



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & KANTAL, JJA)

CIVIL APPEAL NO. 94 OF 2015

BETWEEN

MOSES MWANGI KIMARI.....APPELLANT

AND

SHAMMI KANJIRAPPRAMBIL THOMAS.....1ST RESPONDENT

SPEDTSAVER (K) LIMITED.....2ND RESPONDENT

PRIME BANK LIMITED.....3RD RESPONDENT

(Being an appeal from the Ruling and order of the High Court of Kenya

at Nairobi (Gikonyo, J) delivered on 31st July, 2014

in

HCCC CASE NO. 38 OF 2014

JUDGMENT OF THE COURT

The appeal arises from the Ruling of the High Court of Kenya at Nairobi (**Hon. Gikonyo, J.**) dated 31st July, 2014 in High Court Civil Case No. 38 of 2014.

The background to the appeal is that the appellant filed a suit against the respondents seeking a permanent injunction restraining the 1st respondent from collecting any payment from the 2nd respondent company's debtors and from alienating the company's assets and stock and from tampering with the 2nd respondent's housing lease pending the preparation of proper audited company's accounts. The appellant further sought an order that the appellant and the 1st respondent do jointly foresee the preparation of proper audited books of accounts for the 2nd respondent at the 2nd respondent's expense and the refund of the funds found misappropriated by the 1st respondent. An interim application for injunction filed simultaneously with the plaint was dismissed on merit for the failure to establish a *prima facie* case for the grant of an injunction.

On 23rd May, 2012, the 3rd respondent filed an application dated 26th April, 2012 seeking the dismissal of the appellant's suit with costs for want of prosecution. The application was premised on the grounds that a period exceeding one year had lapsed without the appellant taking up any steps to prosecute the suit. The application was opposed by the appellant. It was heard on merit and in a ruling delivered on 8th November, 2012 the trial court sustained the suit on condition that the same is set down for hearing within 30 days of that order, but without a rider that the suit would stand dismissed if it was not set down for hearing as directed by the court, a condition the appellant never complied with.

After the order lapsed the appellant filed an application dated 9th May, 2013 seeking leave of court to re-amend the amended plaint. The 1st and 2nd respondents opposed that application based on a Replying Affidavit together with grounds of opposition, both dated 8th October, 2013. Simultaneously with the filing of the Replying Affidavit and grounds of opposition to the appellant's application dated 9th May, 2013,

they also filed an application dated the same 8th October, 2013 seeking dismissal of the suit on the grounds *inter alia* that the appellant had failed to comply with the directions given by the Court on 8th November, 2012 to set down the suit for hearing within 30 days of that order: that although the court did not expressly state that the suit would stand dismissed upon default of compliance with the conditional order issued on 8th November, 2012, implication of the order as framed was that the suit would stand dismissed upon non-compliance with the conditional order and on that account urged the court to find that the suit stood dismissed for non-compliance of the conditional court order.

The appellant filed a replying affidavit to the 1st and 2nd respondent's application contending that the delay in prosecuting the suit was occasioned by various factors, namely a pending application that was being prosecuted by both parties; attempts to have the matter settled amicably out of court which also took some time; the pendency of **Kiambu Criminal Case No. 775 of 2011** wherein the 1st respondent was being prosecuted in connection with offences related to matters in issue in the civil suit and whose proceedings the appellant intended to tender in court in support of the suit. Also the pre-trial procedures had not been completed as neither party had filed their respective lists of documents and witnesses or witness statements.

The two applications were consolidated and heard together. The trial court analyzed the record, and framed two issues for determination. The first was the issue as to whether the delay in complying with the Order of 8th November, 2012 was inordinate. In determining this issue, the trial court reviewed the decision in the High Court case of **Utalii Transport Co. Limited & 3 others v NIC Bank & Anor [2014] EKLR** on principles that guide the court of law in the exercise of its discretion in determining an application for dismissal of a suit for want of prosecution and made findings thereon *inter alia* that what amounts to an inordinate delay differs from case to case depending on the circumstances and facts of each case. In the trial court's view it should be an amount of delay which leads to an inescapable conclusion that the delay is inordinate and therefore inexcusable. Second, it should be one which is beyond acceptable limits in the prosecution of a case.

The trial court also reviewed the case of **Allen v Alfred MacAlphine & Sons [1968] 1 ALL ERI 543** where a delay of 14 years was considered inordinate; the case of **Agip Kenya Limited v Highlands Tyres Limited [2001] KLR 630** where a delay of 8 months was considered not inordinate; the case of **Sagoo v Bhari [1990] KLR 459** where a delay of 5 months was considered not inordinate; and lastly **HC ELC Case No. 2058 of 2007** where a delay of one and half years was also considered not inordinate.

Applying the above threshold to the rival positions before it, the trial court expressed itself as follows:

“The court allowed the plaintiff time to set down this case for hearing, i.e. thirty days from 8th November, 2012. The direction was given on an application by the Defendants to dismiss the suit for want of prosecution. And it is worth of note that the said defendants' application had been precipitated by delay on the part of the plaintiff to prosecute the case. The said circumstances in this case are, therefore, the real issues which the court must consider in its decision. Apart from that, the Plaintiff did not take steps as ordered by the Court in order to set down the case for hearing until after six months when he applied for further amendments of his plaint. The only explanation the plaintiff has offered on the delay is that he could not have been expected to fix the matter for hearing because both parties had not complied with order II of the CPR, and the Court had not certified the matter to be ready for hearing. I find the argument to be quite arrogant especially given that the Plaintiff had been directed to take steps towards setting down the suit for hearing. The steps the court meant and which could only have been taken by the plaintiff, are those prescribed in the CPR and specifically Order II of the CPR. The steps to be taken by the plaintiff as the suitor ought to have led to pre-trial conference being undertaken by the court after which the suit would be certified as ready for hearing. Therefore, failure to take such important steps towards preparation of the case for hearing, and more so when the Court had fixed a time frame of so acting is a violation of the order of the court, which should not be taken lightly by this court. It is a serious breach of law and all procedural rectitude required of the plaintiff by the law in a civil process. In the face of such breach without a reasonable explanation, the delay herein can only be said to be un-explained and therefore, inordinate and inexcusable. We should not only look at the delay of six months since the direction of 8th November, 2012, we should look also at the entire conduct of the plaintiff; it is negligent and tinctured a don't-care attitude towards court orders. This is not unfair indictment of the plaintiff; it is simply an atonement of serious disobedience of court orders which no serious court of law should countenance. I am saying these things because many are under a misconception or delusion that Article 159 of the Constitution is a panacea of all ills including those of a nature that is negligent, arrogant or dilatory conduct of suitors. Far from it; and any case which is attended to by inordinate delay which has not been explained should be dismissed straight away unless the interest of justice would demand otherwise. Justice would demand that the process of court be vindicated from blatant breach by parties. It will not, therefore be just to sustain this suit. The upshot is that this suit is dismissed. Consequently, I grant the Defendants application dated 8th October, 2013 and decline the one by the plaintiff for amendment of the plaint dated 9th May, 2013.

The appellant was aggrieved and filed this appeal raising 6 grounds of appeal namely: that the Honourable Judge erred in law and in fact:

- 1. In totally disregarding the appellant's application for amendment and totally addressing itself on the application for dismissal of the suit for want of prosecution.*
- 2. In reaching a finding that the appellant was guilty of inordinate delay in prosecuting his suit yet the appellant did candidly demonstrate and explain the reasons for the said delay*
- 3. In wholly relying on the arguments advanced by the Respondents and wholly disregarding the arguments advanced by the appellant.*
- 4. In meting out a decision that was extremely harsh to the appellant without having due regard to intervening factors and the circumstances of the matter before him.*
- 5. In dismissing the appellant's suit effectively locking him out of the seat of justice.*

6. In failing to exercise his unfettered discretionary powers judiciously

Supporting the appeal, the appellant submitted that the trial court's failure to address the appellant's application for leave to re-amend in favour of the 1st and 2nd respondents' application for dismissal of the suit for want of prosecution sustained the said application and accordingly dismissed the appellant's suit drove the appellant from the judgment seat empty handed contrary to rules of natural justice and the spirit in article 50 of the constitution of Kenya which accords every citizen a right to a fair hearing; and **Article 159 (2) (d)** of the Constitution which enshrines the principle against rendering justice on technicalities.

Relying on the case of **Selle v Associated Motor Boat Co. Ltd 1968 [EA 123]** as approved in the case of **Margaret Njeri Muiruri v Bank of Baroda (Kenya Ltd) [2014] eKLR** the appellant urged the Court to revisit the record, re-analyze it on its own and reverse the impugned orders of the trial court, substitute these with orders dismissing both the 1st and 2nd respondents opposition to the appellants application to re-amend the plaint and the application dated 8th October, 2013 seeking dismissal of the suit and restore both the application dated 9th May, 2013 for leave to re-amend and the suit for hearing on their merits especially when there was no demonstration that the respondents stood to suffer any prejudice if both the appellant's application and the suit were allowed to proceed to merit trial. The appellant also contended that the suit was also dismissed on a point of technicality contrary to **Article 159 (2) (d)** of the Constitution, which enshrines the now crystalized principle that ends of justice to parties before a court of law demands that justice be rendered substantively as opposed to terminating suits on account of technicalities. It was also the appellant's submission that order 8 rule 3 of the **Civil Procedure Rules 2010, (CPR)** vests a right in a litigant to seek an amendment of his pleadings on the one hand and jurisdiction in the court to determine such an application on the other hand. There was therefore no basis for the trial court to decline to pronounce itself on his application for leave to re-amend.

Relying on the case of **Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Ltd [2013] eKLR** the appellant submitted that he had fulfilled all the requirements for the grant of leave to re-amend and on that account faulted the trial court for *inter alia* disregarding his application for leave to re-amend and for not making any pronouncement thereon; finding that the appellant was guilty of inordinate delay in prosecuting his suit not withstanding that he had concisely explained the reason for the delay; relying wholly on the arguments advanced by the respondents and disregarding those advanced in support of the appellant's application hence arriving at an erroneous conclusion on the matter; the failure to appreciate that after directions were given that the appellant does set down the suit for hearing within 30 days of 8th November, 2012, parties entered into negotiations for an out of court settlement which took some time. The appellant could not therefore have set down the suit for hearing when negotiations to settle the matter amicably were still ongoing; the failure to appreciate, that there were ongoing criminal proceedings in Criminal Case No. 775 of 2010 in Kiambu Chief Magistrates' Court: **Republic v Shammi Kanjirappambil Thomas** in which the 1st respondent was the accused person and whose proceedings the appellant intended to tender in evidence as exhibit; and lastly the failure to appreciate that the appellant could not have set down the suit for hearing before parties complied with the pretrial procedures provided for in **Order II** of the **CPR**. Both parties were therefore at fault. It was therefore erroneous for the trial court to penalize the appellant alone.

The appellant relied on the case of **Ivita v Kyumbu [1984] KLR 447 & Rajesh Rughani v Fifty Investments Ltd [2016] eKLR** on the principles that guide a court of law in the determination of an application for leave to amend a pleading and faulted the trial court for the failure to determine his application for leave to re-amend on merit which according to him had satisfied all the prerequisites in the cited case.

The appellant also relied on the case of **Rajesh Rughani vs Rajesh Fifty Investments Ltd. and another** (supra) and faulted the trial court for the failure to properly appreciate and apply the tests that guide a court of law when determining factors of what does or does not constitute inordinate delay as set out therein and also for the failure to appreciate that dismissing the appellant's suit amounted not only to a harsh and excessive decision, but was also draconian in nature, especially when the trial court was aware that the appellant had no other recourse in law to redress the wrongs committed against him by the respondents.

Opposing the appeal the 1st and 2nd respondents submitted that the trial court cannot be faulted on the conclusions reached in the impugned orders because this was a matter where there was clear disobedience to a court order issued on 8th November, 2012 directing the appellant to set down the suit for hearing within a period of thirty (30) days; that the appellant showed no remorse for the said disobedience as he simply sought to explain it away; and divert the court's attention from his default by filing an application for re-amendment, especially when nothing prevented him from fixing the suit for hearing as directed and then thereafter seek leave to re-amend.

To buttress the above submissions the respondents relied on the case of **Choitram v Nazari [1984] KLR 327** and the case of **Mbogo & Another v Shah [1968] EA 93** for the holding *inter alia* that an appellate court will not interfere with the decision arrived at by the exercise of discretion of the court below unless the appellate court was satisfied that the court below had misdirected itself in some matter and as a result arrived at a wrong decision; or that the decision is manifestly wrong and therefore resulted in an injustice.

Learned counsel for the 3rd respondent opposed the appeal by associating herself fully with the submissions of the 1st and 2nd respondents. She then relied on the case of **Argan Wekesa Okumu v Dima College Ltd & 2 others [2015] eKLR** for the principle that the plaintiff as the party in pursuit of a remedy should take all the necessary steps at his disposal to expedite the determination of his claim; and the case of **Zacharia Okoth Obado vs Edward Akong'o Oyugi and 2 others [2014] eKRL** for the holding *inter alia* that courts of law must never provide succor and cover to parties who exhibit scanty respect for rules and timeliness in the disposal of matters.

The appeal arises from the trial courts' exercise of judicial discretion first by consolidation and hearing together the appellant's application to re-amend which had been filed earlier in time on 9th May, 2013 and the 1st and 2nd respondents' application to dismiss the suit filed later in time on 8th October, 2013. Second in electing to pronounce itself first on the 1st and 2nd respondent's application and upon sustaining it, declined to pronounce itself on the merits of the appellant's application for leave to re-amend.

The trial court's impugned jurisdiction being discretionary, our mandate therefore when determining whether the trial court exercised its discretion judiciously is as was set out in the case of **United India Company Insurance Limited vs East Africa Underwriters Kenya Ltd [1985] KLR 898** which we fully adopt. These are that we can only interfere with the exercise of that discretion if we are satisfied that the

trial court misapprehended the facts, took account of considerations which it should not have taken into account, failed to take into account a consideration which it should have taken into account or that its decision albeit a discretionary one is plainly wrong.

We have re-evaluated the record in light of the above mandate. Only one issue falls for our determination namely: whether the trial court exercised its discretion judiciously when it firstly consolidated the two applications and heard them together. Second, when it elected to determine the 1st and 2nd respondents' application for dismissal of the suit first, and upon sustaining it and dismissing the appellant's suit declined to pronounce itself on the merits of the appellant's application for leave to re-amend the plaint.

With regard to the 1st limb of the issue for determination, it is not disputed that the suit sought to be dismissed by the 1st and 2nd respondents' application was the very suit on which the appellant had anchored his application to re-amend the plaint. In the reasoning of the trial court highlighted above, the court found the two applications interrelated hence the direction to have them consolidated and heard together. We find no error in the trial court's holding that the two applications were interrelated because the plaint the appellant sought to re-amend was the very plaint that the 1st and 2nd respondents sought to have dismissed. It was therefore only prudent in the circumstances that the two opposing applications be consolidated and heard together.

As for the 2nd limb of the issue, it is not disputed that the trial court upon dismissing the appellant's suit never pronounced itself on the merits of the appellant's application for leave to re-amend. The trial court's reasoning as already highlighted above was that upon dismissal of the suit, there was nothing left for consideration for purposes of re-amendment as the plaint on which the application to re-amend was anchored was no more. It is this conclusion that forms the core of the appellant's complaint on appeal and which we now proceed to determine.

The appellant does not dispute non-compliance with the court's conditional orders of 8th November, 2012. He however justified his default before the trial court and now before this court on appeal on the basis of the grounds advanced as already highlighted above and which grounds were rejected by the trial court, reasoning that the appellant ought to have applied for extension of time within which to comply before seeking leave of court to re-amend.

We agree with the trial court's reasoning that although the explanations given by the appellant as reason for non-compliance with the orders of 8th November, 2012 were no doubt plausible and were also directed at the right forum, they ought to have formed basis for seeking extension of time within which to comply and upon such extension of time within which to comply being granted when the appellant could have sought leave to re-amend. As already alluded to above the appellant does not dispute non-compliance with conditional orders issued on 8th November, 2012. His complaint on appeal is that his non-compliance with those orders notwithstanding, he was entitled to a merit pronouncement on his application for leave to re-amend the plaint and that the court's failure to so pronounce itself on the said application for leave to re-amend amounted to a violation to his right to a fair hearing, especially when there was no demonstration of any prejudice likely to be suffered by the respondents if the court were to exercise its discretion first of all to sustain his suit and then allow him to re-amend the plaint and have it also heard on merit.

We have considered the above complaint in light of the record. It is our view that since there were two opposing applications before the trial court, the trial court was entitled to determine which of the two applications would dispose of the issues in controversy as between the disputing parties timeously. We therefore reiterate the reasoning of the trial court that since the appellant's application for leave to re-amend was anchored on a plaint, once the plaint was dismissed, nothing was left for consideration for re-amendment. It therefore follows that the moment the appellant's plaint ceased to have any effect, any application anchored on it and which was pending determination as at the time the plaint ceased to have effect, also ceased to have any effect as it had no legs on which to stand to warrant a merit pronouncement on it. No rule or principle of law was cited before this Court on appeal to controvert both the position taken and the reasons the trial court gave in failing to pronounce itself on the appellant's application for leave to re-amend. We therefore find no error in the trial court's exercise of its discretion not to pronounce itself on the appellant's application for leave to re-amend as that would have been an exercise in futility as correctly put by the trial court. We therefore decline the appellant's invitation for us to pronounce ourselves on the merits of the appellant's application for leave to re-amend as it lapsed with the dismissal of the suit on which it was anchored. There was therefore nothing left for interrogation for merit disposal by the trial court nor by this Court on appeal.

The above assessment and reasoning disposes of the appeal. However, since the appellant also raised the issue of infringement on his right to a fair hearing, we find it prudent for the Court to pronounce itself thereon. It is trite that the rules of natural justice dictate that a party should not be condemned unheard. In **JMK v MWM and Another Civil Appeal no. 15 of 2015** the court stressed the importance of observing the right to be heard particularly if one stands to suffer adversely if not heard. Likewise in **Essanji & Another vs Solanki [1968] EA 218** the predecessor of the court stated *inter alia* that the administration of justice normally requires that the substance of all disputes should be investigated and decided on their merits; and second that errors and lapses of procedure should not necessarily debar a litigant from the pursuit of his rights through litigation. Lastly in **Richard Ncharpi Leiygu vs IEBC and 2 others 2013 [eKLR]** the Supreme Court reiterated that the right to be heard is not only constitutionally entrenched but it is also the cornerstone of the rule of law.

Applying the above threshold to the appellant's complaint that his right to be heard on his application for leave to re-amend was compromised by reason of the trial court's failure to pronounce itself therein on the merits of the said application, we find nothing in the above case law to suggest that the right to be heard can be exercised outside the parameters set by the law and the procedural rules governing the exercise of such a right. In our view, the appellant was accorded the right to be heard by the orders issued on 8th November, 2012. He squandered that opportunity and he cannot turn around and claim that his right to be heard was violated.

We believe we have said enough to demonstrate that there is no merit in the appeal and it is accordingly dismissed with costs to the respondents.

Dated and delivered at Nairobi this 7th day of February, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR