IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO(P), KARANJA & SICHALE, JJ.A)

CIVIL APPEAL NO. 408 OF 2018

BETWEEN

DAVID KEMEI.....APPELLANT

AND

ENERGY REGULATION COMMISSION.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL .....3RD RESPONDENT

(Being an Appeal from the Order of the High Court of Kenya at Nairobi (Githua, J.) dated 11th *April, 2018* ***in HCCC No. 461 of 2011)***

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JUDGMENT OF THE COURT

1. Before delving into the substantive appeal, it would be prudent to examine the history of the matter as it unfolded before the superior court. Vide a plaint dated 12th October, 2011 David Kemei, (the appellant), sought general and special damages against the respondents for false imprisonment and exemplary damages arising from his arrest and prosecution following allegations of colluding to defraud a company of a certain sum of money. Having been served with the plaint and summons to enter appearance, the respondents filed their statements of defence in which liability was denied.

2. After close of the pleadings, an invitation to fix a mention date for purposes of taking directions was sent to the respondents by the appellant. The matter was fixed for mention for directions on 29th February, 2012 and the suit was, by consent of the parties, fixed for hearing on 23rd July, 2012. The matter did not however proceed on the said date for reasons recorded, which reasons were not occasioned by the appellant.

3. Subsequently, on 29th November, 2012 when the matter once again came up for directions, it was fixed for hearing on 20th March, 2013 by the appellant *ex-parte* due to non-attendance by the respondent despite being duly served with the mention notice.

4. The 2nd and 3rd respondents later filed an application seeking to amend their statement of defence, which was allowed vide an order dated 11th July, 2013 pursuant to which they filed their amended statement of defence on 18th July, 2013 and served the same upon the appellant on 11th February, 2014.

5. The High Court record shows that the substantive matter came up for hearing on 9th June, 2016 and none of the parties were present. The court therefore, *suo moto* dismissed the suit for want of prosecution.

6. By a motion on Notice dated 8th September, 2016 brought under **Sections 1A**, **1B** and **3A** of the Civil Procedure Act and **Order 51** of the Civil Procedure Rules, the appellant sought an order to set aside the order of dismissal and at the same time sought reinstatement of the suit for hearing.

7. The application was premised on the grounds that: -

> **"i. The Plaintiff's/Applicant's case was dismissed for want of prosecution.**

ii. No Notice to Show Cause why the suit should not be dismissed was served on the Applicant's Advocates to enable them file a suitable deposition to explain the delay.

iii. It is in the interest of justice and fairness that the orders sought herein are granted.

iv. No prejudice will be suffered by the Defendants/ Respondents if the orders sought herein are granted.

v. This application is brought in good faith and without undue delay."

8. The application was supported by an affidavit sworn by Christine Olando, the appellant's advocate, in which she deposes *inter alia* that the dismissal of the suit without notice was prejudicial to the appellant as he was denied an opportunity to demonstrate why the suit ought not to have been dismissed; that it was in the interest of justice and fairness that the application be allowed and the suit be re-instated for hearing and determination; that the plaintiff had at all times been desirous of prosecuting the suit and that the application was in good faith and without undue delay.

9. It was the appellant's case that he was not aware of the proceedings leading to the dismissal of the suit for want of prosecution as no notice was served on his advocates. Counsel submitted that the delay in prosecuting the suit was mainly due to the unavailability of dates as informed by the High Court registry and that even when the matter was listed for hearing previously, the adjournment was not at the behest of the appellant.

10. Opposing the motion, the 1st respondent filed grounds of opposition averring that: there was neither a plausible explanation for the delay to prosecute the suit nor concrete evidence to support the same; that the court acted within the law in dismissing the application without a Notice to Show Cause and ultimately that the appellant had failed to satisfy the court that the application met the required threshold prescribed by law and it was therefore for dismissal.

11. Upon considering the history of the suit as analysed above and previous conduct of the plaintiff, the learned Judge, **Riechi, J.**, in his ruling dated 18th September, 2017 expressed himself as follows: -

"In this application, there is no evidence on record that the Applicant was served with the notice to show cause. I am not prepared to find that publication in the website and cause list alone was sufficient notice particularly where the Applicant contends that no such notice was served to them. This application for setting aside was brought without undue delay, and I am satisfied that the Applicant has demonstrated that he is desirous to prosecute the suit. I, therefore, allow the application, set aside the order for dismissal dated 9th June, 2016. I direct the suit be reinstated and same be prosecuted by the Applicant within six (6) Months. If the same is no*t* prosecuted within 6 months of today's date the suit will stand dismissed."

12. The matter came for hearing subsequently on 11th April, 2018 before **Githua, J**, who in the process of hearing the parties, and following a cursory look at the dates concluded that the conditional period of six months given by Riechi J had lapsed. Counsel then appearing for the parties, equally without any computation appear to have conceded that the six months had elapsed. The learned Judge therefore ordered that the suit stood dismissed pursuant to the order of Riechi J and awarded costs to the respondents.

13. Those are the orders that prompted the instant appeal, which is premised on grounds *inter alia* that the learned Judge erred in finding that the conditional six (6) months period for prosecuting the suit had lapsed hence occasioning a miscarriage of justice; issuing orders as to costs yet the initial ruling of 18th September, 2017 had no orders as to costs; disregarding the steps taken by the appellant to prosecute the suit and; making a decision and orders which were unjustifiably drastic, unfair and wholly unmerited.

14. During the plenary hearing of this appeal, learned counsel Miss Odero and Mr. Menge, appeared for the appellant and the 2nd and 3rd respondents respectively. There was however no appearance for the 1st respondent despite being duly served with a hearing notice. Parties filed written submissions which were briefly highlighted during the plenary hearing.

15. On the first ground, citing **Order 50 Rule 4** of the Civil Procedure Rules, Ms Odero submitted that the learned Judge ought to have been guided by the said provisions when computing the time stipulated in the ruling of 18th September, 2017. See **Keziah Stella Pyman & 2 Others v. Paul Mwololo Mutevu & 8 Others, Eldoret C. A. Civ. Appl. No. Nai. 42 of 2013,** where the said provisions were applied.

16. On the second ground, counsel submitted that by granting further orders regarding costs, the same was not in accordance with the ruling made on 18th September, 2017 where no orders in respect of costs had been made. Counsel thus submitted that in doing so, the learned Judge purported to review the decision of the trial Judge. She argued that this was tantamount to the learned Judge *suo moto* commencing an application for review and determining it. She relied on among others the High Court decision in **Okiya Omtata Okoiti & Another v. Attorney General & 13 Others Nairobi H.C. Pet. No. 129 of 2015.** She urged that the learned Judge ought to have been guided by the principles in the case of **Re Ebuneiri Waisswa Kafuko (2001) E.A 383** where the Court held that a Judge can only exercise discretion which is bestowed upon him by law and must act within such ambits.

17. On the third ground, counsel submitted that the learned Judge erred in fact and law in finding that the appellant had failed to prosecute the suit within the six months as ordered in the ruling of 18th September, 2017. She argued that the appellant through counsel had demonstrated desire to prosecute the case by having the matter fixed for hearing at the registry on the 7th of February, 2018. That however, the availability of dates and fixing of dates is a preserve of the registry, in which case the registry in the circumstances of this case allocated the suit a hearing date of 11th April, 2018. She maintained that after a hearing date was fixed a hearing notice dated 12th February, 2018 was promptly served upon the respondents.

18. Counsel further, argued that the learned Judge failed to appreciate the challenges faced by the appellant's counsel in fixing the matter for hearing following the priority accorded to the election petitions that were being filed in court at the time. She maintained that delay to prosecute a suit is a matter of fact to be determined on the circumstances of each case and that where a reason for delay is offered, the court ought to be lenient and allow a party the opportunity to have his/her matter heard on merit. Further, that the court ought to determine whether the other party is prejudiced by the delay.

19. Citing **Article 50** of the Constitution, counsel urged that the right to a fair trial requires that no person should be denied an opportunity to have their case heard and determined by a court of law and that before striking out a matter, courts should strike a balance between upholding the right to a fair trial and the need to enforce statutory provisions on timelines. She maintained that the learned Judge failed to properly exercise her discretion to enlarge time for prosecution of the matter and hear and determine his case.

20. Opposing the appeal, Mr. Menge submitted on the first ground arguing that the basis for the dismissal of suits for want of prosecution is with a view of ensuring the administration of justice in a just, fair and expeditious manner as enshrined under **Article 159(2)(b)** of the Constitution and **Sections 1A** and **1B** of the Civil Procedure Act. He maintained that the six months period ordered by the trial court within which to prosecute the matter expired on 18th March, 2018 and the Appellant's advocate admitted that the period given lapsed and did not give any justifiable reason or satisfactory explanation for the delay. To buttress this argument, he relied on the case of **Chalo Thali Ngala v. Republic & 4 Others (2018) eKLR.**

21. Relying on the case of **John Mwangi Muhia & 2 Others v. Director of Public Prosecution & 5 Others (2019) eKLR,** counsel maintained that the decision to reverse or set aside an order of the court is discretionary and such discretion must be exercised fairly and judicially. Further, that for the same to be attained, the court must be satisfied that reasons given are plausible and not mere allegations. Counsel submitted that equity aids the vigilant but not the indolent and that the law encourages speedy resolution of disputes. Counsel went on to submit that the appellants had slept on their rights and acquiesced to the delay.

22. On the second ground, counsel submitted that the issue of costs is at the discretion of the court as provided for under section 27 of the Civil Procedure Rules 2010 and that it is a well-recognised principle that costs follow the event and is not used to punish a losing party for the trouble taken in prosecuting or defending the suit.

23. On the third issue as to whether the learned Judge erred in law in disregarding the steps taken by the appellant to prosecute the suit within the 6 months period previously capped by the court, counsel submitted that it was evident from the court record that on the 11th of April, 2018 when the matter came up for hearing before the presiding Judge, Hon. Githua, counsel for the appellant was in court and indicated that she was ready to proceed and that she on her own volition admitted that the six months period granted on the 18th of September, 2017 to have the suit prosecuted lapsed on 18th of March, 2018 and it was on that ground that the court concluded that the suit stood dismissed. Counsel submitted that the learned Judge did not disregard any steps taken by the appellant to prosecute the matter and that the suit was dismissed on the admission by the appellant's advocate that the period to prosecute their case had lapsed.

Counsel entreated us to consider the totality of the submissions raised in opposition of the appeal and dismiss the same with costs.

24. Having considered the record, the submissions by the parties, the authorities cited, we identify the germane issue for determination as **whether the learned Judge properly exercised her discretion in ultimately dismissing the suit for not being heard within the 6 months as directed by Riechi J.**

25. This being a first appeal, our duty is to re-evaluate and re-analyse the evidence and arguments presented before the Court and to make our own conclusions as rehashed in the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** where this Court held:-

> **"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kustron (Kenya) Limited 2000 2EA 212.**

26. The facts as rehashed above are not disputed and we need not delve into them further. What we are called upon to do at this point is to firstly determine whether Githua, J was correct when she determined that the six months period extended by Riechi J had expired without any computation. We must mention here that it mattered not that both counsel for the parties, who were present in court, appeared to agree with the learned Judge. That did not take away the appellant's right to challenge that finding later particularly if the law had not been applied as it should have been.

27. It is evident from the record that the ruling of Riechi, J. was issued on the 18th September, 2017. Six months counted from the normal calender would take the deadline to 17th March, 2018. However, when it comes to computation of time under Order 50 Rule 4 of the Civil Procedure Act and Rules, the 6 months would exclude Sundays, public holidays, and more importantly, the Court recess in December. Had these days been taken into account, there is a possibility that the appellant would still have been within the timelines granted by Riechi J.

28. Secondly, the record shows that the appellant addressed a letter to the Deputy Registrar of the High Court dated 2nd February, 2018 seeking to be allocated a hearing date for the suit. In the letter, the appellant invited the respondents for fixing a mutually convenient hearing date on the 7th February, 2018. It is also evident from the record that a hearing date for the matter was fixed for the **11th April 2018** and a hearing notice dated the 12th February, 2018 was taken out and subsequently served on the respondents on the same day as is evident from the face of the hearing notice itself. All this was done within the timelines given by Riechi J. We take judicial notice of the fact that hearing dates are given by the registry in accordance with the court diary and parties are not in control of availability of hearing dates.

29. From the foregoing, it is evident that before the expiration of the six months period imposed by Riechi, J. in his ruling on the 18th of September, 2017, the appellant took sufficient steps to set down the suit for hearing. This is evident from the letter addressed to the court seeking a hearing date, service of the hearing notice and subsequent appearance in Court on the date set for hearing on the 11th of April, 2018 where the record shows that counsel was ready to proceed.

30. There was also the explanation by the appellant that earlier hearing dates were not available as the courts were giving priority to hearing of election petitions. The appellant cannot be faulted for the predicament he found himself in. Had the learned Judge considered all these factors, she would definitely have arrived at a different conclusion. We do appreciate that the appellant does not seem to have moved with dispatch to set down the matter for hearing bearing in mind the time limitation, but he was still well within time when he wrote to the Deputy Registrar on 2nd February,2018 asking to be allocated a hearing date. The appellant cannot justifiably be accused of inexcusable indolence. Clearly none of these issues were considered by the learned Judge before the suit was dismissed.

31. As stated earlier, the learned Judge invoked her discretionary power to dismiss the suit. It is settled law that this Court can interfere with a superior court Judge's exercise of discretion in certain limited circumstances. In interfering with the exercise of discretion this Court is guided by the parameters set out in the *locus classicus* case of **Mbogo -V-Shah (1968) EA 93** where the predecessor of this Court held:-

> **"…a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice…** "

32. In the more recent case of **Eurobank Limited -Versus-Shah Munge & Partners (2016) eKLR**, this Court reiterated the above holding and held as follows:-

> **"In this case it cannot be gainsaid that in determining whether or not to dismiss a suit for want of prosecution, the trial court is exercising a judicial discretion, to be exercised judicially rather than irrationally or capriciously. (See E.T. Monks & Co. Ltd v. Evans [1985] KLR 584 and Eliud Munyua Mutungi v. Francis Murerwa (CA No. 144 of 2008 (Nyeri)). Essentially, therefore, this is an appeal against exercise of discretion by the learned judge. The guiding principle in that respect is that an appellate court will not interfere with exercise of discretion by the trial court unless it is demonstrated that the trial court misdirected itself, or considered matters it should not have considered, or failed to take into account matters which it should have taken into account, and in so doing arrived at the wrong decision** (emphasis added).

33. Applying the above well tested parameters to the circumstances pertaining to this appeal, we have no difficulty in finding that the learned Judge failed to consider some relevant matters, that is, the correct computation of time and the effort the appellant had made to have the matter listed and heard within the given timelines. We draw guidance from our decision in the case of **D. Chantulal K. Vora & Co. Limited -Versus- Kenya Revenue Authority (2017) eKLR** where the Court held 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."** (Emphasis ours)

34. From our analysis of the matter, it is clear that the appellant was interested in pursuing his suit. The learned Judge dismissed the suit *suo motu* before considering all the circumstances surrounding the matter. In doing so, she denied the appellant the right to be heard and dislodged him from the seat of justice, thus causing him grave injustice. We also observe that hearing the matter and determining it on merit would not occasion any prejudice to the respondents.

35. From the foregoing, we are satisfied that this appeal has merit. We allow it with orders that the order of Githua J dated 11th April, 2018 is hereby set aside. The appellant's suit, being **HCCC No. 461 of 2011** is hereby reinstated. We also order that each party bears its own costs here and at the High Court. The order on costs is informed by the fact that the order appealed from was made *suo motu* and neither party is to blame for this matter ending up in this Court.

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

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR