IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 180 OF 2009

BETWEEN

MBURU M. KIOGA …….....…… APPELLANT

VERSUS

KENYATTA NATIONAL HOSPITAL .....1ST RESPONDENT

DR. KINOTI MUGAMBI ……...…..….. 2ND RESPONDENT

DR. MACHOKI M'IMUNYA ……..…… 3RD RESPONDENT

(Appeal from the Ruling and Order of the High Court at Milimani, (Khamoni, J.) dated 26th June, 2008

in

HCCC NO. 1070 OF 2002)

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JUDGMENT OF THE COURT

1. This is an appeal from a ruling and order of the High Court at Nairobi given on 26th June 2008 by J.M. Khamoni, J. as he then was, dismissing the appellant's suit for want of prosecution. The appellant complains that the Judge did not properly exercise his discretion when dismissing his suit.

Background

2. On 25th June 2002, the appellant filed suit in the High Court seeking special and general damages against the respondents. In his plaint, the appellant averred that his late wife was treated at the 1st respondent hospital between 7th June 1999 and 9th August 1999 when she died; that the death of his wife (the deceased) was caused by negligence or want of care and skill in the diagnosis, treatment and management of the deceased by the respondents or their servants or agents.

3. The respondents entered appearance in the suit and subsequently filed their respective statements of defence in which they denied the appellant's claim. The record shows that the 1st respondent filed its

defence on 30th August 2002; the 3rd respondent filed his defence on 23rd August 2002; while the 2nd respondent filed his defence on 11th September 2002.

4. Approximately two and half years after the last statement of defence was filed, the 2nd respondent moved the court by an application presented on 10th March 2005 seeking orders that the appellant's suit be dismissed for want of prosecution. Shortly thereafter, the 3rd respondent followed with its own motion filed in court on 20th April 2005 in which he also sought an order that the appellant's suit be dismissed for want of prosecution. The advocate for the 2nd respondent, S.K.Bundotich, swore an affidavit in support of that application in which he deposed that the appellant had not since the close of pleadings in the suit taken any reasonable steps with a view to prosecuting the suit.

5. The application by the 3rd respondent was not supported by affidavit, but the grounds enumerated on the face of the application were that pleadings closed on 18th September 2002, as the last of the defences was delivered on 11th September 2002; that since the closure of pleadings, the appellant had "*taken no steps for over 2 years to have the suit heard and determined and the 3rd* [respondent] *is likely to suffer prejudice if the [appellant's] suit is allowed to remain dormant*."

6. In opposition to the applications, the appellant relied on 2 affidavits. Henry Kurauka, an advocate in the law firm of Kamau Kuria & Kiraitu Advocates, swore the first affidavit on 23rd May 2005. That firm was representing the appellant in the High Court at the time. In his affidavit, Kurauka pointed out that the application by the 3rd respondent was not supported by an affidavit and contested the assertion by the respondents that the appellant had not taken steps to prosecute the suit.

7. Kurauka deposed further that by a letter dated 20thNovember 2002, he had invited the 1st and 2nd respondents to explore possibility of settlement; that the 2nd and 3rd respondents had in turn sought further medical reports from the appellant, but the appellant was not able to supply them because the 1st respondent "*kept copies of the said reports*"; that by a letter dated 30th September 2002, the appellant had invited the respondents to attend the registry on 9th October 2002 to fix a date for hearing, but dates could not be taken because the lists of documents had not been filed; that the appellant had not been able to secure some medical reports demanded by the respondents in order to facilitate the taking of a hearing date.

8. He concluded his affidavit by deposing that the delay by the appellant's advocates in prosecuting the suit was "*due to lack of some crucial documents, pressure of work and excusable and inadvertent oversight on their part which could not be visited upon the innocent* [appellant]."

9. The second affidavit was titled "*further replying affidavit*" and was sworn by the appellant on 22nd September 2005 and filed in court on 23rd September 2005. In that affidavit, the appellant took issue with the absence of a supporting affidavit in respect of the 3rd respondent's application. He denied that pleadings in the suit had closed on 15th September 2002 and asserted that the advocates for the 3rd respondent "*continued to demand to be supplied with certain documents as late as August and October 2003*". In his view, it was the advocates for the 3rd respondent "*who were actually blocking the process*" and the "*the main cause of the delay by unreasonably insisting to demand documents which were not in possession of the* [appellant] *and which were in actual fact in their possession*."

10. The appellant deposed further that the 2nd respondent's advocate knew or ought to have known that the appellant is an advocate who does not ordinarily practice law in Nairobi; that his advocates were engaged in government assignments since early 2003; that instead of applying for dismissal of the suit, the respondents were at liberty to fix the suit for hearing; that the 2nd and 3rd respondents had not demonstrated there was inordinate delay and how, if at all, they were affected; that his advocate had informed him that there was a prospect of settlement of the suit with the 1st respondent; that the nature of the suit was of a "*personal nature and importance*" concerning "*serious allegations of negligence*"

and he should be allowed the opportunity to have it "*ventilated on merit*".

11. The two applications were eventually heard together before Khamoni, J. on 12th June 2008. The Judge found, as a fact, that pleadings in the suit closed on 18th September 2002 and that by the time the first application was filed, "*a period of more than two years had elapsed without the* [appellant] *having taken any steps to prosecute the suit*." The Judge also held, "*that period was too long and qualifies to be described as inordinate delay*"; that the delay had "*not been satisfactorily explained*" and that the delay was prejudicial to the respondents because, by the time the case is prosecuted, they may not be able to get some vital documents which would have been available if the case were prosecuted without delay. He accordingly granted the two applications as prayed with the result that the appellant's suit was dismissed with costs. Dissatisfied, the appellant lodged this appeal.

The appeal and submissions by counsel

12. In his memorandum of appeal, the appellant complains that the learned Judge did not understand the arguments presented before him or appreciate the issues that were raised; that 3rd respondent's application did not have a supporting affidavit; that the failure to fix the matter for hearing was wrongly blamed on the appellant instead of his advocate; that the Judge should have taken cognizance of the state of the Judiciary in the period 2003 to 2004; and that the Judge invented his own reasons that the delay would prejudice the respondents.

13. Learned counsel for the appellant, Ms. M. Mutemi, holding brief for Mr. Narangwi, referred to the appellant's written submissions and urged that the Judge's notes of proceedings were not clear demonstrating that the Judge did not appreciate the legal arguments presented before him and the legal issues raised; that the application by the 3rd respondent should have been supported by an affidavit; that the Judge was biased against the appellant in that he invented his own reasons that the delay in prosecution of the suit would prejudice the respondents; that an order to dismiss a suit is draconian and should rarely be made, and then, only in the clearest of cases; that an injustice was occasioned to the appellant who lost his wife and intended to prosecute the suit; that the court must strive, in keeping with Article 159 of the Constitution and the court's statutory overriding objectives, to sustain, rather than strike out, a suit. In support of her arguments, Ms. Mutemi referred us to the case of **Nicholas Kiptoo Arap Korir Salat vs.IEBC & 6 others [2013] eKLR**; **Ivita vs. Kyumba [1984] KLR** and **Githere vs. Kimungu [1976-95] EA**.

14. Learned counsel, Mr. Benjamin Ng'eno, appeared for the 3rd respondent. He also held brief for Mr. Cheptumo for the 1st and 2nd respondents. He informed us that Mr. Cheptumo was relying entirely on the written submissions filed on behalf of the 1st and 2nd respondents on 11th November 2016 in opposition to the appeal. In those submissions, Mr. Cheptumo argued that the appellant has not demonstrated that the Judge improperly exercised his discretion in dismissing the suit; that this Court does not therefore have any basis for interfering with the decision of the High Court; that there was inordinate delay in the prosecution of the suit; that no plausible explanation was given for not prosecuting the suit for a period of over 2 years; that the circumstances in the Judiciary between 2003 and 2004 alluded to by the appellant that are said to have occasioned delay in prosecution of the suit are not stated and are unknown; and that the appeal should be dismissed with costs.

15. On behalf of the 3rd respondent, Mr. Ng'eno invited us to consider the 3rd respondent's written submissions filed on 23rd October 2015. He urged that therespondents demonstrated that the suit had not been set down for hearing for over 2 years after pleadings closed; that there was, prejudice to the respondents, due to the inexcusable and inordinate delay on the part of the appellant in prosecuting the suit; that no evidence was tendered by the appellant to demonstrate any attempts made to set down the suit for hearing; that considering the passage of time, counsel added, it would be impossible for the respondents to procure witnesses, 15 years after the event, and they would suffer great prejudice if the suit is reinstated.

16. According to counsel, the appellant has not demonstrated that the Judge misdirected himself in

dismissing the suit for want of prosecution; that this Court does not, therefore, have any basis for interfering with the decision of the High Court. In support of his arguments, counsel referred us to the provisions of Rule 5 of Order XVI of the then Civil Procedure Rules; the case of **Allen vs. Sir Alfred McAlpine & Sons Limited [1968] 1 All. E. R 543**; **Mbogo and another vs. Shah [1968] EA93**; and **Eliud Munyua Mutungi vs. Francis Murerwa [2014] eKLR**. With that, counsel urged us to dismiss the appeal with costs.

Determination

17. We have considered the appeal and the submissions by learned counsel. When considering the applications by the 2nd and 3rd respondents to have the appellant's suit dismissed for want of prosecution under Rule 5 of the then Order XVI of the then applicable Civil Procedure Rules, the learned Judge was called upon to exercise judicial discretion. As an appellate court, we can only interfere with the exercise of discretion in limited circumstances. In **Mbogo and Another vs. Shah [1968] EA 93** this Court stated:

> ***"…that this Court will not interfere with the exercise of…discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

18. In our view, the learned Judge carefully considered the applications before him and the background against which those applications were made. He considered the length of delay and the explanation offered by the appellant before concluding as follows:

> *"**I find that a period of two years or more in this matter was too long and qualifies to be described as inordinate delay. That period has not been satisfactorily explained. Many other advocates are also busy and work under pressure of work. That does not entitle them to go and sleep in order to be woken up and claim inadvertent and excusable oversight. Further, since the advocate was sleeping, why did the Plaintiff also sleep instead of going to wake up his advocate? That was something the Plaintiff could have done with benefit, yet he also slept until the Defendants woke his Advocate up**…"*

19. The appellant has not demonstrated that the court took into account irrelevant considerations or failed to take into account relevant considerations in reaching that decision. Neither has the appellant demonstrated that the decision is plainly wrong. We do not therefore have any basis for interfering with the decision of the High Court. The result is that the appeal fails. It is accordingly dismissed with no orders as to costs.

Dated and delivered at Nairobi this 7th day of April, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

...…….....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGSITRAR