



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, WARSAME & SICHALE, JJ.A)

CIVIL APPEAL NO 31 OF 2008

BETWEEN

ROYAL MEDIA SERVICES LIMITED.....APPELLANT

AND

TELKOM KENYA LIMITED.....1ST RESPONDENT

COMMUNICATIONS COMMISSION OF KENYA.....2ND RESPONDENT

KENYA BROADCASTING CORPORATION.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

NICHOLAS ETYANG.....5TH RESPONDENT

DANIEL MUSAU.....6TH RESPONDENT

FRANCIS WANGUSI.....7TH RESPONDENT

DANIEL WATURU.....8TH RESPONDENT

J.M. KAMUNGE.....9TH RESPONDENT

PHILIP M. KAMANGA.....10TH RESPONDENT

GEORGE KHOJALA.....11TH RESPONDENT

MUSA ETIKO.....12TH RESPONDENT

HENRY WEST.....13TH RESPONDENT

KAREN LANGATA DISTRICT ASSOCIATION.....14TH RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nairobi (Mugo, J.) dated 24th November 2004

in

H.C.C.C No 15 of 2000)

JUDGMENT OF THE COURT

The appellant herein sued the respondents in the High Court seeking various reliefs. After various applications within the suit, the last one was disposed of on 23rd March 2000, and the appellant took no steps to prosecute its suit. Thereafter, by way of a notice of motion application dated 24th June 2004, the 2nd, 5th – 12th respondents applied to have the suit dismissed for want of prosecution on the grounds that the appellant had not moved to prosecute it for a period of over four years. The appellant opposed this application. While admitting that there had been a delay in setting the suit down for hearing, the appellant contended that the delay was justifiable because it had been expected that there would be an amicable settlement of the matter and also because Dr Kamau Kuria, the advocate who had conduct of the matter, was engaged in the Judicial Commission of Inquiry into the Goldenberg Affair which proceedings had taken too long to conclude. The application was allowed, with the result that the suit was dismissed for want of prosecution with costs to the respondent. It is this order that has prompted the present appeal.

The appeal was canvassed by way of written submissions which were to be highlighted before us on 24th November 2015. Despite being served with a notice of hearing, appellants counsel did not appear in Court, which prompted the respondents' counsel to seek a dismissal of this appeal under rule 102(1) of this Court's rules. We shall not take the drastic step of dismissing the appeal but we wish to remind counsel that even if parties have filed written submissions, that does not discharge them from attending court to argue them or to apply to the court to adopt the submissions.

In its rather prolix memorandum of appeal, the appellant bases its appeal on eighteen grounds. The sum of these grounds is that the learned judge misdirected herself on the principles of law applicable to dismissal of suits, and wrongly exercised her discretion in allowing the respondents' application. The appellant contends that because of this erroneous exercise of discretion, its right to a fair trial under section 77 of the retired Constitution of Kenya was contravened. The appellant has therefore urged us to allow this appeal and set aside the decision of the High Court.

The respondents opposed the appeal. They submit that the appellant's actions indicated a clear lack of interest in proceeding with its suit as it failed to appear and argue against the dismissal. The respondent also submit that the reasons proffered by the appellant to justify the delay in fixing the suit for hearing were not credible and that the learned judge was right in dismissing the suit.

We have considered the grounds of appeal and the written submissions filed by the parties as well as the authorities cited. This appeal is essentially against the exercise of discretion on the part of the trial judge to dismiss the appellant's suit for want of prosecution.

It is well settled law that this Court will not interfere with the exercise of discretion by the High Court unless the exercise of that discretion was erroneous in law. In ***Mbogo & Another v Shah [1968] EA 93 at 96***, this Court held that 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, 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.

The principles that a court will consider in deciding whether or not to dismiss a suit for want of prosecution can be found in this

Court's decision in ***Moses Muriira Maingi & 2 others v Maingi Kamuru & another [2013] eKLR (Civil Appeal No. 151 of 2010)*** where this Court adopted the persuasive decision of the High Court in

Ivita v Kyumbu [1984] KLR 441 at where Chesoni, J. (as he then was) held 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 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 however 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 before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff’s excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

In ***Eliud Munyua Mutungi v Francis Murerwa [2014] eKLR (Civil Appeal No. 144 of 2008)*** this Court reiterated that:

The power of the court to dismiss a suit for want of prosecution is a discretionary power, but which should be exercised judicially. In Allen -vs- Sir Alfred Mc. Alpine & sons (1968) ALL ER, the Court of Appeal of England established the following as principles governing applications for dismissal for want of prosecution:

- a. the delay is inordinate;***
- b. the inordinate delay is inexcusable;***
- c. or the defendant is likely to be prejudiced by the delay.***

We have carefully considered the record before us and have noted that for a period of over three years, the appellant took no steps towards the prosecution of its suit. This much was conceded by appellant’s counsel in its affidavit sworn in opposition to the suit. The explanation given by counsel was first, that it had been hoped that the parties would reach an amicable settlement, and that if such a settlement was not reached, then the appellant was prepared to proceed with the suit. We are not prepared to accept this explanation. This to us does not constitute a reasonable explanation as to why, for a period of three years, the appellant took no steps toward the prosecution of its matter.

We have also considered the contention that Dr Kamau Kuria was appointed assisting counsel to the Judicial Commission of Inquiry into the Goldenberg Affair, and while we appreciate the involving nature of those proceedings, we do not accept that this matter could only be handled by Dr Kuria. We think that due to the urgency of the matter, alluded to by the appellant on several occasions, the option to pass over the handling of this suit to another advocate ought to have been considered. To allow the suit to subsist *ad infinitum* or until the appellant’s counsel was available would amount to holding the respondents at ransom, and as we have stated above, the rights of all parties to the suit must be balanced and weighed against the compelling reasons afforded for failure to prosecute the suit. In the premises therefore, we find that the reasons and the explanations given by the appellant for the delay were not reasonable. This leads us to the conclusion that this appeal is without merit and we hereby order it dismissed with costs to the respondents.

Dated and Delivered at Nairobi this 15th day of July, 2016

M. K. KOOME

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is

a true copy of the original

DEPUTY REGISTRAR