IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 58 OF 2011

BETWEEN

S. K. MACHARIA.....1ST APPELLANT

ROYAL CREDIT LIMITED.....2ND APPELALNT

AND

STANDARD CHARTERED BANK LIMITED.....1ST RESPONDENT

THE OFFICIAL RECEIVER.....2ND RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi* (*Kimaru, J) dated 23rd April, 2010

in H.C.C.C No. 1713 of 2001)

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JUDGMENT OF THE COURT

[1] The facts leading to the order, subject of this appeal are quite simple.By a plaint filed on 9th November 2001, Madhupaper International Limited **(Madhupaper),** S.K. Macharia, (herein 1st appellant) and Royal Credit Limited (herein 2nd appellant), sued Standard Chartered Bank Limited (the 1st respondent), seeking several declaratory orders and a sum of Kshs. 55 million, together with interest.

[**2**] By a notice to show cause dated 22nd October, 2009 issued by the High Court *suo moto*, Madhupaper & the two appellants were served through their advocates, **Kamau Kuria & Kiraitu Advocates**, with a Notice to Show Cause under **Order XXVI rule 2(1)** of the former edition of the Civil Procedure Rules, to show cause why the suit should not be dismissed for want of prosecution. In response to the notice, the 1st appellant filed a replying affidavit in which he explained that the delay in prosecuting the suit was caused by two factors. First, the inability of the appellants to access the court file for purposes of setting it down for hearing, and secondly, the fact that Madhupaper International who was the 1st plaintiff in the suit, had been placed under liquidation on 6th March, 2006, and a winding up order issued. However, the official receiver (2nd respondent) failed to assume the conduct of the suit on behalf of the 1st plaintiff.

[**3**] In the affidavit, the 1st appellant explained that he was a majority shareholder in Madhupaper and that the 2nd appellant was his family company in which his wife and himself were the shareholders. He explained further that at the time Madhupaper was placed under liquidation it was involved in a number of suits, one of which was **Civil Appeal No. 181 of 2004** in which the 2nd respondent, was made a party and participated in the appeal. They therefore expected the 2nd respondent to join in the prosecution of the High Court suit, as the winding up order took away the conduct of the suit from their advocates.

[**4**] The notice to show cause was fixed for hearing on 12th March, 2010 and on that date, **Dr. Kuria** appeared in court for the 1st and 2nd appellants and explained that although he used to appear for Madhupaper, the 2nd respondent was now the one who should appear for that company because there was a receiving order. The hearing of the notice to show cause was adjourned to 23rd April 2010, on which date there was a **Miss Wamuchi** who appeared for the 1st and 2nd appellants and **Miss Ogembo** held brief for **Mr. Chacha** for the 1st respondent. The record indicates that none of the advocates addressed the court but the learned Judge made a short order as follows:

> **"I have read the affidavit filed subsequent to the issuance of the notice to show cause. I am not satisfied that the reasons advanced by the plaintiff are valid. This case has not been prosecuted for six years. It is hereby dismissed with costs for want of prosecution."**

[**5**] The appellants are aggrieved by that ruling. In a memorandum of appeal lodged in Court on 23rd March, 2011, the appellants have raised several grounds. The grounds may be summarized as faulting the trial Judge for:

(i) ignoring the overriding objective of the Civil Procedure Act and Rules which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes;

(ii) ignoring the principles governing dismissal of suits for want of prosecution as laid down in *Sagoo v Barji [1990] KLR 459*, *Njuki Gachugu v Githii [1977] KLR 108*, and *Ivita v Kyumbu [1984] KLR 441;*

(iii) ignoring that Madhupaper was placed under liquidation on 6th March, 2006 and the official receiver had failed to assume the conduct of the suit on behalf of Madhupaper;

(iv) penalising the appellants for matters that were beyond their control as the superior court file had been missing for a period of over one year and the official receiver had failed to assume the conduct of the suit;

(v) in failing to take account of the facts of the intertwined relationship between the appellants and Madhupaper which created a situation where the 2nd and 3rd appellants could not prosecute the case without Madhupaper;

(vi) in exercising the drastic power to strike out the suit for want of prosecution, when there was no intentional, inordinate or inexcusable delay that could inhibit a fair trial;

(vii) in failing to take account of the fact that the order of dismissal contravened the constitutional rights to fair trial of Madhupaper and the appellants under section 77 of the former Constitution.

[**6**] In support of the appeal, the appellants filed written submissions as well as a list of authorities. Learned counsel, **Dr. Kamau Kuria** highlighted the submissions during the hearing of the appeal. In the submissions, the appellants relied, *inter alia*, on **Nicholas Kiptoo arap Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR**, for the proposition that in exercising its discretion to strike out a document or the plaint, the court has to weigh the prejudice that is likely to be suffered by the innocent party against the prejudice to be suffered by the offending party, and that in this case the respondent neither applied for the dismissal of the suit nor supported or opposed the notice to show cause.

[**7**] While expounding on the grounds of appeal, Dr. Kuria argued that the trial Judge failed to consider that Madhupaper having been wound up on 6th March, 2006, the 2nd respondent had the responsibility to handle all suits on its behalf, which conduct the 2nd respondent failed to assume in regard to the dismissed suit. In addition, under **section 228** of the repealed Companies Act, once a winding up order has been issued or an interim liquidator appointed, no action or proceedings can proceed or be commenced against the company except with leave of the court. The appellants had tried reaching out to the official receiver but their efforts were never reciprocated. Dr. Kuria submitted that because of the relationship between the appellants and Madhupaper who were all plaintiffs in the suit before the High Court, the appellants were unable to prosecute the suit against the 1st respondent without Madhupaper. Counsel further urged that the trial court failed to consider that the file before the trial court had been missing for over one year and only resurfaced when the Notice to Show Cause was issued, hence the appellants right to a fair hearing under **Section 77** of the former Constitution were contravened.

[**8**] In addition, counsel argued that the trial Judge failed to consider the explanations given on the delay to prosecute the suit; that the delay was excusable and not inordinate and that the respondents did not demonstrate any prejudice they continued to suffer due to the delay as the dismissal came about through a court mandated notice. Further, counsel pointed out that the 1st respondent continues to be unjustly enriched to the detriment of the appellants. Counsel concluded that the learned Judge in exercising his discretion failed to appreciate the principles governing dismissal of suits for want of prosecution and urged the Court to allow the appeal.

[**9**] In opposing the appeal, the 1st respondent filed written submissions that were duly highlighted by learned counsel **Ms. Lubalo**. Counsel argued that the delay in setting down the suit for hearing was inexcusable and prolonged; that the excuse given by the appellants that the 2nd respondent, failed to take up the conduct of the suit was not a valid justification as the appellants had various options at their disposal to address the issue; that **Section 242(5)** of the repealed Companies Act permitted a person who was aggrieved by any action of a liquidator to approach the court for an appropriate relief; that the appellants could have applied for leave to continue prosecuting the suit in Madhupaper's own name since the 2nd respondent had declined to do so. Further, that **Section 223** of the repealed Companies Act permitted the appellants to have the suit before the trial court stayed, which would have effectively frozen time from running.

[**10**] **Miss Lubalo** further submitted that the overriding objective that the appellants sought to rely on was not applicable as the appellants had not been interested in prosecuting the suit; that the appellants claim is over 30 years old and the 1st respondent shall be prejudiced as it would be difficult to find the necessary witnesses and evidence in support of its case; that the appellants right to be heard under **Section 77** of the repealed Constitution, if allowed, shall infringe on the 1st respondent's rights to be heard within a reasonable time; that the Judge properly exercised his discretion in dismissing the suit by considering the required considerations as set out in **George Gikubu Mbuthia v KCB [2015] eKLR**; that as set out in the case of **Shah v Mbogo [1968] E.A 93**, this Court should not interfere with the exercise of discretion by an inferior court unless satisfied that the Judge misdirected himself, which was not the case herein.

[**11**] Counsel also argued that the appellants did not have the *locus* to institute this appeal by virtue of the provisions of **Section 228** of the repealed Companies Act, which provides that once a winding up order has been made, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such terms as the court may impose; that the appellants did not adduce evidence to show that it sought and obtained the leave of the court to institute the current appeal. **Joseph Kaara Mwethaga v Thabiti Finance Company Limited [1998] eKLR** in which it was held that where leave has not been obtained in breach of **Section 228** of the Companies Act, the suit could be rendered incurably defective and incompetent in law, was relied upon. The Court was thus urged to dismiss the appeal.

[**12**] We have carefully perused the record of appeal and considered this appeal, the submissions made by both parties, and the authorities cited. The appellants' suit was dismissed under the former **order XVI rule 2** that stated as follows:

> **"(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties, to show cause why the suit should not be dismissed and if cause is not shown to its satisfaction, may dismiss the suit.**
>
> **(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit."**

[**13**] It is evident that the rule gives the court discretion to dismiss the suit where no action has been taken for more than one year. What is in issue is the exercise of discretion by the trial Judge in dismissing the appellants' suit. In **Mbogo & Anor v Shah [1968] EA 93**, it was held that:

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

[**14**] In considering whether the learned Judge properly exercised his discretion, **Ivita v Kyumbu [1984] KLR 441** that was cited by the appellants' counsel is relevant. In that case, **Chesoni, J.** stated as follows:

> **"The test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the 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, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court."**

[**15**] Of relevance also is **Sagoo v Bharji [1990] 459** in which **Mbito, J** stated:

> **"… it is not the practice of our courts to exercise this drastic power unless it is satisfied:**
>
> **(i) That there has been intentional and continuous delay, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court.**
>
> **(ii) (a) that there has been inordinate and excusable delay on the part of the plaintiff or his lawyers.**
>
> **(b) that such delay will give rise to substantial risk that it is not possible to have a fair trial of the issues in action or is such as is likely to cause or to have caused serious prejudice to the defendants whether as between themselves and the plaintiff, or between each other, or between them and the third party. See Njuki Gachugu v Githii [1977] KLR 108."**

[**16**] In exercise of his discretion, the learned Judge was required to take into account the circumstances and the reasons, if any, for the delay, in order to determine whether there has been intentional delay, whether the delay was inordinate and inexcusable, and whether the delay made it impossible to have a fair trial.

[**17**] In the first instance, the record shows that the learned Judge did not give the parties' counsel who were present in court an opportunity to address him. Secondly, the learned Judge noted that the reasons advanced by the 1st appellant in the affidavit were not valid. We have examined the affidavit that was sworn by the 1st appellant, and with due respect, find it difficult to accept the position taken by the learned Judge.

[**18**] In the replying affidavit, the 1st appellant gave two reasons for the delay. The first was the inability to access the court file between the years 2005 and 2006. There was no reply to this affidavit, nor does the learned Judge give any reason as to why he did not find this explanation valid. The second reason that was given for the delay, was the failure by the 2nd respondent to assume the conduct of the suit upon Madhupaper being wound up. The 1st appellant annexed a copy of a judgment in ***High Court Winding up case No. 12 of 1995*** which confirmed that a judgment had been delivered by **Kasango, J** winding up Madhupaper. It is clear from the record that the 2nd respondent has never attempted to take over the proceedings in the High Court on behalf of Madhupaper. The explanation given was therefore not without substance, but was yet again rejected without any proper reason.

[**19**] In the circumstances, we find that the learned Judge did not properly exercise his discretion as he failed to take into account relevant factors. Although the delay of about five (5) years appeared inordinate, there were good reasons for the failure to prosecute the suit, which reasons ought to have been taken into account. In addition, much as the 1st respondent maintained that it was prejudiced by the delay, the 1st respondent did not take any action to have the suit heard or dismissed. The cause of action appears to be anchored on transactions that took place in 1st respondent's bank. The evidence does not depend on a particular officer, but on record kept by the bank. That is to say, that the 1st respondent will not be substantially prejudiced by the delay.

[**20**] For these reasons, we allow this appeal, set aside the order of dismissal that was made by the learned Judge, and direct that the 1st and 2nd appellants shall take appropriate action to have the suit heard and determined without undue delay.

[**21**] We do not find it appropriate to award any costs. Each party shall therefore bear their own costs. These shall be the orders of the Court.

Dated and delivered at Nairobi 6th day of December, 2019.

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR