination was whether this court can interfere with the trial court's exercise of discretion in allowing the 1st Respondent's application dated November 4, 2019, and placed reliance on the decisions in *United India Insurance Co. Ltd vs East*

African Underwriters (Kenya) ltd [1985] EA and Mbogo & another vs Shah (1968) EA 93 on the circumstances when an appellate court can interfere with a discretionary decision of the judge.

The counsel pointed out that the trial Court considered the fact that as at November 4, 2019 when the 1st respondent filed its application for dismissal of the appellants' reinstatement application, there was no record of any initiative taken by the appellants to fix their application for hearing for a period of more than a year from the last recorded action, and four (4) years after the court's orders for dismissal issued on the July 8, 2015, and that the exercise of discretion was therefore fair and guided by the principles of law anchored in order 17 rule 1 of the *Civil Procedure Rules,* 2010 and section 1B of the *Civil Procedure Act*.

12. Therefore, that no constitutional issue arose and the Appellants could not rely on article 50 or article 159 (2)(d) of *the Constitution*. The counsel placed reliance on the decisions in *Habo Agencies Ltd vs Winfred Odhiambo Masingo* [2015] eKLR, *Rajesh Rughani vs Fifty Investment Ltd & another* [2005] eKLR and Barns Construction Co. Ltd vs John Mzare Ogone [2011] eKLR that it is not enough for a party in litigation to simply blame the advocates on record for all manner of transgression in the conduct of litigation, and that parties as the principals have a responsibility to follow up on their case even when they are represented by counsel, and should therefore bear the consequences.

13. 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."

14. It is notable in this regard that this appeal arises from a decision by the trial court on the 1st respondent's application dated 4th November 2019 that was principally brought under order 17 rule 2(3) of the *Civil Procedure Rules* 2010 as well as section 3A of the *Civil Procedure Act*, and which sought to dismiss the appellants' application for want of prosecution. It is therefore necessary to clarify at the outset that the application for reinstatement of the suit was not the one before the trial Court, and the applicable law in this regard was order 17 rule 2 of the *Civil Procedure Rules* of 2010 provides as follows:

    1. In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

    2. If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

    3. Any party to the suit may apply for its dismissal as provided in sub-rule 1.

    4. The court may dismiss the suit for non-compliance with any direction given under this Order.

15. This court in *Moses Muriira Maingi & 2 Others vs Maingi Kamuru & Another*, Civil Appeal No 151 of 2010, agreed with the test set out in Ivita v Kyumbu (supra) for dismissing a matter for want of prosecution, 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 the 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 satisfy the court that he 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."

16. Similar circumstances as those in this application arose in *D. Chantulal K. Vora & Co. Limited vs Kenya Revenue Authority* (2017) eKLR where this court noted as follows:-

> "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."

17. From our analysis of the record, it is apparent that the appellants were interested in pursuing the application dated April 4, 2018 for reinstatement of their suit, and did take steps in this regard. A perusal of the record reveals that that on the May 27, 2011, the appellants filed a suit in the High Court, being H.C Civil Suit No. 140 of 2011, and on March 5, 2014, the suit was fixed for pre-trial conference and directions issued. On July 8, 2015, after one year and four months, the Court noted that a notice to show cause had been issued to the parties under order 17 rule 2 of the *Civil Procedure Rules*, and in the absence of any cause shown, the suit was dismissed for want of prosecution. Three years after dismissal of the suit, the Appellants filed the application dated 4th April 2018 seeking for reinstatement of the suit. On April 25, 2018, the said application was fixed for hearing on July 3, 2018. There is no record that the trial Court was sitting on that date, and on July 6, 2018, the application was scheduled for hearing on September 17, 2018, and again there is no record that the trial court was sitting on which date. The next activity on record is on is November 5, 2019, when the 1st Respondent's application dated November 4, 2019 was fixed for hearing on January 28, 2020.

18. While it is the case that there were no steps taken by the appellants for over a year after September 17, 2018 to prosecute the application dated April 4, 2018, it is noteworthy that the appellants' counsel were present in court on April 25, 2018 and July 6, 2018 when the dates for hearing of the application were set, and it cannot therefore be said that the appellants totally went to sleep. The appellants have explained that their previous advocates were not diligent in following up on new hearing dates after the court did not sit on September 17, 2018, and we are of the view that, this was a sufficient reason for the one year and two months of inactivity, given that the trial court was also partly to blame for the delay.

19. The aspect of the delay in the prosecution of the main suit and prejudice that was caused thereby to the respondents was in our view not a relevant consideration in the application for dismissal of the appellants' application dated April 4, 2018 for want of prosecution, and was only valid in the

consideration of the application for reinstatement of the suit, which was not before the trial Court for hearing. To this extent the learned trial Judge therefore erred in taking this factor into consideration, and in not considering the efforts made by the appellants at prosecution of the application dated April 4, 2018 and the circumstances giving rise to the delay.

20. We are therefore satisfied that this appeal has merit and we can interfere 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 October 7, 2020 in High Court Civil Suit No 140 of 2011. The Appellants' application dated 4th April 2018 filed in High Court Civil Suit No 140 of 2011 is hereby reinstated for hearing. We also order that each party bears its own costs of this appeal and of the 1st respondent application dated November 4, 2019 at the High Court. The order on costs is informed by the fact that the appellants have conceded to their counsel's contribution to the delay in prosecuting the application dated April 4, 2018.

21. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF APRIL 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR