



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 84 OF 2014

EUROBANK LIMITED.....APPELLANT

AND

SHAH MUNGE & PARTNERS.....RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi, (Kimondo, J.) dated 17th February 2012

in

HCCC NO. 232 OF 2006)

JUDGMENT OF THE COURT

The **appellant, Eurobank Limited** is aggrieved by the order of the High Court (**Kimondo, J.**) dated 17th February 2012 by which the learned judge dismissed its suit for want of prosecution. It contends that there were no valid grounds for the dismissal; that it was not guilty of inordinate delay in prosecuting the suit; that the decision of the High Court was in violation of its right to be heard; and that on the whole the learned judge exercised his discretion erroneously. The appellant, being of a different mind supports the dismissal of the suit as proper and utterly justified.

By way of brief background to the appeal, on 4th May 2006 the appellant, then under liquidation by the Deposit Protection Fund, filed a suit against **the respondent, Shah & Munge Partners**, claiming a sum of **Kshs.86,290,000/-** being the total amount that the respondent allegedly withdrew from its account with the appellant between 2001 and 2004, thereby creating a debt due and owing to the appellant. The appellant further pleaded that by a letter dated 7th February 2003, the respondent had admitted indebtedness to the appellant to the tune of the said amount. In addition to the said sum, the appellant also prayed for compound interest at the rate of 18% per annum from 5th February 2003 until payment in full and costs. On 1st November 2007 the appellant amended the plaint and pleaded the amount claimed from the respondent to be **Kshs.86,295,280.21**.

By a defence and counterclaim dated 22nd June 2006, the respondent denied liability and pleaded that while it had held various accounts with the appellant, it had not created any debt as alleged or at all. As regards the admission alleged by the appellant, the respondent averred that the letter relied upon by the appellant was a mere offer; that the said offer was not accepted by the appellant; that the same did not constitute admission of liability; and that it was written in ignorance of the fact that the appellant had

wrongfully debited the respondent's accounts and arbitrarily charged interest thereon.

By way of counterclaim, the respondent averred that on 18th July 2001, it took an overdraft of **Kshs.20 million** from the appellant at 32% interest p. a. on amounts within the limit and a penalty interest at 34% interest p. a. on amounts in excess of the overdraft sum. In breach of agreement, the respondent further averred, the appellant varied the interest, charged ledge fees, and debited the respondent's accounts arbitrarily and without consulting the respondent, and also refused to pay interest on credit balances as agreed. Accordingly, the respondent prayed for an account between 1997 and 2003, general damages for breach of contract, and costs.

The appellant delivered its reply to defence and defence to counterclaim on 7th August 2006. Thereafter the appellant filed an application for judgment on admission, which was heard and dismissed, vide a ruling dated 18th September 2009.

What transpired next is what led directly to the ruling resulting in this appeal. On 17th February 2010, counsel for the respondent fixed, *ex parte*, the suit for hearing on 21st September 2010. The suit was listed before the deputy registrar on 30th July 2010 for call-over to confirm the hearing. Only counsel for the respondent was present and the suit was not confirmed for hearing as scheduled. Next, on 18th November 2010 the parties by consent fixed the suit for hearing on 4th April 2011. On 25th March 2011 the matter was again listed before the deputy registrar for call-over to confirm the hearing. On that date the record shows that once again only counsel for the respondent was present, as a result of which the suit was once more taken out of the hearing list for 4th April 2011.

It appears from the record that the next development was a notice issued by the court to show cause why the suit should not be dismissed for want of prosecution. The parties appeared before Kimondo, J. for that purpose on 3rd February 2012 and counsel for the appellant is recorded telling the court that they did not receive the notice to show cause. He successfully applied for adjournment to 17th February 2012 to enable him file an affidavit to show cause why the suit should not be dismissed.

On that date the parties again appeared before Kimondo, J. when counsel for the appellant confirmed having filed the affidavit and informed the court that he had taken steps in the suit within the preceding one year. For his part, counsel for the respondent did not press for dismissal of the suit, but left the issue to the court's determination. In a short, succinct and extempore ruling, the learned judge adverted to previous adjournments of the hearing of the suit, which he blamed on counsel for the appellant and concluded that the appellant had not shown cause why the suit should not be dismissed for want of prosecution. Accordingly he ordered the suit dismissed but did not award costs. The learned judge did not address his mind to the counterclaim. The appellant was aggrieved by the decision of the learned judge and after obtaining leave to appeal on 20th December 2012, preferred this appeal.

Ms. Lubano for the appellant assailed the ruling of the High Court on four grounds, submitting that the learned judge erred by failing to appreciate that one year had not expired since the suit was last scheduled for hearing; by not appreciating the court's role in case management and thereby erroneously dismissing the suit instead of facilitating its hearing and determination; by sacrificing the appellant's constitutional right to a fair hearing on the alter of procedural didact; and by failing to appreciate that the suit could have been confirmed for hearing at call-over even in the absence of counsel for the appellant and the challenges of obtaining an immediate date for the hearing of the suit.

The appellant hinged its case on a number of authorities among them **Allen v. Sir Alfred McAlpine & Sons Ltd [1968] 1 All ER 543** to contend that the learned judge had misapprehended the principles applicable in an application for dismissal of suits for want of prosecution; **Mwangi S. Kimenyi v. Attorney General & Another, HC Misc. S. No. 720 of 2009** for the view that dismissal of a suit for want of prosecution is a drastic action which should be invoked sparingly; **Phillip Chemwolo Another v. Augustine Kubede [1982-88] KAR 103** and **Chevona v. Seventh Day Adventist Church of East Africa Union, NET CS No. 254 of 2009** for the proposition that the courts will not punish litigants for the mistakes of their counsel; **Ngwambu Ivita v. Akton Mutua Kyumbu [1984] KLR 441** and **Agip (K) Ltd v. Highlands Tyres Ltd [2001] KLR 630** for the assertion that the prejudice likely to be suffered by

the respondent is a critical consideration which was ignored by the learned judge and *Biguzzi v. Rank Leisure PLC [1999] 1 WLR 1926* and *Deepak Chamanlal Kamani & Another v. Kenya Anti-Corruption Commission & 3 Others, CA (A) No. 152 of 2009* for the view that the overriding objective obliges courts to deal with cases justly.

In opposing the appeal, *Ms. Onsongo*, learned counsel for the respondent was of the view that the appellant had failed to show cause why the suit should not be dismissed for want of prosecution and therefore could not blame the court. In her opinion, nothing had happened in the suit for a period of almost two years since the dismissal of the appellant's application for judgment on admission. Counsel further submitted that the delay involved was inordinate and that the suit was adjourned twice due to failure by the appellant's counsel to attend the call-over. In counsel's view, it was not enough to merely set the suit down for hearing and then fail to attend the call-over to confirm the hearing date.

It was also contended that the respondent stood to suffer prejudice because of the delay occasioned by the appellant in the conclusion of the suit and that delay of justice was tantamount to denial of justice. Invoking *section 1A* of the *Civil Procedure Act*, it was submitted that the appellant and its counsel had a duty to assist the court to further the overriding objective towards faster disposal of cases, which duty they miserably failed to uphold. To the extent that the learned judge had exercised a judicial discretion, it was urged that this Court should not interfere, in the absence of proof that the discretion was wrongly exercised.

Lastly counsel submitted that there was no violation of the appellant's constitutional right to fair hearing because it was the policy of the Constitution and the law that disputes must be determined expeditiously and that in any event the appellant had been granted the opportunity to list the suit for hearing, which it had squandered. Counsel added that the appellant was in fact heard before the suit was dismissed.

The respondent too relied on several authorities, among them *Eliud Munyua Mutungi v. Francis Murerwa, CA No. 114 of 2008* for the proposition that the power to dismiss a suit for want of prosecution is a discretionary power; *Governors Balloon Safaris Ltd v. Skyship Co. Ltd, HCCC No. 461 of 2008* and *Royal Media Services Ltd v. Telkom Kenya Ltd & 13 Others, CA No. 31 of 2008* for the principles which guide the court in an application for dismissal of a suit for want of prosecution; and *Saarel Investment Ltd v. Pyramid Construction Co. Ltd & Another, HCCC No. 181 of 2010* for the view that the court has inherent power to dismiss dormant suits and that in showing cause why a suit should not be dismissed for want of prosecution, only actual and solid steps to set down the suit for hearing will suffice.

We have anxiously considered this appeal and the illuminating submissions by both learned counsel. *Order 17 rule 2* of the *Civil Procedure Rules* under which the appellant's suit was dismissed for want of prosecution provides thus:

"2.(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order."

It cannot be gainsaid that in determining whether or not to dismiss a suit for want of prosecution, the trial court is exercising a judicial discretion, to be exercised judicially rather than irrationally or capriciously. (See *E.T. Monks & Co. Ltd v. Evans [1985] KLR 584* and *Eliud Munyua Mutungi v. Francis Murerwa (CA No. 144 of 2008 (Nyeri))*). Essentially, therefore, this is an appeal against exercise of discretion by the learned judge. The guiding principle in that respect is that an appellate court will not interfere with

exercise of discretion by the trial court unless it is demonstrated that the trial court misdirected itself, or considered matters it should not have considered, or failed to take into account matters which it should have taken into account, and in so doing arrived at the wrong decision. (See **Mbogo & Another v. Shah (1968) EA 93** and **United India Insurance Co. Ltd v. East African Underwriters (Kenya) Ltd [1985] E.A 898**).

The rationale behind Order 17 rule 2 is the eminently rational requirement that suits should be heard and determined expeditiously, for as is often said, justice delayed is justice denied. In **Fitzpatrick v. Batger & Co Ltd [1967] 2 ALL ER 657**, **Salmon L.J.** expressed the proposition as follows:

“It is of the greatest importance in the interests of justice that these actions should be brought to trial with reasonable expedition. It is not in the interests of defendants that this should be done, but it is perhaps even more in the interests of “plaintiffs themselves.”

In the same judgment **Lord Denning, M. R.** added that it was a demand of public policy that the business of courts should be conducted with expedition. In **Victory Construction Co v. A. N. Duggal [1962] EA 697**, Edmonds, J. stated as follows on the former provision, which is now substantially Order 17 rule 2:

“The purpose of r. 6 in my view is to provide the court with administrative machinery whereby to disencumber itself of case records in which the parties appear to have lost interest.”

(See also **E.T. Monks & Co. Ltd v. Evans (supra)** and **Ngwambu Ivita v. Akton Mutua Kyumbu (supra)**). It is also apt to observe that since the promulgation of the Constitution of Kenya 2010, Order 17 rule 2 is one of the provisions that give meaning to **Article 159 (2) (b)**, which demands that justice shall not be delayed.

The courts of this land have settled the principles, which guide them in determining whether or not to dismiss a suit for want of prosecution. Among those decisions, include **Ngwambu Ivita v. Akton Mutua Kyumbu (supra)**, **Eliud Munyua Mutungi v. Francis Murerwa (supra)**, **Moses Miriira Maingi & 2 Others v. Maingi Kamuru & Another, CA No. 151 of 2010 (Nyeri)**, **Royal Media Services Ltd v. Telkom Kenya Ltd & 13 Others (supra)**, and **Agip (K) Ltd v. Highlands Tyres Ltd (supra)**. Those principles are in brief whether the delay is inordinate; if so, whether it is inexcusable; and whether the defendant is likely to be prejudiced by the delay.

Acutely aware that in law the discretion under Order 17 rule is conferred on the trial court and not on this Court, and further appreciating that we are not entitled to substitute our own preference for that of the trial court, our obligation in this appeal is to satisfy ourselves that the learned judge properly applied the principles we have set about above in the matter at hand. With respect, we are not able to say so because in the first place, he did not advert to the guiding principles. To begin with, the learned judge did not address a central aspect of Order 17 rule 2, namely whether any of the parties had taken a step in the suit **within one year** before the matter came up for the appellant to show cause why the suit should not be dismissed. The appellant contends that one year had not elapsed from the last abortive date when the suit was scheduled to be heard. Indeed even if the date when the deputy registrar last adjourned the hearing of the suit is taken into account (25th March 2011), one year would not have elapsed. We do not have to determine what constitutes a “taking a step” in this suit because that was a relevant determination to be made by the learned judge, which he did not.

The learned judge was not impressed, and justifiably so, by the fact that the appellant’s counsel had failed to appear twice for the call-over, leading to the suit being taken out of the hearing list. The explanation, which the appellant gave for that failure, was that by practice, parties are notified of the call-overs through the cause list rather than through service of a notice, thusmaking it easy for counsel to miss a matter listed for call-over. We do not necessarily agree with that explanation, but it deserved to be considered by the learned judge, which unfortunately he appears not to have done.

The question of prejudice that the respondent was likely to suffer was also an important consideration, which the learned judge was obliged to address. We agree with counsel for the appellant, with respect,

that on the material before him, the learned judge could not have readily concluded that the respondent was likely to be prejudiced by the delay. This is because when counsel for the respondent was called upon to address the court, and therefore an opportunity to demonstrate what prejudice the respondent stood to suffer, he did not present any argument from which it could be deduced that the respondent was exposed to prejudice. He did not even positively support the dismissal of the suit for want of prosecution, electing instead to leave the matter to the court. In any event, delay, which is likely to be compensated by award of costs, or which does not make fair trial impossible or otherwise impinge on the fairness of the trial, is never deemed fatal.

As has been pointed out severally, the language of Order 17 Rule 2 is permissive rather than mandatory. The trial court is not obliged to dismiss the suit. Even where it finds delay to be inordinate and not satisfactorily explained, it can still save the suit to be heard on merits by imposing conditions to ensure sooner or expeditious hearing and determination or by requiring, as a term of refraining from dismissing the suit, an undertaking from the plaintiff to list the suit for hearing within a specified time. (See **Chipchase v. Rosemond [1965] 1 ALL ER 145** and **Victory Construction Co v. A. N. Duggal (supra)**).

In light of what we have stated above, we are persuaded that the learned judge did not take into account all the relevant considerations when he exercised his discretion and dismissed the appellant's suit for want of prosecution. In the premises we allow this appeal, but make no order on costs. To ensure that there is no further delay in the hearing and determination of the suit, we direct the appellant to list the suit before the trial court for hearing and determination within the next 45 days from the date of this ruling. It is so ordered.

Dated and delivered at Nairobi this 4th day of November, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

/jkc