IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, P., MAKHANDIA & GATEMBU, JJA)

CIVIL APPEAL NO. 6 OF 2014

BETWEEN

NIC BANK LIMITED..APPELLANT

AND

JOHN KISUKHA MUKAKHULA

T/A BUNGOMA TEACHERS TRAINING COLLEGE.....RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Ogola, J.) dated 19th April, 2013

in

H.C.C.C. No. 803 of 2010)

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JUDGMENT OF THE COURT

The pertinent facts of this appeal are brief and are as follows. The **NIC Bank Limited** "*the appellant*" instituted a suit in the High Court at Nairobi seeking to recover Kshs.3,628,168.83 from **John Kisukha Mukakhula T/A Bungoma Teachers Training College**, "*the respondent*". The respondent entered appearance and duly filed defence to the claim. On 13th February 2011, the appellant filed its reply to the defence which marked the close of pleadings. Thereafter on 6th May 2011, the appellant filed a notice of motion dated 25th May 2011 seeking to have the respondent's defence struck out. The application was heard on its merits and on 12th March 2012, the High Court delivered its ruling with a finding that, contrary to the appellant's assertion that the respondent's defence failed to raise any triable issues, indeed the defence did raise triable issues and a full trial on merits was therefore apt.

In the last paragraph of the ruling, the court made directions that now form the core of this appeal. The court stated as follows;

> "**10. I further direct that the parties do prepare the suit for hearing within 60 days from today and the matter be fixed for hearing within 14 days thereafter.**"

Despite the clear and unambiguous directions of court above, the suit was not fixed for hearing as directed. Instead the appellant filed another application dated 7th March 2013 requesting court to enlarge time within which to prepare the suit for hearing. To support its request, the appellant advanced grounds that, it had complied with pre-trial procedures by filing witness statements and bundles of documents; secondly, that it had not been made aware that the court had issued directions giving a time frame or limit within which the parties were to fix the suit for hearing.

The respondent did not oppose the application. However, on 19th April 2013, **Ogola, J.** delivered the ruling in respect of the application and dismissed it. The learned Judge stated that instead of complying with the directions of court, the appellant filed an application to extend the time given without providing reasons for its failure to comply. The learned Judge remarked that orders of court ought to be taken seriously as they are not issued in vain. He stated that he found no genuine reason(s) for non-compliance with his earlier directions and accordingly refused to invoke his discretion to extend time. Noteworthy is that the dismissal of the application for extension of time meant that the underlying suit was also dismissed.

Those findings are now the subject of this appeal. Based on a memorandum of appeal dated 20th January 2014 that raises 5 grounds that the

learned Judge erred in law and in fact in failing to find that there were sufficient reasons given by the appellant to warrant extension of time within which parties were to prepare and fix the suit for hearing; the appellant had established genuine reasons for non-compliance of the court order; that the appellant had taken reasonable steps towards preparation of the suit for hearing including filing bundle of documents, witness statements, pre-trial questionnaire and list of witnesses; and in dismissing the appellant's application and the suit.

The present appeal was canvassed by way of written submissions which both parties duly filed and exchanged. In its submissions, the appellant took issue with the Judge's finding that it failed to provide reasons for its failure to comply with the directions. It submitted that contrary to the finding, the reasons were duly provided in the grounds of the application and also in its Supporting Affidavit. Specifically, the appellant stated that the part of the ruling giving directions as to the time limit for preparing the suit for hearing was not read to the parties. It claimed that the court only stated that the application had been dismissed with costs. That its advocates only became aware of the time limitation when their law clerk attempted to fix the suit for hearing. It was the appellant's submission that the Judge failed to address himself to the reasons given in its application. It maintained the reasons given were genuine.

The appellant also challenged the Judge's findings on the basis that in exercising his discretion he failed to consider the steps it had taken to prepare the matter for trial which included filing of Bundle of Documents, Witness Statements, Pre-Trial Questionnaire and List of Witnesses. It claimed the preparation was sure indication of having the matter heard and determined. The appellant termed the court's verdict as harsh under the circumstances and considered the same as a misapprehension of the evidence given in the Supporting Affidavit. In its view, the advocates' omission in noting the strict timelines given by the court was an excusable mistake or error which deserved court's sympathy and the court ought to have allowed its application to avoid injustice or hardship resulting from the inadvertence or excusable mistake or error. To back its arguments, the appellant cited the decision of **CMC Holdings Ltd v Nzioki (2004) KLR 173** and prayed that in the interest of justice, the appeal be allowed.

In opposing the appeal, the respondent submitted that the appellant failed to comply with the directions of the court without any plausible explanation. According to the respondent, the reason given for the failure had no merit as the sixty days granted was sufficient time to set the suit down for hearing. He argued that filing the application seeking to extend time one year after the directions were given indicated that the appellant was not keen in prosecuting the suit making the same eligible for dismissal for want of prosecution under Order 17 rule 2 of the Civil Procedure Rules. The respondent maintained that the reason given for the delay was inexcusable, inordinate and hence the dismissal was merited. Further and according to the respondent, the authorities relied on by the appellant in support of its case were distinguishable from the instant appeal.

The main issue for determination in this appeal is the exercise of judicial discretion by the trial court. In the exercise of such discretion, courts try to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not to assist a person who has deliberately sought to obstruct or delay the cause of justice. See **Mbogo v Shah & Another (1968) EA 93**. Further, the circumstances under which this Court may interfere with the exercise of discretion of a single judge are well stated in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) eKLR** as below;

The Court of Appeal may only interfere with the exercise of a court's judicial discretion if satisfied:

a) that the judge misdirected himself on law; or

b) that he misapprehended the facts; or

c) that he took account of considerations of which he should not have taken account; or

d) that he failed to take account of consideration of which he should have taken account; or

e) that his decision, albeit a discretionary, was plainly wrong.

The ruling the subject of this appeal was a short one, indeed a mere paragraph. Despite the appellant's application having contained grounds upon which the application was premised and further the evidence in the Supporting Affidavit, the Judge accused the appellant of bringing an application to extend time without providing reasons for failure to comply with the initial court order. In its affidavit in support of the application, it was deponed that the part of the ruling giving restriction of time within which the parties were to set the suit down for hearing was not read to the parties. Further in the affidavit sworn by the appellant's counsel having conduct of the suit, it was deponed that he only came to learn of the time limits when his clerk went to fix the matter for hearing when he was informed by the court registry that he could not do so until the period within which parties were to fix the suit for hearing was extended. That upon perusal of the court file, he confirmed the time limits given by court. Counsel also deponed that the appellant was desirous of prosecuting the suit without delay and had filed the necessary documents alluded above. The Judge did not consider those depositions despite the same having not been controverted by the respondent who did not even file a replying affidavit or otherwise oppose the application. There is nothing in the learned Judge's ruling to suggest that he considered the evidence. Considering a scenario where the High Court had failed to consider crucial matters, this Court in **Samson Karino Ole Nampaso v Kaana Ka Arume Co. Ltd (2016) eKLR,** stated that given the Judge's failure to consider crucial matters he was required to do under the setting aside jurisdiction, then that was a proper case for the Court to interfere with the judge's exercise of discretion. Similarly, in **Coast Development Authority v Adam Kazungu Mzamba & 49 Others [2016] eKLR,** where the High Court judge had failed to address pertinent matters before dismissing the appellant's suit, this Court held as follows;

> **"While it is accepted that both Article 159 and the overriding objective are not a panacea in all and sundry situations of breaches of orders of the court or rules of procedure, they are nevertheless fundamental provisions that a court must pay due regard to before taking the drastic action of dismissing a suit without affording a party an opportunity to be heard, on account of technical breaches committed by the party, in this instance, the learned judge, unfortunately did not advert to any of these important issues."**

Without a rebuttal of the appellant's evidence, then it becomes apparent that the failure to comply with the courts direction was by mistake, accident, inadvertence or error. As such, the issue then becomes whether the same was excusable. It has been stated that if the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The appellant has deponed that it had taken reasonable steps towards preparation of the suit for hearing including filing of Bundle of Documents, Witness Statements, Pre-Trial Questionnaire and List of Witnesses. Though the respondent submitted that the sixty days given by court were sufficient to set the suit down for hearing, the appellant maintained that it was keen in prosecuting the suit. The delay occasioned was a period of about one year and may be deemed a long time considering the sixty days directed by the Judge.

Nevertheless, the respondent did not demonstrate or even allude to any prejudice it would suffer in the event the application or this appeal was allowed. In **Abdurrahman Abdi v Safi Petroleum Products Ltd. & Ors (2011) eKLR**, it was observed that a court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party. In this appeal, no doubt the appellant stands to be prejudiced if its suit is dismissed without being accorded a trial or chance to prosecute it. In **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 Others (2013) eKLR,** it was held that,

> **"The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."**

The principle of proportionality and justice would demand that the appellant be given a bite of the cherry and its day in court.

Accordingly, we allow the appeal, set aside the ruling and order dated 19th April 2013. The appellant is directed to take steps to set down the suit for hearing within the next forty-five (45) days from the date of delivery of this ruling. We make no order as to costs.

Dated and delivered at Nairobi this 22nd day of February, 2019.

W. OUKO, P.

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR