



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, WARSAME & MAKHANDIA, JJ.A)**

**CIVIL APPEAL NO. 283 OF 2012**

**BETWEEN**

**D. CHANDULAL K. VORA & CO. LTD .....APPELLANT**

**AND**

**KENYA REVENUE AUTHORITY .....RESPONDENT**

*(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Kimondo, J) dated the 30<sup>th</sup> day of April 2012 in H.C.C.C. No. 356 of 2005)*

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**JUDGMENT OF THE COURT**

This is an interlocutory appeal in which the appellant appeals to this Court against the ruling and order of the High Court (**Kimondo, J.**) dated 30<sup>th</sup> April 2012. The said ruling dismissed the appellant's application for review and/or setting aside of an earlier order dated 10<sup>th</sup> February 2012 which dismissed the suit or want of prosecution.

Following the earlier order of dismissal, the appellant took out an application under sections 1A, 1B and 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules seeking to have the order of dismissal, reviewed and/or set aside. The application's main ground was that there was sufficient cause to warrant a review to avoid injustice being meted out on the appellant. Other grounds were that the appellant had made several attempts to fix the suit for hearing without success; that the notice for dismissal was not served on it; that it stood to suffer heavy financial loss and injustice unless the court order was reviewed or set aside. Another important ground in support of the application was that the respondent had admitted owing the decretal sum, hence the suit remained uncontested.

In its supporting affidavit sworn by **Michael Mubea**, learned counsel for the appellant numerated previous instances or attempts to fix the suit for hearing and further annexed various notices inviting the respondent to fix hearing dates though none of the attempts were successful as either the court file could not be traced or the court register for the year had been closed. Further, he deposed that the respondent had previously conceded to the appellant's claim. In the circumstances, it was wholly unjust to dismiss the claim on a technicality and for reasons that were not of the appellant's making.

On its part, **Mr. Paul Muema Maluki**, learned counsel for the respondent in opposing the application deposed that on 7<sup>th</sup> February 2012, the suit was listed and the court invited the parties to appear in court

on 10<sup>th</sup> February 2012 to show cause why the same should not be dismissed for want of prosecution. That on 10<sup>th</sup> February 2012, the appellant's counsel appeared in court without having filed any replying affidavit but presented oral arguments before court justifying why the suit should not be dismissed and ought to proceed to hearing in the normal manner. The respondent also opposed the appellant's application on the grounds that the appellant had adequate time within which to set the suit down for hearing but had failed, neglected and or refused to do so. According to the respondent, it stood to be prejudiced due to the delay since it may not be able to trace and call witness with knowledge of the facts of the suit, and may also be unable to trace the relevant documents.

The learned Judge in his determination found that the appellant had not met the parameters of review as required under Order 45 rule 1 of the Civil Procedure Rules; that there was no new evidence; no error on the face of the record or any other sufficient cause shown to warrant review or setting aside of the order dismissing the suit. The learned Judge therefore dismissed the appellant's application.

Aggrieved by the said decision, the appellant has now approached this Court challenging the ruling and order on grounds that the learned Judge failed to take into account the fact that it was not served with the notice to show cause why the suit should be dismissed; failed to consider the attempts it made to fix the suit for hearing and hence arrived at a wrong decision; failed to appreciate the fact that justice could still be served to the parties in view of the respondent's admission of the claim and its offer to refund the money but without interest and that by dismissing the application, the judge had condoned unjust enrichment by the respondent.

Although both parties agreed to canvass the appeal by way of written submissions, only the appellant duly filed its written submissions. From those submissions, the history of the dispute emerges thus; the appellant after emerging the highest bidder at an auction conducted by the respondent in respect of a consignment of tyres imported by a 3<sup>rd</sup> party, **Kingsway Tyres Ltd**, paid a sum of Kshs.3,880,000 being the action price. However, the 3<sup>rd</sup> party subsequently proceeded to court and obtained an injunction in **Mombasa HCCC No. 461 of 1999** restraining the respondent from releasing the tyres to the appellant on the ground that it had unlawfully auctioned them to the appellant. The respondent filed a defence to that suit asserting that it legally auctioned the tyres in a bid to recover unpaid duty and that since the tyres had already been sold to the appellant, the 3<sup>rd</sup> party's suit seeking to set aside the auction so that it could be allowed to clear the unpaid duty was without merit. It went on to state that the 3<sup>rd</sup> party failed to prosecute the suit for a period of more than five (5) years and the respondent was not keen in pursuing finalization of the suit, since according to the appellant it held both the money and the tyres.

The appellant therefore demanded for a refund of the sum it had paid claiming the sale or contract had been frustrated by the injunction obtained by the 3<sup>rd</sup> party which had lasted in excess of five years. When it became clear that the respondent was not inclined to refund the money, the appellant instituted the suit seeking a refund plus interests. The respondent filed a Defence in response and pleaded that, though it remained ready and willing to release the tyres to the appellant it was prevented from doing so by the court injunction. That reason was not a cogent reason to the appellant and so it sought to have the respondent's defence struck out and judgment entered in its favour, the quest was however unsuccessful.

The suit was thereafter fixed for hearing for two consecutive days i.e. on 13<sup>th</sup> and 14<sup>th</sup> November, 2007 but at the request of the respondent, the hearings were adjourned and the respondent condemned to pay costs. The next hearing was fixed with the consent of the parties for 12<sup>th</sup> June 2008. On that date however, it was taken out on the basis that an out-of-court negotiations were ongoing. A mention date was fixed for 16<sup>th</sup> July 2008 with a view to recording a consent. Ultimately, negotiations broke down since the respondent was only willing to refund the purchase price without interest thereon. Thereafter, the suit was fixed for hearing on 18<sup>th</sup> October 2009 but was taken out of the day's cause list. Thereafter several attempts to fix the suit for hearing in 2011 were unsuccessful on account of the court diary for that year being closed. The appellant subsequently invited the appellant to fix a hearing date on 19<sup>th</sup> January 2012 but that on that day, the file was missing and could not be traced. According to the appellant, it sent another invitation letter to fix a hearing date on 10<sup>th</sup> February, 2012. However, on that date the suit had

been listed for dismissal for want of prosecution. Though counsel for the appellant had not been served with the notice to show cause, he nonetheless appeared when the matter was brought to his attention by his pupil who was in the court registry at the time pursuing the fixing of a hearing date. Counsel explained that he came to know of the dismissal bid that very day. Counsel did not however, apply for an adjournment in order to file a replying affidavit to the notice to show cause but opted to oppose the notice orally. He explained at length the several attempts he had made to set the suit down for hearing of the appeals. It appears the attempts did not persuade the court as it went ahead to dismiss the suit for want of prosecution under order 17 rule 2 of the Civil Procedure Rules.

According to the High Court Judge, a letter to the opposing party to fix a hearing date is not the kind of step contemplated under the aforementioned provisions of the law. That the provisions envisaged a concrete step to progress the suit for hearing.

Following the dismissal aforesaid, the appellant filed the application seeking a review and/or setting aside the order of dismissal; reiterating the above grounds as well as annexing several exhibits and more particularly, the documentary evidence regarding the negotiations in which the respondent acknowledged the appellant's claim and its willingness to refund the amount minus interest and the respondent's insistence on interest, hence the stalemate. In the main, therefore the appellant anchored the application on sufficient cause.

The respondent opposed the application for review on the ground that the notice to show cause had in fact been posted on the Judiciary's website and so the appellant could not claim lack of service or knowledge of the notice which had been taken out by court *suo moto*. That it would be prejudiced in its defence of the suit because it would not be able to trace and call witness with the knowledge of the matter as well trace all the relevant documents.

As already stated, the learned Judge was impressed by the appellant's plea.

Accordingly, he dismissed the application hence this appeal.

According to the appellant, the key issue for determination by this Court was whether the Judge, taking all relevant facts into consideration correctly exercised his discretion in dismissing the appellant's application for review based on the principles espoused in **Mbogo & Another v Shah (1968) EA 93**. The appellant also cited the case of **Ivita v Kyumbu (1984) KLR 441** where the High Court considered the test applied by the courts in application for dismissal of a suit for want of prosecution. These were; whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay. Thus even if the delay was prolonged, and the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the suit 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. The appellant's contention is that the Judge did not bear in mind these considerations and accordingly exercised his discretion injudiciously. It was further submitted that it was also up to the respondent to prove prejudice that may be suffered and must also demonstrate that justice will not be served due to the prolonged delay on the part of the plaintiff.

The appellant also submits that in considering reinstatement, this Court must be cognizant of mistakes by counsel which courts have held should not be visited upon a litigant. It relied on the cases of **Phillip Chemowolo & Another v Augustine Kubede (1982-88) KAR 103** and **Belinda Murai & Another v Amos Wainana (1978) LLR 2782** in support of this proposition. The appellant faults the Judge for failing to find that there was lack of sufficient notice regarding the listing of the suit for want of prosecution and lack of evidence of service of the notice to show cause to the appellant. That as per order 17 rule 2 of the Civil Procedure Rules, the court was obliged to give notice to both parties to show cause why the suit ought to be dismissed for want of prosecution. The appellant further faults the learned Judge for failing to take into account the various attempts made to set the suit down for hearing. That at the time of dismissing the suit, the court file before the Judge did not contain the letters of 8<sup>th</sup> October 2009, 13<sup>th</sup> November 2009 and 20<sup>th</sup> January 2009 inviting the respondent to fix a hearing. That as it were, the suit was ready for hearing and the appellant was all along ready to prosecute the case with the only

impediment being securing a hearing date.

The appellant also contends that no prejudice would be occasioned to the respondent if reinstatement was granted given the undisputed facts of the case and the respondent's offer to settle the suit out of court by refunding the money paid to it for the tyres but without interest. According to the appellant, the completion of the transaction had been frustrated. As such, the only issue not agreed on was whether the respondent ought to refund the purchase price with interest. In conclusion, the appellant submits that judicial discretion must be exercised upon facts and not on whims or caprice and that the court exercising such discretion is bound to consider various factors with its main concern being to do justice to both parties. That a court should not impose conditions on itself or fetter the wide discretion given to it.

As already pointed, both parties agreed to canvass this appeal through written submissions but only the appellant duly filed its submissions as summarized above. The respondent however did not file any written submissions and even there was no representation on its behalf during the oral hearing of the appeal. This appeal therefore proceeded as unopposed.

Considering the appeal and the submissions on record, the sole issue for consideration by this Court is whether the learned Judge exercised his discretion in dismissing the appellant's application for review judiciously. In undertaking this exercise, the Court ought to bear in mind the factors upon which it can interfere with the discretion exercised by a single judge. The factors have been espoused in many cases. In **Mbogo & Another V Shah (1968) EA 93** at page 95, Sir Charles Newbold P. held;

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

For similar propositions, in **Matiba v Moi & 2 Others, (2008) 1 KLR 670**, the Court of Appeal stated that;

**“The High Court was exercising discretion and the Court of Appeal was not entitled to substitute the Judges' discretion with its own discretion. It had to be shown that the Judges' decision was clearly wrong because he misdirected himself or because he acted on matters on which he should not have acted on or because he failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong decision”.**

Order 45 rule 1 of the Civil Procedure Rules gives the High Court discretionary power to allow review on the three limbs therein stated. An applicant may bring an application for review upon discovery of new and important matter; where there is a mistake or error on the face of the record or for any other sufficient reason. The appellant's application was hinged on the last ground, that there existed sufficient reason or cause to warrant the court not to order dismissal of the appellant's suit for want of prosecution. Sufficient reasons meant under the said order and rule have been the subject of discussion in several authorities. For instance, in **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR**, this Court quoted with approval the case of **Wangechi Kimata & Another vs. Charan Singh (C.A. No. 80 of 1985)** (unreported) wherein this Court held that;

**“any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the Civil Procedure Act; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”**

The sufficient reasons according to the appellant are varied according to its affidavits as well as written submissions. The appellant takes the view that there had been several attempts to fix the matter for hearing; that the notice to show cause was not served upon it; that it had a good case against as the

respondent in effect admitted its claim and the sticking point was only interest; that it stands to suffer heavy financial losses if the suit was dismissed. However, the main reason why the Judge should have exercised his unfettered discretion in his favour on the application was that respondent had admitted the claim. The appellant has annexed on the application the correspondence exchanged leading to the admission and offer to settle the claim but minus the interest. To our mind, if this does not amount to sufficient cause, we do not know what else can be.

The appellant too has endeavored to show the steps it took to set the suit down for hearing. In an affidavit in support of its application, the appellant exhibits a hearing notice dated 6<sup>th</sup> February 2009. It then attaches letters inviting the respondent for date fixing dated 8<sup>th</sup> October 2009, 13<sup>th</sup> November 2009, 20<sup>th</sup> January 2009, 1<sup>st</sup> March 2011, 11<sup>th</sup> January 2012 and 3<sup>rd</sup> February 2012. According to the Judge however, a letter to the opposite party to fix a date is not the kind of step contemplated at Order 17 of the Civil Procedure Rules. That may be so. However, there were reasons advanced by the appellant as to the failure that deserved some interrogation by the Judge.

The appellant has also claimed that the notice to show cause was not served upon it. In its submissions, the appellant opines that though the wording of order 17 rule 2 (1) of the Civil Procedure Rules is not couched in mandatory terms, it is practice that notice be given to parties before dismissal of a suit. The appellant denied service of a notice to show cause. Indeed, a perusal of the record does not show whether there was an inquiry as to whether or not the appellant's advocates were served with a notice to show cause. Though the appellant's advocates Mr. Mubea did appear when the matter was listed for dismissal, he stated that he did not have the file so as to refer the Judge appropriately to the attempts that he had made in trying to set the suit down for hearing. It may be pointed out that the decision by counsel for the appellant to proceed and to respondent to the notice to show cause on a whim and orally might not have been prudent. That a better way would have been to seek an adjournment and then formally reply to the notice through a replying affidavit. That might as well be so but according to counsel, there was no time to file a replying affidavit. However, his decision to proceed that way might have been prejudicial to the appellant especially if the fact of the respondent's acknowledgment of the claim is taken into account.

In our jurisdiction, courts have been cautious and slow to visit mistakes of counsel on a litigant. In the case of **Habo Agencies Limited v Wilfred Odhiambo Musingo [2016] eKLR**, the Court of Appeal cited with approval the English case of **Gatti -v-Shoosmith (1), [1993] 3 All E.R. 916**, wherein it was observed that there is nothing in the nature of mistake to exclude it from being a proper ground for not allowing it as an effective ground to grant leave to appeal. Whether a mistake should be treated as good ground must depend on the facts of each case and there may be facts in a case which would make it unjust to allow a party to succeed on the ground of mistake of counsel.

We must in this determination then examine whether the mistake of counsel, indeed is being visited on an innocent litigant. The appellant cited the case of **Belinda Murai & Others v Amos Wainaina** (supra) where it was held that a door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The appellant also cited the case of **Phillip Chemowolo** (supra) where it was held that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit. That courts exist for the supreme purpose of deciding rights of the parties and not for the purposes of imposing discipline.

In their plea before the High Court the respondent stated that it would be prejudiced if in spite of the delay occasioned the suit was allowed to proceed to trial since it would not be able to trace and call witness with history and knowledge of the facts of the dispute and that it would not be able to trace all the relevant documents; an allegation that was accepted by the learned Judge. According to the Judge, the respondent would be prejudiced in getting a fair trial. It is trite that a party alleging prejudice must prove it. In **Ivita v Kyumbu** (supra) it was held that a defendant must satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced.

In considering whether indeed the respondent would be prejudiced, let us revisit the circumstances of the case. The appellant paid Kshs. 3,880,000/- when it emerged the highest bidder at a public auction conducted by the respondent for a consignment of tyres. However, the hitherto owner of the tyres filed

suit in the High Court at Mombasa alleging wrongful sale of the tyres and successfully obtained injunctive orders against the respondent pending the determination of the suit. The appellant alleged failure of consideration and or frustration of the sale as a result and demanded refund of the amount paid. The respondent dithered forcing the appellant to file suit against the respondent, after a period of six years, seeking a refund and interest. The respondent in its defence stated that it was restrained from releasing the tyres by the order of injunction obtained by the third party. At some point during the pendency of the suit, the respondent proposed to settle the matter out of court by refunding the amount paid to the appellant but minus interest.

According to the respondent, the demand for interest by the appellant was untenable since according to it, the basis for selling the tyres was to recover government revenue and was not meant as a commercial venture. As such, and without preempting the trial in the High Court, the central issue in the trial would be whether the appellant was entitled to interest on its monies. In our view, the issue is a general one that can be canvassed without necessarily producing witnesses or documents that are specific or relevant to the suit, they require only witnesses knowledgeable in such matters. In other words, the question whether interest would be applicable in the circumstances of this case can still be ventilated through witnesses and/or documents that were not specific to the transaction. The respondent's argument that it might not be able to trace relevant witnesses or documents does not therefore suffice.

On the other hand, the prejudice that may be suffered by the appellant is apparent. It stands to lose the whole amount paid for the tyres that were never delivered on account of a total failure of the respondent. A court of justice cannot allow a party to benefit from its own fault to the detriment of the innocent party. In this scenario, it is prudent to consider whether locking out the appellant from the seat of justice is justifiable and whether it might as well be considered as visiting the sins of counsel on an innocent litigant. We think that this will be ultimate result if we were not to intervene and allow this appeal. It is clear to us and beyond peradventure that in refusing to allow the application on grounds of sufficient cause, the learned Judge did not exercise his discretion judicially in the circumstances.

The main consideration for courts is do justice to the parties in a suit. The discretion to dismiss a suit or strike out an appeal or pleadings generally should be exercised sparingly and judicially and only in deserving cases which cannot be mitigated. The practice nowadays is to elevate substantial justice to the parties over and above the strictures of rules of procedure, which have been stated to be mere hand maidens of justice. This is especially in view of the saving provisions under sections 1A, 1B and 3A of the Civil Procedure Act, which had been invoked by the appellant. More so Article 159 (2) (d) of the Constitution obligates courts and tribunals to exercise judicial authority without undue regard to technicalities. In **Abdirahman Muhumed Abdi v Safi Petroleum Products Ltd. & 6 others, Civil Application No. Nai. 173 of 2010**, quoted with approval in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others (2013) eKLR**, a notice of appeal was served on the respondent out of time and without leave of the court, upon being asked to strike it out, the Court of Appeal stated as follows;

**“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice.....**

**In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The 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 if the court strikes out its document. The court in that regard exercises judicial discretion.***”

No doubt the appellant or its representatives should have been more prudent or keen in the prosecution of its suit. However, as at 3rd February 2012, the appellant was still inviting the respondent to fix a hearing date and showing attempts to prosecute the suit. This was before the suit’s dismissal on 10<sup>th</sup> February 2012. In our view, there cannot be said to be an inordinate delay in the scenario as such. The attempts to set the suit down for hearing ought to count for something and it was wrong for the High Court to brush them off as inconsequential. To avoid injustice to either party in the circumstances of this case, and to prevent prejudice to one party, justice behooves this Court to allow this appeal. In **Essanji & Another v Solanki (1968) EA 218** it was observed;

**“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that error and lapses should not necessarily debar a litigant from the pursuit of his rights.”**

Taken in totality, the circumstances herein should entitle the parties in this suit to have their day in court to fully ventilate the claims they have against each other and bring it a meritorious closure. This is especially since a hearing would cause no greater prejudice to either party. However, lack of it, would greatly prejudice the appellant.

The appeal in view of the above is allowed with costs to the appellant. The Ruling and order of **Kimondo, J.** is set aside and substituted with an order allowing the notice of motion dated 23<sup>rd</sup> February, 2012 with costs to the appellant as well.

**Dated and delivered at Nairobi this 15<sup>th</sup> day of December, 2017.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**M . WARSAME**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**