



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & GATEMBU, JJ.A)

CIVIL APPEAL NO. 107 OF 2013

BETWEEN

KENYA COMMERCIAL BANK LTD.....APPELLANT

AND

SAMSON KEENGU NYAMWEYA.....RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nairobi (Kimondo, J) dated 10th February, 2012

in

HCCC No. 474 of 2005)

JUDGMENT OF THE COURT

1. This is an appeal from a decision of the High Court (Kimondo, J) given on 10th February, 2012 dismissing the appellant's suit for want of prosecution "*under the provisions of Order 17 Rule 2 of the Civil Procedure Rules, 2010*".
2. The appellant contends that the order for the dismissal of its suit constitutes a wrong exercise of judicial discretion and this Court should be guided by the principles in *Mbogo & another v Shah (1968) 1 EA 93* and set aside that order.
3. To the extent that it is relevant to this Judgment, the brief background is that on 22nd August 2005, the appellant filed suit before the High Court seeking judgment against the respondent for Kshs. 25,574,472.90 together with interest at the rate of 21% p.a. It averred that the respondent had defaulted in repaying a bridging loan that it had advanced to him to purchase land in Kitale. The Bank asserted that the respondent had indeed admitted the indebtedness in a different suit, HCCC No. 502 of 2003, in which the respondent had sued the bank.
4. In his statement of defence, the respondent denied the claim. He asserted that appellant's right of action was extinguished by operation of the doctrine of novation; that the claim had been compromised; and that the appellant had breached the provisions of the Banking Act.
5. The occasion to test those pleadings at trial never presented itself. In an affidavit sworn on 24th October 2012, Chacha Odera, an advocate in the firm of Oraro & Company advocates for the appellant deposed that on 10th February 2012, he noticed that the suit was listed in the Daily Cause list for that day for dismissal for want of prosecution; that he presented himself in court on that date and pleaded for time to file an affidavit in order to place material before the court why there had been a delay in the prosecution of the suit; but the Judge declined that request; that despite explaining orally to the Judge that the appellant's advocates file had been locked up in a drawer in the firm of an advocate who had died, the Judge proceeded to dismiss the suit.

6. Appearing before us during the hearing of the appeal, learned counsel for the appellant Miss. J. Barasa in her written submissions which she highlighted, expounded on the grounds of appeal and urged that the Judge in the lower court failed to consider that no prior notice to show cause why the suit should not be dismissed was served as required under Order 17 Rule 2(1) of the Civil Procedure Rules; that it was by chance that Mr. Odera stumbled upon the matter on the cause list and appeared before court; that the appellant was wrongly denied an opportunity to file an affidavit to show cause why the suit should not be dismissed and its rights to a fair hearing under Articles 25 and 50 of the Constitution were breached. In that regard, counsel referred us to the decisions in **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2007] eKLR** and **Mbaki & others v Macharia & another (2005) 2 EA 206**.

7. It was submitted that the Judge failed to have proper regard to the explanation given as to why there had been a delay in prosecuting the suit; that the delay was excusable and was not inordinate; that the respondent did not suffer any prejudice but continued to enjoy the benefits of the loan advanced by the appellant. Reference was made to High Court decision in **Ivita v Kyumbu [1975] eKLR** regarding the proper test upon which an application to dismiss a suit for want of prosecution should be judged.

8. Counsel concluded by urging that the appellant should not, in any event, suffer on account of mistake of counsel. In that regard the decision of this Court in **Philip Chemwolo & another v Augustine Kubede (1982-88) KAR 1037** was cited.

9. Opposing the appeal, Mr. W. Njagi, learned counsel for the respondent while tacitly acknowledging that no notice was served as required under Order 17 Rule 2(1) of the Civil Procedure Rules submitted that the appellant did not suffer any prejudice as his advocate was in court; that the delay in setting down the suit for hearing was inordinate; that the explanation for the delay that was offered by counsel for the appellant was not satisfactory; that the respondent stood to suffer prejudice as the matter had been pending in court for thirteen years without resolution; and that the Judge properly exercised his discretion in dismissing the suit for want of prosecution.

10. We have considered the appeal, the submissions and the authorities cited. Order 17 Rule 2 provides that the court may give notice in writing to the parties to show cause why the suit should not be dismissed where no step has been taken by either party for one year. In considering whether to dismiss a suit for want of prosecution under those provisions the court exercises judicial discretion. Chesoni J, (as he then was) captured the principles applicable when exercising that discretion in **Ivita v Kyumbu** (above) where he stated:

“... the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, (sic) and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

Those principles were adopted by this Court in **Moses Muriira Maingi & 2 others v Maingi Kamuru & another [2013] eKLR**.

11. It is not manifest from the learned Judge’s ruling, the subject of this appeal, that he bore those principles in mind. Beyond observing that the suit had not been fixed for hearing for a long time and rejecting the impromptu explanation offered by counsel for the appellant from the bar, having been denied an opportunity to lodge an affidavit, the Judge did not consider the question of prejudice and whether, “*justice can still be done to the parties*” notwithstanding the delay.

12. Apart from those considerations, there is the uncontested claim that the appellant did not have prior notice that the suit was scheduled for dismissal and that the advocate for the appellant chanced on the matter on the cause list for the day. This claim is given credence by the fact that the respondent was not himself represented in court on 10th February 2012 when the proceedings for dismissal took place, presumably on account of not having had notice of the proceedings of that day.

13. In the foregoing circumstances, we are satisfied that this is a proper case for us to interfere with the decision of the learned Judge, as, to use the words of Sir Clement De Lestang, VP, in **Mbogo & another v Shah** (above) the lower court “*...failed to take into consideration matters which it should have taken into consideration...*”

14. We accordingly allow the appeal, set aside the ruling of the lower court given on 10th February 2012 in its entirety. The appellant shall take steps, within 30 days from the date of delivery of this judgment, to have the suit in the High court fixed for hearing.

The costs of this appeal shall abide by the outcome of the suit in the High Court.

Orders accordingly.

Dated and delivered at Nairobi this 8th day of March, 2019.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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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