Gibson Kamau Kuria t/a Kamau Kuria & Company Advocates v Mumwe Investments Ltd & 6 others (Civil Appeal 92 of 2019) [2022] KECA 809 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KECA 809 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 92 OF 2019

MA WARSAME, MSA MAKHANDIA & HA OMONDI, JJA

JUNE 24, 2022

BETWEEN

GIBSON KAMAU KURIA T/A KAMAU KURIA & COMPANY ADVOCATES ..... APPELLANT

AND

MUMWE INVESTMENTS LTD ..... 1ST RESPONDENT

E KARIUKI ..... 2ND RESPONDENT

MARY KANJI KIMAN ..... 3RD RESPONDENT

KENYA NATIONAL CAPITAL CORPORATION LTD ..... 4TH RESPONDENT

INDUSTRIAL DEVELOPMENT BANK LTD ..... 5TH RESPONDENT

NDUNG'U NJOROGE & KWACH ADVOCATES ..... 6TH RESPONDENT

WANJAMA & COMPANY ADVOCATES ..... 7TH RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (A. Mabeya, J.) dated 28th June 2013 in HCCC No. 5245 of 1992)

JUDGMENT

1. This appeal arises from the decision of the High Court (Mabeya, J.) dismissing the appellant's application dated 14th March 2001 for want of prosecution.

2. The genesis of the appeal is a dispute over the repayment of various loan facilities advanced by the 4th and 5th respondents, Kenya Capital Corporation Limited (KENYAC) and the Industrial Development Bank Limited (IDB) to Mumwe Investments Ltd, the 1st respondent. The 2nd and 3rd respondents were the directors of the 1st respondent.

3. In a bid to stop the financiers from exercising their statutory power of sale, the 1st - 3rd respondents instructed the law firm of Kamau Kuria & Kiraitu Advocates to file the suit before the High Court. The 4th and 5th Respondents were represented by the firm of Ndung'u Njoroge& Kwach Advocates, the 6th respondent in the filed suit.

4. The parties eventually entered into an agreement where some of the charged properties would be converted into residential properties and subdivided into plots to be sold to members of the public and the proceeds of the sale would be used to repay the outstanding loans.

5. It is common ground that in the course of the proceedings, the 1st -3rd respondents changed representation and a Notice of Change of Advocates was filed by Messrs. Wanjama & Co. Advocates on 30th November 2000. The parties then proceeded to compromise the suit through an out of court settlement Agreement dated 27th November 2000 which was filed in court on 21st February 2001.

6. Aggrieved by the turn of events, the appellant filed an application dated 14th March 2001 challenging the validity of the appointment of Messrs. Wanjama & Co. Advocates and sought to set aside the settlement agreement filed. The appellant maintained that Messrs. Wanjama & Co. Advocates were not properly on record and could therefore not purport to enter into a settlement agreement with the respondents and the financiers while it was still on record.

7. By a motion on Notice dated 26th October 2010, brought under Order 16 rule 5 of the repealed *Civil Procedure Rules*, the respondents sought an order to dismiss the application for want of prosecution. The application was premised on the grounds that the delay in prosecuting the application was inordinate and inexcusable and that the delay had prejudiced the respondents as the appellant had stayed the proceedings in High Court Miscellaneous Application No. 42 of 1997, *Ndungu Njoroge & Kwach Advocates v. Kamau Kuria & Kiraitu Advocates* pending the determination of their application. These grounds were similarly reiterated by an affidavit sworn by Charles Njagi, the respondents advocate.

8. Opposing the motion, the appellant filed a replying affidavit sworn by Gibson Kamau Kuria averring that: the application was mischievous as the respondents had not filed a response to the application, that the object of the application was to enforce an illegal consent and to complete the fraud perpetuated on his firm by evading the hearing of the their application and that many attempts had been made to set the matter for hearing but their efforts were futile as the court file had gone missing.

9. In allowing the application, the learned Judge, Mabeya, J., in his ruling dated 28th June, 2013 expressed himself as follows: -

> " I am therefore satisfied that there had been inordinate delay on the part of the Firm in setting the application down for hearing. With regard to whether the delay has been explained, I have seen and examined the annexures marked "GKK 2". ...In my view, the letters so produced by the Firm, do not aid the Firms position that the delay was occasioned by the missing court file. The same however illustrate that there was vigilance on the part of the Defendants to have the matter listed for hearing. I would have expected such vigilance on the part of the Firm since it was their Application that required prosecution. Further, the Firm has not produced evidence that there was an attempt to apply for the reconstruction of the Court File upon the realisation that the Court file was missing, if ever the file went missing as claimed."

On whether justice could still prevail despite the inordinate and inexcusable delay, the court rendered itself thus:

> " I must say that the Firm had raised serious issues that required adjudication. Be that as it may, I find that given the weight of the application dated 14th March, 2001 it was incumbent upon the Firm to prosecute the same to its logical conclusion at the earliest. It was for the Firms benefit to do so... the wheels of justice cannot come to the aid of the firm as justice delayed is justice denied."

Finally, in considering the prejudice suffered by the respondents, the court stated:

> " I am therefore of the view that the fact that MISC. CAUSE No. 42 of 1997 (*supra*), was stayed pending the determination and outcome of the Application dated 14th March, 2001, which to date has not been determined has not only caused anxiety to but also prejudiced the Defendants"

10. This decision prompted the instant appeal, which is premised on grounds inter alia that the court misdirected itself on the facts pertaining to the application dated 14th March 2001 and 26th October 2010, that the learned judge ignored evidence which illustrated the appellant's attempts to set the application down for hearing and that the delay occasioned was the fault of the registry, that the learned judge exercised his discretion wrongly and that the Judge failed to consider the prejudice to be suffered by both parties.

11. During the plenary hearing of this appeal, learned counsel Mr. Ngángá who appeared for the appellant submitted that the *Civil Procedure Rules* did not provide for the dismissal of pending applications before the court, and that in any event the procedure to be followed was laid out in Order 17 Rule 2, the delay which was not inordinate, was excusable and that justice could still be done despite the delay.

12. Citing the cases of *D. Chandulal K. Vora & Company Ltd v. Kenya Revenue Authority* [2017] eKLR and *David Kemei v. Energy Regulation Commission &Amp; 2 Others* [2020] eKLR it was submitted that the attempts of the appellant to set down the matter for hearing could not be brushed off as inconsequential and that the appeal ought to be allowed to avoid prejudicing one party and dislodging the appellant from the seat of justice.

13. The appellant also contended that court's analysis of the weight of the prejudice to be suffered by the parties was one sided. In their view, the court had failed to consider that the appellant was to bear the liability of a claim which was settled illegally and that the effect of dismissing the suit was that the appellant would bear liability on behalf of its former clients for some properties which were the subject of the suit.

14. Lastly, citing the case of *Pkiech Chesimaya v Limakorwai Achipa* [2020] eKLR it was submitted that the court failed to consider whether justice could still be done to the parties despite the delay.

15. Opposing the appeal, Mr. Bundotich who appeared for the 1st, 3rd and 4th respondents emphasized that the learned judge gave comprehensive and cogent reasons why he dismissed the appellant's application; specifically, that ten years of not setting down the application for hearing was inordinately long and inexcusable. In his view, it was evident that the court had taken into consideration the import of the appellant's application and had rightly determined that the respondents had suffered greater prejudice in the circumstances. He therefore urged this court to uphold the findings of the superior court.

16. We have considered the record of appeal, the law, the authorities cited and the oral submissions made by counsel. In our view, the pertinent question for our determination is whether the learned judge

exercised his discretion correctly. However, we must first of all dispel the notion that the Law does not provide for dismissal of applications for want of prosecution. Even though Order 16 rule 5 of the repealed rules (which the application to dismiss was brought under) and Order 17 rule 2the *Civil Procedure Rules* speak to the dismissal of "suits" for want of prosecution and not applications, the court is not powerless. The Court under Section 3A of the *Civil Procedure Act* has inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. It is within the discretion of the court to dismiss for want of prosecution, and to reinstate the application after receiving a satisfactory explanation. As was aptly stated by Justice Platt Ag JA, in *Wanguhu v Kania* [1985] eKLR.

> " It would lead to very serious injustice if a court could not control a party who appeared to be failing to prosecute an application. Equally it would be a serious failure of justice not to restore the application to hearing if there were good reasons why the applicant had been prevented from moving or applying to the court."

17. It is trite that the discretion to dismiss a matter for want of prosecution is a judicial one, to be exercised taking the following factors into consideration – the length of the delay and the explanation thereof and the prejudice that has been or is likely to be occasioned by the delay (see *Allen v. Sir Alfred McAlpine & Sons* [1968] 1 ALL ER 543).

18. Bearing the above principles in mind, it is our view that the learned Judge correctly appreciated the principles in dismissing an application for want of prosecution as espoused in various cases. The record clearly shows that from the year 2001 to 3rd May 2006, the parties attempted to set down the matter for hearing but progress was tainted with adjournments, attempted settlements and one incident of shortage of Judges.

19. As noted by the learned Judge, from May 2006, it was the respondents' advocates who tried to inject life into the appellant's motion by inviting the appellant's advocates to set down the matter for hearing. There is no proof of any form to ascertain the appellant's claim that the court file was missing. There are no affidavits by the appellant's clerks to prove that they went to the registry on certain dates and were informed by registry officials that the file was missing or what steps, other than mute acceptance; they undertook to remedy the situation. In our view, the appellant had the primary responsibility to initiate action in the matter and no credible explanation was given for the inaction on its part rendering the delay inexcusable.

20. On the question of whether the respondents have suffered, or will likely suffer, serious prejudice as a result of the delay there is rebuttable presumption of prejudice where there has been inordinate and inexcusable delay. The respondents submit that the mere existence of the appellant's application warranted a stay of proceedings in H.C. Misc. Application No. 42 of 1997 where they sought to enforce the professional undertakings of the appellant to pay the purchase price and/or deposit in respect of various properties owned by their client.

21. It was contended that the failure to prosecute served as a noose on the respondent's claims as they were kept from prosecuting both suits and accessing the money sought, even though the parties had long settled the dispute between them and had adjusted to the terms of consent which were cemented by the appellant's lack of action.

22. The appellant on the other hand maintains that the issues raised in the dismissed application deserve to be heard on their merits as they involve grave issues that go to the root of the suit and the conduct of Advocates as officers of the court and justice could still be done despite the delay.

23. In our considered view, the appellant's argument on the right to be heard and their right to substantive justice, sound as they may seem, do not outweigh or mitigate the serious prejudice to the respondents herein occasioned by the prolonged delay and by the stalling of the suit in the High Court and Miscellaneous Civil Application No. 42 of 1997 which sought to compel the appellants to comply with their professional undertakings. Any prejudice suffered by the appellant falls squarely at their door. Despite reminders and invitations from the respondents' counsel, the appellant's counsel took no concrete steps to set down that application for four years. The appellant has provided no explanation for this. In fact, there was not a single complaint from the appellant regarding the court's or the registry's delay or the missing file until the respondents filed their application for dismissal of the application. In any event, the appellant is not locked from the seat of justice. In our understanding the appellant was given the opportunity to be heard but resorted to unwarranted delaying tactics in order not to comply with the terms of the consent. In the words of the Learned Judge:

> " In any event, I am of the view that the Firm still has recourse for its claims. With regard to the Legal fees owed by the Plaintiff, I do not see why the Firm cannot proceed to tax its Bill of Costs with the taxing master. Further, on the issue of misconduct of Messers. Wanjama & Advocates and Messers Ndungu, Njoroge & Kwach Advocates, the Firm can still institute separate proceedings in connection to those allegations."

24. We remain steadfast that the duty of this court is not to determine the merits of the appellant's dismissed application, but to determine whether the respondents' application for dismissal was warranted in the circumstances. To which we must answer in the affirmative.

25. The learned judge applied the correct test to the issues before him, weighed the prejudice likely to be suffered by the innocent party and weighed it against the prejudice to be suffered by the offending party if the event of dismissal and came to the conclusion that justice demands that the application be dismissed. We think the trial Judge correctly exercised his discretion in accordance with the law and we see no reason for interference.

26. In light of the foregoing, we do not hesitate to dismiss the appeal with costs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

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M. WARSAME

JUDGE OF APPEAL

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ASIKE-MAKHANDIA

JUDGE OF APPEAL

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H. OMONDI

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar