IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 81 OF 2018

BETWEEN

TELEPOSTA PENSION SCHEME

REGISTERED TRUSTEES…..……...…….…… APPELLANT

AND

1. SAID HEMED……..……...……1ST RESPONDENT

2. ISLAM ALI INVESTMENTS LIMITED……...…...2ND RESPONDENT

3. THE NATIONAL LAND COMMISSION…..…….3RD RESPONDENT

4. DISTRICT LAND REGISTRAR MOMBASA…..…..4TH RESPONDENT

(*Being an appeal from the Ruling and orders of the Environment and Land Court at Mombasa (A. Omollo, J.) delivered on 21st February 2018*

in

ELC No. 229 OF 2013)

****

JUDGMENT OF THE COURT

The appellant, Teleposta Pension Scheme Registered Trustees has appealed to this Court seeking to have the trial judge's (A. Omollo, J.) decision dismissing its suit, that is *ELC No. 229 of 2013* in the Environment and Land Court set aside and for the suit to be reinstated.

The appellant had filed the suit against ***Said Hemed, the 1st respondent,*** and ***Islam Ali Investments Limited, the 2nd respondent,*** seeking orders to the effect that the property known as Title Number Mombasa/Block XXVI/665 *(the disputed property)* was vested in the appellant, and that the Certificate of Lease of the disputed property issued to the 1st and 2nd respondent on 10th May 1994 be declared fraudulent, illegal, null and void. Also sought was a permanent injunction restraining the 1st respondent his servants and agents from taking possession of, selling, disposing of, charging, alienating or dealing with the disputed property and an order directing the Commissioner of Lands to cancel the impugned Certificate of Lease.

The facts of the dispute are not of relevance at this juncture, what is in contention in this appeal is a ruling of the trial judge delivered on 21st February 2018 that dismissed the appellant's suit for the reason that the appellant had failed to produce any evidence in support of its case. The appellant stated that on the hearing day, the 21st February 2018, its counsel had sought an adjournment to allow it an opportunity to file a survey report which had yet to be finalized. But counsel for the 1st and 2nd respondents had objected to the adjournment, and had urged the court to dismiss the suit. The court declined to grant the adjournment and the appellant was directed to proceed to prosecute its case. As it did not have any witnesses, its counsel sought to rely on the documents and witness statements already filed in court. Without any witness to produce the documents, the court concluded that the appellant's case was not proved, and dismissed the suit under ***order 17 rule 2*** and ***4*** of the ***Civil Procedure rules***.

It is for this reason that the appellant has brought this appeal on the grounds that;

> *1) The learned judge erred in wrongfully exercising her discretion in dismissing the suit;*
>
> *2) The learned judge erred in ordering the hearing of the suit when the appellant's counsel had sought an adjournment and had communicated the request to the 1st and 2nd respondents' counsel;*
>
> *3) The learned judge failed to give effect to the overriding objectives under sections 1A and 1B of the Civil Procedure Act and Article 159 of the Constitution;*
>
> *4) The learned judge erred in ordering that the hearing proceed when the appellant and the 4th respondent were not ready for the reasons stated; and*
>
> *5) That the learned judge reached a decision that was prejudicial to the appellant.*

Both the appellant and the 1st and 2nd respondents filed written submissions. ***Ms. Nyabenga,*** learned counsel for the appellant holding brief for Messrs. Kale, Maina and Bundotich Advocates submitted that the appeal seeks to set aside the trial court's order dismissing the suit; that adjournment sought was necessary to allow the surveyor an opportunity to finalise and file the survey report which was vital to the appellant's case; that the appellant has always been ready to prosecute its suit, and by denying of the adjournment had prejudiced the appellant. It was finally submitted that it was an error not to produce the appellant's witness but the appellant's case was centered around the survey report. In support of the appeal, counsel cited the cases ***of D T Dobie & Company (Kenya) Limited vs Joseph Mbaria Muchina & Another [1980] eKLR***, ***Abdulreham vs Almaery [1978] eKLR*** and ***Peter Kariuki vs Attorney General [2014] eKLR.***

Mr. Taib, learned counsel for the 1st and 2nd respondents submitted that the suit had been pending before the court for 10 years; that the appellant's counsel who had conduct of the suit did not attend court on the material day, and neither did any of the appellant's witnesses. It was further submitted that the learned judge explained the reason for not granting the adjournment, and thereafter, gave the appellant a chance to call any of its witnesses, and not necessarily the surveyor; that when the appellant failed to produce any of its other witnesses, or explain their failure to attend, the learned judge was compelled to dismiss the suit under ***order 17*** of the ***Civil Procedure Rules***.

It was further submitted that, this Court should hesitate to invoke ***Articles 50*** and ***159*** of the ***Constitution*** in order to reinstate the suit, as to do so would be to encourage the law to be flouted; that this would ensure that the integrity of the court process was protected from abuse and injustice. In support of this proposition counsel cited the cases of ***Japheth Pasi Kilonga & 8 others vs Mombasa Autocare Limited [2015] eKLR*** and ***Jack & Jill Supermarket Limited vs Republic & 4 others [2017] eKLR.***

On her part ***Mrs. Waswa,*** learned counsel for the 4th respondent informed the Court that she had not filed written submissions, but nevertheless would adopt the submissions of the 1st and 2nd respondents; that the Attorney Generally had severally requested for the appellant's title documents and pleadings, but had yet to receive them; that they had demonstrated that they were not interested in pursuing the suit; that the court was right to decline to grant the adjournment particularly since the reason that the surveyor's report was not ready was fallacious, and a non-issue.

We have considered the appeal and the submissions of the parties and find that what this Court is required to determine is whether the learned judge properly exercised her discretion in declining to grant the adjournment sought, and thereafter dismissed the appellant's suit for their failure to prosecute its case.

The law is settled on the principles that this Court should take into account before interfering with the exercise of discretion of a trial court. In the case of ***Mbogo & Another vs Shah [1968] EA, p.15,*** it was emphasised that;

> ***"An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice."***

In the case of ***Japheth Pasi Kilonga & 8 others vs Mombasa Autocare Limited [2015] eKLR*** this Court citing the case of ***Savannah Development Company Ltd vs Merchantile Company Limited CA No. 120 of 1992*** which relied on the decision of the Judicial Committee of the Privy Council in ***H.K. Shah & Another vs Osman Allu (1946) 14 EACA*** 45 and laid down rules for the exercise of judicial discretion thus;

> ***"The Court of Appeal will be very slow to interfere with the discretion of the trial judge on matters of adjournment of a trial but it will not hesitate if the result of the adjournment is to defeat the rights of the parties or injustice to one or other of the parties. In the instant case, the appellant has been denied the right to prosecute its suit and the learned trial Ag. Judge failed to consider the possibility of injustice or miscarriage of justice which might result to the appellant ….***
>
> ***The reasons being given by the Ag. Judge (Supra) were limited to the conduct of the advocate (Mr. Sheth) and although quite deplorable, he did not consider all the other necessary matters. The principles to be applied for granting or refusal of the applications for adjournment were aptly summarized in the decision of the Judicial Committee of the Privy Counsel in*** *H.K. Shah and Another v. Osman Allu* ***(1946) 14 EACA p 45 at p. 49.***
>
> ***'The granting or refusal of an application for adjournment is, of course, a matter of discretion, but the discretion must***

> ***be exercised judicially. The authorities go to show that the elements to be taken into consideration are (1) the adequacy of reasons given for the application for adjournment; (2) how far, if at all, the other party is likely to be prejudiced by an adjournment; and (3) how far such other party can be suitably compensated by mulcting the applicant in costs'."*** *(per* ***Muli, JA****)*

Applying the above principles to the instant case, did the appellant provide a valid reason for the adjournment sought so as to establish a basis upon which the learned judge could exercise her discretion? The appellant's case is that it sought an adjournment because it was unable to obtain a surveyor's report in time for the hearing fixed for 21st February 2018. At this juncture an outline of the chronology of the events leading up to the dismissal of the suit is essential.

The appellant's suit was listed for hearing before the trial judge (A. Omollo, J.) on 19th July 2017. On that day, Ms. Matiko, learned counsel appearing for the appellant sought an adjournment from the court, to file a further list of documents. Despite opposition to the application by the 1st and 2nd respondents' counsel, the court granted the adjournment in the following terms;

> ***"I reach the conclusion that the Plaintiffs have not previously sought adjournment and therefore contributed to the delay in prosecuting this matter. For this reason, I allow them the adjournment as prayed".***

In addition, the court fixed the next hearing date for 21st February 2018, and ordered the appellant to file and serve their further list of documents within 21 days.

When the suit came up for hearing on 21st February 2018, Mr. Njeru learned counsel for the appellant informed the court that the appellant was unable to proceed because, a survey report it had commissioned was not ready as the surveyor had only managed to access the suit property two weeks prior. The court was informed that the survey report was crucial to the appellant's case, hence necessitating the adjournment sought together with a further 60 days to enable them file the report.

Mr. Taib, learned counsel for the 1st and 2nd respondents strenuously opposed the application, arguing that the court had previously allowed an adjournment at the appellant's request, and that no valid reason had been advanced for the adjournment; that the pretrial stage was concluded, and the trial could not proceed with *'parties throwing documents along the way'*. Counsel nevertheless conceded to be paid costs in the event the court granted the adjournment.

In an *ex tempore* ruling, the trial judge declined to grant the adjournment and stated;

> ***"Taking into account the reasons given for the adjournment, this court is perplexed on what basis the Plaintiff filed its suit in 2013 if the survey report is now so crucial to its case. More interesting is why on 8th May 2017 they confirmed to the court that they were ready to take a hearing date. Secondly, the court has not been told why the witness listed in the original list of witnesses is not present before court so that the hearing can commence and probably the court considers granting them more time to bring in the surveyor. The fact that they accede to pay costs is not sufficient reason to grant an adjournment. I therefore find no valid reason has been given why the matter should not proceed today."***

The learned judge's conclusion that no valid reason was advanced for the adjournment was clearly a misdirection. This is because the appellant's explanation was that the surveyor commissioned to prepare the reports had only two weeks earlier managed to access the suit property so as to prepare the report, which had yet to be filed. The explanation was against the backdrop of the court's earlier order granting the appellant leave to file additional documents, and the learned judge's acknowledgement that the appellant had not habitually sought adjournments in the past. The adjournment sought on 21st February 2017, was the second of its kind, and was specifically sought, in support of the appellant's case. This in our view was adequate reason to allow the adjournment. On this basis the learned judge ought to have taken into account the circumstances and granted the adjournment.

The matter, however, did not end there. After declining to grant the initial adjournment, the judge directed the appellant to proceed to prosecute its case, but since the report was not ready, the concerned witness was not available to testify. The court was informed that the earliest the witness from Nairobi could attend court was 4.00 p.m that afternoon. At pains to proceed with the suit, counsel urged the court to invoke the provisions of ***sections 1B, 3***, and ***3A*** of the ***Civil Procedure Act*** and allow them to rely on the amended Plaint, list of documents, documents produced and list of witnesses, and leave to file the survey report when it was ready.

At this point Mr. Taib interjected to inform the court that;

> ***"They cannot rely on the documents in the absence of their witnesses. The court was alive to the absence of the Plaintiff's witnesses and therefore no new directions ought to be issued."***

It is noteworthy that the court provided no directions on the appellant's submission to try to avail a witness by 4.00 p.m. Instead the learned judgewent ahead to dismiss the appellant's suit in the impugned ruling. The court further opined that;

> ***"…the Plaintiff is attempting to obtain an adjournment through the back door. He has failed to prosecute his case within the time allocated and thus unable to prove the facts contained in the pleadings. The result is that the suit is dismissed…"***

The above enumerated sequence of events culminating in the dismissal of the appellant's suit, is demonstrative of an appellant having been injudiciously denied an adjournment, and thereafter cornered into prosecuting its case in the absence of crucial witnesses, the effect of which was to deny it the opportunity to be heard on merit, which in our view, was a gross miscarriage of justice.

In the case of ***Mbaki & Others vs Macharia & Another (2005) 2 EA 206***, at page 210, it was stated that;

> ***"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."***

And in the case of ***General Medical Council vs Spackman [1943] 2 All ER 337***, Lord Wright at page 345 stated:-

"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared no decision. Similar sentiments were expressed by Lord Reid in the case of RIDGE v BALDWIN [1963] 2 ALL ER 66".

Without having had an opportunity to be heard, the appellants' case was severely prejudiced.

As for, whether any prejudice would have been occasioned to the 1st and 2nd respondents if the suit was adjourned a second time, besides having to fix another hearing date, we can find nothing that would have subjected the respondents to irreparable inconvenience. To the contrary, it is quite possible that between the time the suit was dismissed and the filing, hearing and determination of this appeal to set aside the dismissal, the suit might already have been heard and concluded. Clearly an improper, and injudicious exercise of judicial discretion had only succeeded in prolonging the hearing and determination of the appellant's suit in the lower court.

Finally, the 1st and 2nd respondent's counsel had acceded to costs. Our view is that a more efficacious approach to the circumstances of this case may have been to grant the adjournment and award costs to the respondents.

All told, in exercising her discretion in the manner that she did, the learned judge did not take into account matters she ought to have taken into account, and as a result arrived at a decision that was clearly wrong. The interest of justice warrants this Court's intervention with that decision.

In sum, the appeal is merited, the ruling and order of the Environment and Land Court dated 21st February 2018 dismissing the appellant's suit is hereby set aside and the appellant's suit be and is hereby reinstated. The suit to be mentioned within 14 days from the date of delivery of this judgment for a hearing date to be fixed. We further order that it be heard by another Judge of the Environment and Land Court other than A. Omollo, J. The 1st and 2nd respondents shall bear the cost of the appeal.

It is so ordered.

Dated and delivered at Nairobi this 24th day of April, 2020.

D.K MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

.....

JUDGE OF APPEAL

A.K MURGOR

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

Signed

DEPUTY REGISTRAR