



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, MAKHANDIA & OTIENO-ODEK, JJA)

CIVIL APPEAL NO. 322 OF 2013

ORCHID PHARMACY LIMITED.....APPELLANT

VERSUS

SOUTHERN CREDIT BANKING CORPORATION LIMITED....1ST RESPONDENT

MUGA AUCTIONEERS & GENERAL MERCHANTS.....2ND RESPONDENT

HIGH ENERGY SOLUTIONS LIMITED.....3RD RESPONDENT

ATTORNEY GENERAL4TH RESPONDENT

(Appeal from the Ruling of the High Court at Nairobi (Havelock J.) dated and delivered on 1st August 2013 in High Court Civil Case No. 389 of 2007)

JUDGMENT OF THE COURT

- 1 At all material times to the suit in the High Court, the appellant was the registered proprietor of two properties namely Nairobi LR No. 1870/X/111 and Nairobi LR No. 1870/X/116 situate in Westlands in the City of Nairobi.
2. In 1996, the 1st respondent Bank offered the appellant an overdraft facility to the tune of Ksh.8.5 million and took charge over Nairobi LR N. 1870/X/111. The appellant averred that there was no charge over Nairobi LR No. 1870/X/116. The appellant contended that the 1st respondent fraudulently created a charge over Nairobi LR No. 1870/X/116.
3. The appellant defaulted in repayment of the loan and on 8th August 2003, the 1st respondent instructed the 2nd respondent to sell by public auction Nairobi LR No. 1870/X/116 to recover the outstanding sums. The 3rd respondent purchased the said property at the auction.
4. By a Complaint dated 1st August 2007, as amended on 5th October, 2009 the appellant filed suit seeking a permanent injunction to restrain the respondents from evicting the appellant from Nairobi LR No. 1870/X/116 and or transferring the said parcel of land to any other third party.
5. The 1st and 2nd respondents in a joint statement of defence averred as follows:
 - i. That the appellant's property Nairobi LR No. 1870/X/116 was merely a strip of a common road standing next to the appellant's other main property Nairobi LR No. 1870/X/111.
 - ii. That the mortgage and further mortgage over the appellant's property Nairobi LR No. 1870/X/111 permitted accession of the 1st respondent's mortgagee's interest onto the appellant's neighbouring property upon the happening of certain events.
 - iii. That upon renewal of the lease over the appellant's mortgaged property Nairobi LR No. 1870/X/111, the strip/common road adjacent to the mortgaged property Nairobi LR No. 1870/X/116 was amalgamated or accented to and the name of the property became Nairobi LR No. 1870/X/116 (original L.R. Nairobi LR No. 1870/X/111).
 - iv. That the attempted differentiation between Nairobi LR No. 1870/X/116 and Nairobi LR No. 1870/X/111 is futile, misconceived and is made in bad faith.

6. In its defence, the 3rd respondent averred that it bid at the auction on 8th August 2003 for Ksh. 9 million and was an innocent purchaser for value without notice of Nairobi LR No. 1870/X/116.

7. The 1st respondent further denied that the public auction conducted on 8th August 2003 was fraudulent and in any way illegal, null and void. The particulars of fraud or misrepresentation pleaded in the Complaint were denied.

In an amended complaint dated 5th October, 2009 the appellant alleged that the 4th respondent fraudulently relied on a replacement charge of 31st October, 2000 when none existed.

8. Upon filing of the Statements of Defence, two applications were lodged before the trial court. The first application by way of Notice of Motion dated 3rd June 2010 was filed by the 3rd respondent seeking to strike out the appellant's suit and an order for possession of the suit property be granted to the 3rd respondent. The second application was by the appellant who sought an order to compel the 3rd respondent to comply with a Notice to Produce specified documents. The two applications were heard together.

9. In a ruling dated 1st August 2013, the trial court allowed the 3rd respondent's Motion and struck out the appellant's suit against the 3rd respondent. The court also struck out the appellant's defence to the counterclaim of the 3rd respondent. The trial court further ordered the appellant to immediately give possession of the suit property to the 3rd respondent. The appellant's Notice of Motion dated 4th December 2012 on Notice to Produce was dismissed.

10. Aggrieved, the appellant has proffered the instant appeal. In its Memorandum of Appeal, the following compressed grounds of appeal are urged:

- i. The learned judge erred in law and fact in failing to appreciate that Nairobi LR No. 1870/X/116 and Nairobi LR No. 1870/X/111 were two distinct and separate properties.
- ii. The judge erred in relying on wrong decisions of the High Court to find that the suit property was transferred to the 3rd respondent *when there was no such evidence before him*.
- iii. The judge erred in failing to appreciate the new evidence presented before him which showed that the 3rd respondent directors were employees of the 1st respondent and any purported auction between the 1st and 3rd respondent was a sham and a product of collusion.
- iv. The judge erred in failing to appreciate that no documentary or any form of evidence was placed before him to show that the 3rd respondent had acquired any or either of the suit properties.
- v. The judge erred and failed to find that the 3rd respondent had never existed before the public auction of the suit properties.
- vi. The judge erred in failing to appreciate that the appellant had several triable issues in its amended defence against the 3rd respondent's counterclaim and made a wrong decision in striking out the same.
- vii. The judge erred in law in granting orders of a mandatory injunction evicting the appellant by way of summary procedure without giving the parties a chance to adduce evidence in support of their cases at trial and the judge further erred in giving a ruling without reasons.
- viii. The judge was extremely biased against the appellant and erred in refusing the application for discovery of documents.
- ix. The judge erred in failing to grant all parties an opportunity to proceed to full trial and put to rest all matters of evidence.
- x. The judge erred in ignoring cardinal rules of procedure and misapprehended the issue of res judicata.

11. At the hearing of this appeal, learned counsel Ms. Oswera holding brief for Mr. Kirimi appeared for the appellant. Learned counsel Mr. Chrispin Wainaina appeared for the 3rd respondent while Mr. Eredi appeared for the 4th respondent. Despite service of the hearing notice, there was no appearance for the 1st and 2nd respondents.

12. Prior to the hearing of the instant appeal, the 3rd respondent filed a Notice of Motion dated 5th April 2018 being an application to strike out both the Notice of Appeal dated 24th September 2013 and the Record of appeal filed on 22nd November 2013. The grounds in support of the application were that the appeal arose from a Ruling delivered on 1st August 2013 in HCCC No. 389 of 2007. Leave to appeal out of time was granted to the appellant on 23rd September 2013. Upon leave being granted, the appellant filed the Notice of Appeal on 25th September 2013 and served the said Notice upon the 3rd respondent on 14th March 2018. The Notice of Appeal was served outside the prescribed time by 1,616 days.

13. In relation to the Record of Appeal, it was filed on 22nd November 2013 and served upon the 3rd respondent on 9th March 2018. The Record of Appeal was thus served outside the prescribed time by 1,550 days.

14. The affidavit in support of the Motion to strike out the Notice and Record of Appeal was deposed by Mr. Chrispin Wainaina Advocate who deposed that both the Notice of Appeal and Record of Appeal were served outside the prescribed time; that the appeal came up for case management without the knowledge of the 3rd respondent; that on 13th November 2017, the 3rd respondent was served with a notice indicating the hearing of the appeal shall be on 28th February 2018. Upon service of the hearing notice, counsel for the 3rd respondent wrote to the appellant's counsel requesting for the Notice of Appeal and Record of Appeal but there was no response; when the appeal came up for hearing on 28th February 2018, the issue of non-service of both the Notice and Record of Appeal was raised before this Court; the appellant's advocate had been unable to give an explanation for delay in service of both the Notice and Record of Appeal.

15. The appellant filed a Replying Affidavit to the application to strike out both the Notice and Record of Appeal. The replying affidavit was deposed by Mr. Mohammed Allibhai. In response, it was deposed that the failure to serve was an oversight and honest mistake on the part of counsel for the appellant; the appellant should not be punished for mistake of its counsel; the mistake by counsel was not intentional; the appellant should be given an opportunity for its appeal to be heard on merit. Counsel urged this Court not to focus on procedural justice but to do substantive justice and allow each party to have its day in court. It was submitted that the overriding objective is to ensure justice is administered without undue regard to procedural technicalities.

16. We have considered the Notice of Motion dated 5th April 2018 as well as submission by counsel and the Rules of this Court. The Motion to strike out both the Notice of Appeal and Record of Appeal raise a preliminary point that must be considered and determined by this Court. The gist of the Motion is that both the Notice and Record of Appeal were served outside the stipulated time lines.

17. The Motion is grounded on **Rules 77 (1), 84, 87 (1) and (2) and Rule 90** of the Rules of this Court. **Rule 84** provides: -

“A person affected by an appeal may at any time either before or after institution of the appeal apply to the Court to strike out the Notice of Appeal or the appeal, as the case may be on the ground that no appeal lies or that some essential step in proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a Notice of Appeal or appeal shall not be brought after the expiry of 30 days from the date of service of the Notice of Appeal or Record of Appeal as the case may be.”

18. In the instant appeal, the 3rd respondent submitted that the Notice of Appeal was served upon it on 14th March 2018 and the Record of Appeal on 9th March 2018. The instant Notice of Motion dated 5th April 2018 was filed on 9th April 2018. It is manifest that the application to strike out both the Notice and Record of Appeal was filed within 30 days from the date of service. The proviso in Rule 84 has therefore been complied with.

19. We are alive to dicta from this Court in **Nicholas Kiptoo Arap Korir Salat – v- IEBC & 6 Others**, Civil Appeal No (Application) 228 of 2013 [2013] eKLR where the court (Ouko JA) held:

“the power to strike out pleadings and in the process deprive a party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases...”

20. In **Costello –v- Somerset County Council (1993) 1 WLR 256**, Sir Thomas Bingham, M. R. had this to say at page 263 –

“The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate”.

21. **Rule 77(1)** of the Rules of this Court is couched in mandatory terms and compliance with the same is not optional. The Rule provides as follows: -

77(1) “An intended appellant *shall, before or within seven days after lodging the notice of appeal, serve copies* thereof on all persons directly affected by the appeal.”

22. It is imperative to note also that service must be within seven (7) days of filing of the Notice of Appeal. In the instant case, there has been no application for enlargement of time to serve the Notice of Appeal outside the seven (7) days provided by the Rules. Other than referring to mistake of counsel, the appellant has not offered any satisfactory explanation for delay in serving both the Notice and Record of Appeal. The appellant has not denied that both the Notice of Appeal and Record of Appeal were served outside the prescribed period. There being no application to enlarge time within which to serve the Notice and Record of Appeal, it is clear that there is no valid Notice of Appeal on record to clothe us with the requisite jurisdiction to entertain the appeal herein.

23. The appellant in its replying affidavit submitted that failure to serve both the Notice and Record of Appeal was mistake by counsel; that mistake by counsel should not be visited upon a client. In the persuasive case of **Lucy Bosire -vs- Kehancha Div. Land dispute Tribunal & 2 Others [2013] eKLR**, the High Court expressed:

“It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits.

24. In Savings and Loans Limited -vs- Susan WanjiruMuritu Nairobi (Milimani) HCCS No.397 of 2002, it was held that it is trite that a case belongs to a litigant and not to the Advocate. It is the duty of the litigant to constantly check with the advocate the progress of the case.

25. In Tana&Athi Rivers Development Authority v Jeremiah KimighoMwakio& 3 Others[2015] eKLR, this Court held that 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. This Court expressed:

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.”

26. In the instant case, there is no affidavit from the appellant's counsel explaining the delay or alleged oversight. The failure to serve both the Notice and Record of Appeal has not been satisfactorily explained. There has been no application by the appellant to enlarge time for service of both the Notice and Record of Appeal. No reason has been given for failure to make such an application. (See Gibb Eastern Africa Limited = v- SysconBuilders Limited & 2 others, Court of Appeal Dar-es-salam, Civil Application No. 5 of 2005)

27. The appellant urged us to take into account the overriding objectives and the need to administer substantive rather than procedural justice. In Murandula Suresh Kantaria-v- Suresh NanalalKantaria, CivilAppeal No. 277 of 2005 (unreported), this Court expressed that the overriding principle is not a panacea for all ills and in every situation, and that a proper basis must be laid before the Court can invoke the same in favour of a party. In exercising the power to give effect to the principle, the Court must do so judicially and with proper and explicable foundation. (See also Daniel NkirimpaMonirei-v - Sayialel Ole Koilel& 4 others [2016] eKLR).

28. In Ratman- v -CumaraSamy (1965) IWLR 8 at page 12 the Privy Council, stated:

“The rules of court must be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules, which is to provide a time table for the conduct of litigation”.

29. In this appeal, it is not disputed that both the Notice and Record of Appeal were served outside the prescribed time. The appellant has neither satisfactorily explained the delay in service of both the Notice and Record of Appeal nor explained failure to make an application to enlarge time for service. The upshot is that we allow the Notice of Motion dated 5th April 2018. We hereby strike out the Notice of Appeal dated 24th September 2013 and also strike out the Record of Appeal filed on 22nd November 2013.

30. Having struck out both the Notice and Record of Appeal, there is no appeal pending before this Court. Consequently, there is no need to delve into the merits of the grounds proffered in the Memorandum of Appeal. We note that this is an interlocutory appeal where the appellant's defence and counterclaim against the 3rd respondent was struck out and the main suit is still pending between the appellant and the 1st 2nd, and 4th respondents. The grounds urged in the memorandum are live issues pending before the trial court. This appeal be and is hereby struck out with costs to the 3rd respondent.

Dated and delivered at Nairobi this 9TH day of NOVEMBER, 2018

M. WARSAME

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JUDGE OF APPEAL

M. MAKHANDIA

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR