IN THE COURT OF APEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A

CIVIL APPEAL NO. 53 OF 2015

BETWEEN

COAST DEVELOPMENT AUTHORITY...……..……APPELLANT

AND

ADAM KAZUNGU MZAMBA & 49 OTHERS…….……..……..….RESPONDENTS

(Appeal from the ruling and order of the Environment & Land Court at Malindi, (Angote, J.) dated 6th February 2015

in

ELCC No. 76 of 2011)

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JUDGMENT OF THE COURT

The appellant, ***Coast Development Authority***, is aggrieved by the ruling and order of the Environment and Land Court ***(ELC)*** at Malindi ***(Angote, J.),*** dated 12th August 2014. By that ruling the learned judge dismissed the appellant's application to set aside an earlier order of that court dismissing its suit with costs on account of the appellant's failure to list the same for hearing within 90 days as ordered by the court. The court also dismissed the appellant's prayer for extension of time within which to set the suit down for hearing. While the appellant contends that the learned judge erred in the manner in which he exercised his discretion, the respondent submits that the exercise of discretion was judicious, leaving no room for interference by this Court.

By way of background, the appellant is a public corporation established by the ***Coast Development Authority Act, cap 449,*** with among others, the responsibility of planning and coordinating the implementation of development projects in the Coast Province and the Exclusive Economic Zone. From the paltry information available in the record of appeal, the appellant is also the registered proprietor of the parcel of land known as ***LR No. 10841*** in Malindi. In June 2011 the appellant filed ***ELC Case No. 76 of 2011*** against the respondents claiming that they had encroached and trespassed on the said property and sought an order for their eviction. The respondents filed a defence to the claim on 7th May 2013 claiming, *inter alia*, that they had been in occupation of the suit property from time immemorial.

On 11th July 2013, the ELC gave directions on the hearing and disposal of the suit requiring the appellant

to set down the suit for hearing within 90 days from that date, failing which the suit would stand dismissed. It is common ground that the appellant did not set down the suit for hearing within 90 days. However, the appellant succeeded in listing the suit for hearing on 24th February 2014, which it is conceded was outside the 90 days set by the Court. On the latter date, it appears that the respondents took an objection to the suit, contending that since the appellant had failed to set it down for hearing within the 90 days as ordered by the court, the same stood dismissed, a position which the ELC agreed with.

By an application dated 12th August 2014 brought principally under ***Article 159 (2) (d)*** of the ***Constitution*** and ***Section 3A*** of the ***Civil Procedure Act,*** the appellant applied to the ELC to set aside the order of 11th July 2013 and to enlarge the time within which the appellant was to set the suit down for hearing. The application was based on the grounds that the applicant had endeavoured to set down the suit for hearing; that its efforts were frustrated by non-availability of the court file which had gone missing; that the file had previously gone missing and had to be reconstructed; that by a letter dated 25th September 2013 the appellant's advocates had sought Deputy Registrar's, intervention in tracing the court file; that the said latter was not acknowledged on account of the missing file; and that ultimately the file became available and the appellant was able to fix the suit for hearing on 24th February 2015.

The respondents opposed the application raising a host of arguments, key and relevant among them being that the order of dismissal was made after hearing the parties; that the appellant ought to have appealed against the order of dismissal rather than applying to set it a side; that the application was tantamount to an invitation to the court to sit on appeal from its own ruling; and that there was no new matter in the application which was not within the knowledge of the court.

By the ruling dated 12th August 2014 which has precipitated this appeal, the learned judge held that the letter of 25th September 2013 was not presented to the Deputy Registrar; that the suit was set down for hearing outside the period prescribed by the court; that by the time the appellant purported to set the suit down for hearing, there was no suit to set down for hearing; and that there were no good reason why the appellant did not comply with the order of the Court.

The appellant's memorandum of appeal raises 6 grounds of appeal, but in our estimation, the gravamen of this appeal is whether in the circumstances of the case, the learned judge exercised his discretion judiciously. By consent of both parties, this Court ordered the appeal to be heard and determined through written submissions. Although the parties were granted leave to orally highlight the submissions, they elected on the appointed day to rely only on their written submissions.

Relying on Article 159 of the Constitution, section 3A of the Civil Procedure Act and Order 50 rule 6 of the Civil procedure Rules, the appellant submitted that the trial court had jurisdiction to set aside the order dismissing the suit and to extend time for the listing and hearing of the suit. In addition it was contended on the authority of ***Maina v. Mugiria, CA. No. 27 of 1982***, ***Patel v. East Africa Cargo Handling Services Ltd [1974] EA 75***, and ***Richard Ncharpi v. IEBC & Others, CA. No. 18 of 2013*** that there was no restriction on the discretion of the judge and that the primary concern of the court was to do justice to the parties.

It was the appellant's further argument that it had placed before the court the explanation for its inability to set the suit down for hearing within the period prescribed by the court and that the learned judge had erred by rejecting the explanation offhand, particularly given the fact that the file had disappeared earlier on and had to be reconstructed, a fact which was not disputed.

Next the appellant submitted that the dismissal of the suit had the effect of literally depriving it of property without a hearing in a situation where the respondents would have been sufficiently compensated by award of costs.

Lastly the appellant submitted that the trial court erred by failing to strike out all the documents filed by the respondents' advocate because at the material time he did not hold a valid practicing certificate as required by the ***Advocates Act***. ***Kenya Power & Lighting Co Ltd v. Chris Mahinda, CA. No. 148 of 2004***

was relied upon in support of that proposition.

The respondent opposed the appeal submitting, as far as is relevant to this appeal, that on the authority of ***United India Insurance Co Ltd & Others v. East African Underwriters Ltd*** ***[1982-88] 1 KAR 639*** and ***Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others*** ***[2003] KLR 125*** this Court will not substitute its discretion for that of the trial court and that it will only interfere with exercise of discretion by the trial court in exceptional circumstances where the exercise of discretion is plainly wrong. In this case, the respondent argued, there was no basis for holding that the trail judge had not exercised his discretion judiciously. In addition, it was contended, that the appellant had not put forth any good explanation for its failure to set the suit down for hearing within the time set by the court. We were urged to uphold the maxim that justice delayed is justice denied and the principle that litigation must come to an end.

Lastly the respondent asked us to ignore the appellant's submissions as they were also filed out of time. This issue was raised in the written submissions to which, in view of the order of the Court regarding the filling and service of the written submission, the appellant did not have an opportunity to respond.

We have duly considered the appeal, the submissions by learned counsel, the authorities cited and the law. We shall first dispose of the issue of the respondents' counsel's practicing certificate. The appellant, with the leave of the court raised this issue and the respondents' counsel filed a replying affidavit after obtaining corresponding leave, to which he attached his practicing certificate issued on 11th September 2015. Even if it is assumed that at the material time the respondents' counsel did not hold a valid practicing certificate, that *per se* would not invalidate the pleadings prepared and filed by the advocate. The Supreme Court has finally settled that age-old question in ***National Bank of Kenya Ltd v. Anaj Warehousing Ltd, Petition No. 36 of 2014,*** by holding that documents drawn by an advocate who does not, at the material time, hold a valid practicing certificate, are not null and void; it is the advocate who is liable to civil and criminal sanctions for practicing without a valid certificate. The Supreme Court expounded the principle thus:

"The transgressor, in our view, is the advocate, and not the client. The illegality is the assumption of the task of preparing the conveyancing document, by the advocate, and not the seeking and receiving of services from that advocate. Likewise, a financial institution that calls upon any advocate from among its established panel to execute a conveyance, commits no offence if it turns out that the advocate did not possess a current practicing certificate at the time he or she prepared the conveyance documents. The spectre of illegality lies squarely upon the advocate, and ought not to be apportioned to the client."

The effect of the above judgment, which by virtue of ***Article 163(7)*** of the ***Constitution*** is binding on all courts except the Supreme Court itself, is to overrule the holdings in ***Kenya Power & Lighting Co Ltd v. Chris Mahinda*** ***(supra)*** and ***National Bank of Kenya Ltd v. Wilson Ndolo Ayah, CA No. 119 of 2002***, which the appellant seeks to rely on.

The central issue in this appeal is whether there is basis for interfering with the exercise of discretion by the trial judge. The decisions of this Court are consistent that when an appeal questions exercise of discretion by the trial court, this Court will be slow to interfere unless it is demonstrated that indeed grounds for interference exist. In ***Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others*** ***(supra),*** this Court restated that an appellate court will only interfere with the exercise of judicial discretion by a trial court if satisfied either that:

(a) the judge misdirected himself on the law; or

(b) he misapprehended the law; or

(c) he took into account considerations which he should not have; or

(d) he failed to take into account considerations which he should have;

(e) the decision was plainly wrong.

The Court has also consistently held that since the discretion exercised by the trial court properly belongs to that court rather than to the appellate court, this Court will not interfere with the exercise of discretion by the trial court simply because had it been sitting in the first instance, it could have come to a different conclusion from the trial court. (See ***United India Insurance Co. Ltd & Others v. East African Underwriters Ltd, (supra).***

Back to the merits of this appeal. There is no dispute that on 11th July 2011 the ELC directed the appellant to set down its suit for hearing within 90 days. It is also not in dispute that the appellant did not comply with that order. The explanation that it gave, of the missing court file, was considered and rejected by the trial court. The real question, in our view, is whether the learned judge considered all the relevant factors before dismissing the suit.

The first relevant factor which appear not to have been considered was that despite failure to set the suit down for hearing within 90 days as ordered by the court, the suit was nevertheless set down for hearing on 24th February 2014. Secondly the trial court did not consider the effect of Article 159 (2) (d) of the Constitution and the Overriding Objective set out in ***section 3*** of the ***Environment and Land Court Act*** before dismissing the appellant's suit. Article 159 (2) (d) demands that justice shall be administered without undue regard to technicalities. In ***Salat v. IEBC & 7 Others, Petition No. 23 of 2014***, the Supreme Court reiterated that the above constitutional provision accords precedence to substance, over form and in ***Lamanken Aramat v. Harun Maitamei Lempaka, Petition No 5 of 2014*** the same Court observed that a court dealing with a question of procedure, where jurisdiction is not expressly limited in scope, may exercise discretion to ensure that any procedural failing that lends itself to cure under Article 159, is indeed cured. The Court concluded thus:

"The Court's authority under Article 159 of the Constitution remains unfettered, especially where procedural technicalities pose an impediment to the administration of justice."

As regards the overriding objective, the ELC Act provides that its principle objective is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes and enjoins the court to discharge its functions so as to give effect to the overriding objective. Speaking to the essence of the overriding objective in the context of the Civil Procedure Act, which is in the same terms as the ELC Act, this Court stated as follows in

E. Muriu Kamau & Another v. National Bank of Kenya Ltd., CA No. 258 of 2009 (UR180/2009):

"The courts including this Court in interpreting the Civil Procedure Act or the Appellate Jurisdiction Act or exercising any power must take into consideration the overriding objective as defined in the two Acts. Some of the principle aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of all is maintained and that as far as it is practicable to place the parties on equal footing. (Emphasis added)**"**

While it is accepted that both Article 159 and the Overriding objective are not a panacea in all and sundry situations of breaches of orders of the court or rules of procedure, they are nevertheless fundamental provisions that a court must pay due regard to before taking the drastic action of dismissing a suit without affording a party an opportunity to be heard, on account of technical breaches committed by the party. In this instance, the learned judge, unfortunately did not advert to any of these important issues.

The last consideration, which we think the learned judge ought to have addressed, is whether any prejudice occasioned to the respondents by the appellant's failure to set down the suit for hearing strictly within 90 days could have been ameliorated by award of appropriate costs. A further relevant consideration was the respective prejudices each party stood to suffer; the appellant, a public authority with important developmental mandate in the coast region stood to lose property without the benefit of a

hearing, while the respondents stood to suffer a short delay pending the determination of the dispute, which delay the appellant explained and clearly could have been adequately compensated by award of costs.

In light of the foregoing, we are satisfied that the learned judge failed to address pertinent matters before dismissing the appellant's suit. In the result, we allow this appeal with costs, set aside the order dismissing the appellant's suit, and substitute therefore an order that the said suit shall be heard on priority basis before a judge of the ELC other than Angote, J. It is so ordered.

Dated and delivered at Mombasa this 27th day of May, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

K. M'INOTI

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR