IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, KIAGE & SICHALE, JJ.A)

KISUMU CIVIL APPEAL NO. 63 OF 2016

BETWEEN

DAQARE TRANSPORTERS LIMITED ....APPELLANT

AND

CHEVRON KENYA LIMITED .... RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Kisumu

(E. N. Maina, J.) dated 11th February, 2016

In

HCCC No. 143 of 2006)

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JUDGMENT OF THE COURT

By a plaint filed at the High Court at Kisumu on 14th December 2006 the appellant herein filed what could be termed as a pre-emptive suit seeking to restrain the respondent from terminating a 13-year Road Transport Carriage Agreement executed between the two parties on 20th September 2004. It also sought an order of specific performance of the remaining part of the contract or, in the alternative, damages for breach of contract, for fraudulent misrepresentation and costs plus interest.

Alongside to the Plaint, the appellant filed a Chamber Summons application dated 14th December 2006 and sought a temporary injunctive order restraining the respondent from terminating the agreement until the dispute between them was referred to arbitration for final determination. The said prayers were granted and, by consent of the parties' advocates dated December 6th 2007, two Advocates were appointed to arbitrate the dispute. The arbitration was to be heard and determined within ninety (90) days of the appointment of an umpire by the arbitrators.

On 24th October 2008, by further consent, the arbitration proceedings were extended by a period of six (6) months from 21st August 2008, to be determined before 21st February 2009. On 20th August 2009, the arbitral proceedings were again extended by consent for a further nine (9) months from 21st February 2009 to be determined on or before 21st December 2009.

The respondent then filed a Notice of Motion application dated 1st March 2013 seeking to terminate the mandate of the arbitral tribunal; to set aside the reference of the dispute to the arbitration; and to have the appellant's suit against it dismissed for want of prosecution. By a ruling delivered on 19th March 2015, in the presence of the Plaintiff's advocate, Maina, J. ordered the appellant to take steps to move either the arbitrators or the court within sixty (60) days of the ruling with a view to having the dispute or suit heard.

Consequently, the appellant's advocate fixed the suit for hearing on 16th September 2015. However, on the material day, there was no attendance nor representation from either party and the learned Judge proceeded to dismiss the suit for non-attendance.

A full month later, on 16th October 2015, the appellant brought a motion under **Articles 48**, **159** & **165** of the **Constitution**, **Section 1A**, **B**, **3A & 63E** of the **Civil Procedure Act** and **Order 12 Rule 7** of the **Civil Procedure Rules** seeking to set aside the order of dismissal and have the suit reinstated. The appellant blamed its previous advocate for failure to prosecute the suit and for non-attendance on the day of the hearing. It was claimed that the said advocate did not notify the appellant of the fateful hearing date. The appellant pleaded that the mistakes

of Counsel ought not to be visited upon it.

In opposition, the respondent filed a replying affidavit sworn on 30th October 2015 by Boniface Abala, its Legal Manager. He deposed that the appellant was squarely to blame for what befell the suit. Not only was the appellant to blame for stalling the arbitral proceedings, it was also not diligent in following up with its advocate for the status of the suit. He swore that the respondent would be prejudiced if the suit were reinstated. It had already put in a lot of money and resources and he feared that their key witnesses memory continues to be eroded and it had also become increasingly difficult to trace them.

By a considered ruling rendered on 11th February 2016, the learned Judge dismissed the application, reasoning that **Section 1A (3)** of the **Civil Procedure Act** places a duty on a party and his advocate to assist the Court to achieve the overriding objective. The appellant had a duty to ensure that the order given by the court on 19th March 2015 was adhered to, hence the blame could not be placed solely on its advocate. The learned judge also took into consideration the indolence of the appellant in pursuing the arbitration of the matter it had initially sought.

Aggrieved by the ruling, the appellant filed the instant appeal containing 8 grounds, which, condensed, are that the learned judge erred in law and in fact by;

> a) Violating the well-known practice that the mistake of Counsel ought not to be visited upon an innocent litigant and condemned the appellant unheard.
>
> b) Holding that the appellant failed to diligently take the necessary steps towards having the suit heard.
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> c) Dismissing the appellant's suit without taking cognisance of the monetary value of the subject dispute.

During the hearing of the appeal, learned Counsel **Mr Oguttu** appeared for the appellant while his learned counterpart **Mr Imende** appeared for the respondent.

Mr Oguttu argued that visiting the mistakes of counsel upon a client should be the last resort. He faulted to the learned judge, for taking into account the appellant's past conduct thereby disregarding the provision of **Article 159** of the Constitution; failing to appreciate that in the 60 days given, the appellant through its advocate took some action by fixing a hearing date, which was however never communicated to the appellant; and failing to look at the substance of the suit and allowing it to be heard on merit.

Mr Imende in opposition submitted that the appellant's previous conduct was relevant for consideration, as it had refused to extend the mandate for arbitration. The appellant was given a second chance by the judge for sixty (60) days and did not bother to follow up with its advocate. Nor did it give an explanation for the inaction for it is not enough to shift blame to counsel. Contending that justice as provided for in **Article 159** is not one sided, he urged the Court to dismiss the appeal with costs.

Having carefully considered the submissions made before us, we decipher that the central issue for our consideration is whether the learned judge exercised her discretion judiciously in declining to reinstate the appellant's suit.

It is trite that when a court is called upon to exercise its discretion, it ought to do so judiciously. That is because discretional power is derived from the law and must be exercised upon certain legal principles and according to the circumstances of each case, to the end of doing substantial justice to the parties. See **PATRIOTIC GUARDS LTD V JAMES KIPCHIRCHIR SAMBU [2018] eKLR**.

The appellant is inviting this Court to interfere with the discretion of the learned judge. We are cognisant of the fact that this Court can only interfere with the judicial discretion of the learned judge if satisfied that she misapprehended the facts; or misdirected himself on law; or that she took into account matters of which he should not have; or failed to take into account considerations which he should have; or that her decision was plainly wrong. See **SHAH VS MBOGO & ANOTHER [1967] EA 1116**.

The discretion under **Order 12 Rule 7** is exercised so as to avoid injustice as a result of inadvertent or excusable mistakes and errors. Therefore, a court needs to satisfy itself as to whether the reason given by the appellant was excusable. The appellant contends that after the collapse of the arbitral proceedings, the suit stood reinstated for hearing and disposal. However, its Counsel failed to notify it of the hearing that was listed on 16th September 2015 and as a result, it was not aware of the hearing date. Its former advocates' failure to attend court on the material day is what caused the suit to be dismissed. It urges that the mistake of its previous counsel ought not to have been visited upon it.

The record shows that on 15th May 2015, the appellant's advocate was present in court when an order was given that the matter be listed for hearing on 16th September 2015. On the assigned day there was no attendance from either party in the suit and that is when the learned judge proceeded to dismiss the suit for non-attendance. The learned Judge rejected the notion that Counsel was solely to blame for the reluctance in the prosecution of the suit, holding correctly in our view, that pursuant to **Section 1A (3)** the appellant as well as his advocate, had a duty to assist the Court to further the overriding objective.

From the record, there is no evidence that the appellant took any steps to ensure that the suit was prosecuted. As the learned judge rightly put it, it took about six months from the time the order preserving the suit was given to the time the suit was set for hearing and during that time there was no evidence to show that the appellant took any steps to move it forward. There was no explanation for the indolence of the appellant and we concur with the holding of the learned judge that the former Counsel was not solely to blame. We echo the holding in **RAJESH RUGHANI V FIFTY INVESTMENTS LIMITED & ANOTHER [2016] eKLR** where the Court, in holding that there was not sufficient explanation given for the delay in prosecuting a suit, reasoned that;

> ***"It is insufficient to blame previous counsel on record without an explanation as to the action taken by the litigant to show he did not condone or collude in the delay."***

The adage rule that the mistake of counsel should not be visited upon an innocent litigant does not have a blanket application. Nor do we think that it has doctrinal status. The court must always look into the conduct of the party pointing the finger of blame in order to make a just decision. The appellant felt that the learned judge erred in looking into its past conduct, in reaching her decision. That cannot be right as the conduct of the appellant was key in the determination of whether or not it deserved to be granted the reinstatement. In exercising discretion, the Court must be satisfied that justice will be done to all parties to a suit.

From the record, it is clear that the suit was filed on 14th December 2006 and the jurisdiction of the arbitration tribunal was extended a number of times until 1st March 2013 when, out of frustration, the respondent filed an application which among other prayers sought for the setting aside of the reference of the matter for arbitration as the same had stalled due to the indolence of the appellant. Moreover, the record reflects that the appellant's then advocate was frustrated by the conduct of his client with regard to the arbitral proceedings. A letter dated 11th January 2011 to the appellant from its former advocate indicates that they had failed to pay the arbitral fees amounting to Kshs. 508,209 and because of this the arbitral proceedings had been stalled. In that letter the advocate made reference to two other letters which contained similar communication, and which the appellant had ignored. Another letter dated 23rd June 2011 from the appellant's former advocate to Mohamed & Muigai Advocates, who were and are still on record from the respondents, show a picture of a frustrated advocate as he indicated therein his intention to file an application to cease acting for the appellant for want of proper instructions in the matter.

All these paint a picture of an indolent appellant and we cannot fault the learned judge for considering such conduct. She also rightly considered the prejudice that the respondent would suffer if the suit was reinstated. It had already spent its time and resources in the arbitral proceedings which the appellant caused to fall apart. The respondent also had a legitimate fear that due to length of time already taken by the suit in the arbitral proceedings, its witnesses had become harder to trace and they may not have the detailed facts of the case still intact in memory. This was a legitimate consideration for, as was stated in **TANA AND ATHI RIVERS DEVELOPMENT AUTHORITY V JEREMIAH KIMIGHO MWAKIO & 3 OTHERS [2015] eKLR**

> ***"In determining whether to exercise the discretion in a party's favour, the court pays regard to the damage sought to be forestalled vis a vis the prejudice to be visited on the opposing party."***

Ultimately, we find no reason to fault the Judge. She addressed herself properly on the law and took into account all relevant factors in exercising her discretion. The appeal is devoid of merit and we therefore dismiss it with costs to the respondent.

Dated and delivered at Nairobi this 9th day of October, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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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