IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MWILU & OTIENO-ODEK, JJ.A)

CIVIL APPEAL NO. 80 of 2007

BETWEEN

RAJESH RUGHANI ……..……. APPELLANT

AND

FIFTY INVESTMENTS LIMITED ……..…..…….. 1st RESPONDENT

KEMBI & MUHIA ADVOCATES ……..……..…… 2nd RESPONDENT

(An appeal from the Ruling/ judgment of the High Court of Kenya at Nairobi (O.K. Mutungi J.) dated 3rd October 2005

in

H.C.C.C No. 3038 of 1996)

****

JUDGMENT OF THE COURT

1. This appeal is against a ruling delivered by the High Court dismissing the appellant's suit for want of prosecution. The appellant ***RAJESH RUGHANI*** filed suit against the respondents by way of plaint dated 9th December 1996. Summons to Enter Appearance was served in September 1998 and defence entered on 22nd September 1998. Pleadings closed on 24th October 1998. The appellant neither set down the suit for hearing nor prosecuted the same. On 7th April 2005, the respondents moved the High Court under the then ***Order 16 Rule 5 (a)*** and ***(d)*** and ***Order 50 Rule 1*** of the **Civil Procedure Rules** seeking an order for dismissal of the appellant's suit for want of prosecution. Upon being served with the application to dismiss the suit for want of prosecution, the appellant filed a list of documents on 30th May 2005 together with a signed list of issues.

2. Upon hearing the parties, the learned judge O. K. Mutungi, J. dismissed the appellant's suit for want of prosecution. In dismissing the suit, the judge held that the delay in setting down the suit

for hearing and prosecuting the case was inordinate and the appellant had not, to the satisfaction of the court, explained the delay. The appellant blamed the delay on its former advocate on record; the appellant urged the trial court to find that delay and inaction on the part of counsel should not be visited on the innocent client. In rejecting the argument, the judge held:

"…The above line of thinking no longer holds water and in my view it is the duty and right of any litigant to put pressure on his counsel to have the suit prosecuted earliest possible. If counsel can't rise to the task, the plaintiff has the power and the right to dismiss such an advocate and get the services of another…It must always be remembered it is the plaintiff's suit, not the advocate's, which risks dismissal for want of prosecution. Put differently, it is not acceptable for a plaintiff to hide behind his counsel's inaction, for such a defence is tantamount to an admission or collusion with his advocate, not to prosecute the suit as required by law…. In the present case, the delay is unquestionably unexplained other than that counsel on record took no action. I have expressed myself on that lame excuse….I dismiss the suit herein for want of prosecution in terms of the provisions of Order 16 rule 5 of the Civil Procedure Rules."

3. Aggrieved, the appellant has lodged the instant appeal citing the following grounds:

"i. The judge erred in law in not ascertaining who was the advocate on record up to and including 27th May 2005 and by failing to appreciate that the present advocate was appointed on that date and had no knowledge of the suit up to then;

ii. *The judge failed to appreciate that by dismissing the appellant's suit he denied the appellant the right to be heard on a matter of complexity;*

iii. *The judge failed to appreciate that under the provisions of Order XVI, the respondent could have set down the suit for hearing but instead opted for dismissal thereby denying the plaintiff/appellant the right for adjudication and fair determination;*

iv. *The judge erred in failing to appreciate that in equity and justice, negligence on the part of an advocate should not be visited on a client;*

v. *The learned judge misinterpreted the dicta in the case of IVITA -v- KYUMBU (Civil Suit No. 340 of 1971).*

vi. *The learned judge failed to explain and misdirected himself in law in making an equivocal finding that the appellant's submissions before the trial court were unfortunate and callous; the judge erred in making unsolicited findings of collusion thereby indicating that he was giving evidence in the suit.*

vii. *The judge erred by stating that the respondent had suffered mental torture by reason of delay in prosecuting the case and failed to direct himself to know why the appellant took no steps to proceed with the hearing."*

4. At the hearing of this appeal, learned counsel Mr. Rustam Hira appeared for the appellant while learned counsel Ms Wambui Njogu appeared for the respondent. Counsel filed written submissions and list of authorities.

5. The appellant emphasized that his present counsel came on record on 30th May 2005 and could not be faulted for the acts of the previous advocate who had been terminated for inaction; that mistake of counsel should not be visited upon a client; that the learned judge misdirected himself in considering only the prejudice to be suffered by the respondent whilst ignoring the prejudice to be suffered by the appellant in dismissing the suit; the judge failed to appreciate that at stake was money being held by the 2nd respondent as stakeholder and that the right of hearing should always be protected; the judge failed to appreciate that the respondent could adequately be compensated by way of costs if the application for dismissal of suit was disallowed; that the wordings of the

ruling show that the judge had made up his mind without asking any explanation from the parties; that the judge forgot he was an arbiter and not a witness giving evidence and acted as if he was a party to the proceedings arguing the respondent's case.

6. The appellant cited the case of **Abdirahaman Abid -v- Safi Petroleum Products & 6 others, Nairobi Civil Application No. NAI 173 of 2010** to support submission that days are long gone when a court could strike out pleadings regardless of the length of delay; that enactment of ***Sections 3A*** and ***3B*** of the **Appellate Jurisdiction Act** and ***Article 159 (2) (d)*** of the 2010 Constitution changed the position and presently, a court is not bound by technical rules but has to weigh prejudice to be suffered by the offending party before striking out any pleading or document. Citing the case of **Richard Nchapi Leiyegu -v- IEBC & 2 Others Civil Appeal No. 18 of 2013**, the appellant urged this Court to note that the right to a hearing has always been a well protected right and is the cornerstone of the rule of law. We were urged to follow the decision in **Wangulu Enterprises Limited v-Abdalla Said Kugotwa & 6 Others Civil Appeal No. 9 of 2014** where a suit that had been dismissed was reinstated by this Court. Counsel cited the decision in **Tana and Athi Rivers Development Authority -v- Jeremiah Kimigho Mwakio & 3 Others Civil Appeal No. 41 of 2014** in support of the proposition that mistake of counsel should not be visited upon an innocent litigant.

7. The respondent in opposing the appeal urged that the appellant has laid blame squarely on his former advocate without indicating what steps, if any, he took to ensure that the suit was set down for hearing and prosecuted. Citing the persuasive authority of **Edney Adaka Ismail -v- Equity Bank Limited (2014) eKLR,** the respondent submitted that a suit belongs to the litigant and not his advocate and a litigant has duty to pursue the prosecution of his case. Counsel submitted that the respondent has never acquiesced to the delay in prosecuting the suit and as held in **Ivita -v- Kyumbu (1984) KLR 441,** inaction on the part of the respondent to take out an application for dismissal of the suit for want of prosecution does not amount to acquiescence. The respondent citing dicta in **Marangu Rucha & Another - v- Bernadette Muthina Nzioki & Others (2015) eKLR** submitted that whereas mistake of an advocate is one of the factors to be considered, the mistake must be an excusable mistake for it to inure to the benefit of an applicant. Counsel submitted that there was no satisfactory excuse given for the inordinate delay in prosecuting the appellant's suit. On prejudice, the respondent submitted that the appellant filed suit in 1996 and did not take any steps to prosecute the same; that to reinstate the suit after twenty (20) years would cause great prejudice to the respondents. Counsel urged this Court to follow the decision in **Eliud Munyua Mutungi -v- Francis Murerwa (2014) eKLR,** where this Court recognized that it would be against the interests of justice to reinstate a suit that had been filed twenty years before.

8. The appellant by way of rejoinder submitted that whether delay is inordinate or not, inexcusable or not, is a relative matter which does not apply to the present case. Counsel submitted that a look at the plaint shows that the main claim of the appellant against the respondents relates to a sale agreement and the issue is whether the completion period had expired and whether the deposit of Kshs.2 million paid under agreement could be forfeited; it was submitted that there was no prejudice to be suffered by the respondents because the sum of Ksh. 2 million was deposited and is being held by the respondents as stakeholders and the respondents are thus well secured; it was submitted that there was a variation agreement between the parties and the respondent had been given notice to return the deposit.

9. Replying to the rejoinder, the respondent emphasized that the appellant had been given ample opportunity to canvass any matter in the suit but choose not to do so through unexplained inordinate delay in setting down the suit for hearing with the result that the respondent exercised its right to have the suit dismissed for want of prosecution; that the appellant in making reference to the plaint and the deposited sum of Kshs.2million is misdirecting this Court to go into the merits of the suit which it should not do.

10. We have considered the grounds of appeal and the written submissions filed as well as the authorities cited. The instant appeal is against exercise of discretion on the part of the trial judge to

dismiss the appellant's suit for want of prosecution. An appellate court will not interfere with the exercise of discretion by a lower court unless the exercise of that discretion was erroneous in law. This is well captured in **Mbogo & Another -v- Shah (1968) EA 93 at 96**, where it was stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which the court should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

11. The test for dismissal of a suit for want of prosecution is stated in the case of **Ivita -v- Kyumbu (1984) KLR 441)**. The test was expressed as follows:

"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 the 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 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 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."

12. Keeping the foregoing test in mind, we are cognizant of the decisions of this Court on mistakes by counsel. In **Phillip Chemowolo & Another -v-Augustine Kubede (1892-88) KAR 103 at 104**, Apalloo, JA observed that it does not follow that "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 purpose of deciding rights of the parties and not the purpose of imposing discipline." In **Belinda Murai & Others - v- Amos Wainaina (1978) LLR 2782 (CALL)** Madan, JA stated that "the door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better."

13. In the instant appeal, the question is whether the appellant has given a satisfactory explanation for the over five (5) years delay in prosecuting the suit before the High Court and whether the delay was inordinate. The learned judge held that the delay was inordinate and no excusable and satisfactory explanation was given. The appellant in explanation for the delay states that it is due to inaction on the part of his previous advocate. In the memorandum of appeal, an explanation is offered by the appellant's present advocate stating that he was not on record at the material time; that he had no knowledge of the suit up to 30th May 2005 when he came on record.

14. In our analysis, the present advocate on record offers no explanation for the delay in prosecuting the suit between 24th October 1998 when the pleadings closed and 7th April 2005 when the application to dismiss the suit for want of prosecution was made. The period between these two dates needs explanation as this is the period of delay. Our re-evaluation of the record shows that no satisfactory explanation for the delay between 24th October 1998 and 7th April 2005 has been given; all that is stated is that the delay is due to inaction by the appellant's former advocate on record. There is no evidence on action taken by the appellant as the litigant and owner of the suit; all the appellant did was to change advocates in May 2005 after the delay; there is no explanation for inaction on the part of the appellant himself as the litigant who took the risk that his suit could be dismissed for want of prosecution.

15. Chesoni, J. in the persuasive decision of **Ivita -v- Kyumbu Civil Appeal No. 340 of 1971** dismissed a suit for want of prosecution due to a 4 ½ year delay and stating that where an action has been dormant for twelve months or more, a defendant is entitled to dismissal of the suit for want of prosecution unless the plaintiff shows sufficient reasons for non-dismissal. In **Paxton -v- Allsopp (1971) 3 All ER 370 at 371** it was reiterated that when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other or to both, the court may in its discretion dismiss the action straight away. In **Habo Agencies Limited -v- Wilfred Odhiambo Musingo [2015] eKLR** this Court stated that it is not enough for a party in litigation

to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. In **Mwangi -v-Kariuki (199) LLR 2632 (CAK)** Shah, JA ruled that mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude. In the instant case, there is nothing on record to show what action the appellant took between 24th October 1998 and 7th April 2005 to ensure that the suit he had filed at the High Court was prosecuted. There is no credible explanation for the delay by the appellant's former advocate.

16. Our re-evaluation of the record leads us to conclude that no credible, satisfactory and sufficient explanation for delay has been given. It is insufficient to blame previous counsel on record without an explanation as to the action taken by the litigant to show he did not condone or collude in the delay. It is our considered view that the judge did not err in finding that the delay was not only inordinate but unexplained. Guided by the dicta of this Court in **Habo Agencies Limited -v-Wilfred Odhiambo Musingo (2015) eKLR** and in **Mwangi -v- Kariuki (1999) LLR 2632 (CAK)** , we come to the conclusion that this appeal has no merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 29th day of January, 2016

W. KARANJA

……...……..

JUDGE OF APPEAL

P. M. MWILU

……...……

JUDGE OF APPEAL

J. OTIENO-ODEK

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR