



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

CIVIL APPEAL NO. 293 OF 2010

BETWEEN

BARCLAYS BANK OF KENYA LIMITEDAPPELLANT

AND

RAMZANALI GULAMHUSSEIN NANJI LALANI.....RESPONDENT

(Appeal from a Ruling and Order of the High Court of Kenya at

Kisii (M. Makhandia, J) dated 4th March 2010

in

KISII HCCC No. 136 OF 2001)

JUDGEMENT OF THE COURT

The genesis of the suit leading to this appeal is the Plaintiff filed at the High Court of Kenya, Kisii on 28th August, 2001 where Ramzanali Gulamhussein Nanji Lalani (“the Plaintiff”) sued the appellant Barclays Bank of Kenya Limited (“the defendant”) in respect of a cause of action regarding a parcel of land No. Nyaribari Chache / B/B/Boburia/4414 (“the parcel of land”). The parcel of land was advertised for sale and was purchased by the plaintiff from the defendant which was exercising a statutory power of sale as mortgagee. Several reliefs were sought in the Plaintiff by the plaintiff from the defendant but because they are not relevant to this appeal we need not set them out here. The suit was heard in the absence of the defendant who had neither entered appearance nor filed a defence but the subsequent judgement was set aside by consent of the parties. After the defendant filed a defence the suit was set down for hearing on 28th February, 2008 but was stood over generally on that day because neither of the parties attended court.

On 29th June, 2009 the defendant filed an application which prayed inter alia that the suit be dismissed with costs for want of prosecution. No date was immediately assigned for hearing of that application and

a lot of correspondence was then exchanged between various law firms and the court essentially enquiring whether the court file was available for necessary steps to be taken in the suit. When the court file became available the suit and the application came to court on a number of occasions but these were adjourned for various reasons.

The suit was called before court on 17th February, 2010 but was adjourned on application by the plaintiff. A specific order was made on that day that the application by the defendant be heard first when the matter would next come to court.

On 4th March, 2010 the said application was listed for hearing before Asike Makhandia, J (as he then was). Let the record speak for itself on what transpired upon the matter being called:

“4/3/2010

Before M. A. Makhandia J.

Mr. Makana court clerk

Mr. Soire for respondent

Mr. Ochwang'i for Gichuhi for applicant

Mr. Ochwang'i: The application is dated 10/3/10. I am ready.

ASIKE -MAKHANDIA

JUDGE

Mr. Soire: I am also ready.

ASIKE-MAKHANDIA

JUDGE

Court: I have read through application, the supporting affidavit as well as the annexures thereto and the replying affidavit. I have also perused the skeletal arguments filed by the applicant. It would appear to me that the delay cannot wholly be attributed to the plaintiff. Part of it is attributed to the court viz the disappearance of the court file and also the court diary for the year being closed early. I am therefore inclined to disallow the application but direct that the parties do fix the case before me for hearing at the earliest possible date.

Ochwang'i: That is fine with me. I propose 20/5/10

ASIKE-MAKHANDIA

JUDGE

Mr. Soire: Agreed.

ASIKE-MAKHANDIA

JUDGE

Court: This case shall be heard on 20/5/10. The applicant shall have the costs of the application. The application dated 10/3/09 is accordingly compromised in those terms.

ASIKE MAKHANDIA

JUDGE.”

That is what provoked this appeal. In the Memorandum of Appeal eight grounds are set out as follows and we are asked to allow the appeal and hear and allow the application which according to the learned Judge was compromised:

- “1. The judge erred in law by failing to accord the Appellant its constitutional rights to a fair hearing or abide by the rules of natural justice to a fair hearing when he acted on his own motion and did not allow the Appellant to prosecute its Notice of Motion dated 10th March 2010 or highlight its written submissions.**
- 2. The judge erred in law by disallowing the application on his own motion without considering the substance of the application that set out circumstances as to why a fair trial could not be heard on account of a delay of 15 years since the property was sold to the Respondent.**
- 3. The judge erred in law by failing to consider the applicant and supporting affidavit which explained that 6 years had passed by the time suit was filed and the Appellant averred on oath that it did not have any evidence or witnesses to support its defence.**
- 4. The judge erred in law by failing to consider the Appellant's written submissions that specifically explained that a prolonged delay in setting a suit down for hearing greatly prejudiced the Appellant and that public policy demanded that such a suit be dismissed for want of prosecution.**
- 5. The judge erred in fact when he partly attributed the delay to the court in the absence of any evidence to support this claim and when in fact the court file was available.**
- 6. The judge erred in fact by failing to consider the Deputy Registrar's letter dated 20th April 2008 sent to the Appellant's Advocate and copied to the Respondent's advocate that stated as follows:**
 - (a) The Respondent's advocates had fixed a hearing date ex- parte on 30th August 2007 for hearing of the main suit on 28th February, 2008.**
 - (b) On 28th February 2008 the case did not take off as the (sic) neither party attended court.**
 - (c) Parties were invited to take a mutually convenient hearing date.**
- 7. The judge erred in fact by failing to consider that the Notice of Motion had been filed on 29th June 2009 and the court file was not missing.**
- 8. The judge erred in law and in fact by failing to take into consideration that the Respondent had taken no steps to complete the process of discovery of documents to facilitate the hearing of the suit”.**

When the appeal came for hearing before us learned counsel for the appellant Mr. Allan Gichuhi relied on the skeletal submissions filed in court and submitted that the suit before the High Court had been pending for too long when the respondent did not take steps to prosecute the same.

Counsel submitted that the suit should have been dismissed for want of prosecution. Counsel submitted further that the learned judge erred in not hearing the parties when the parties were in court ready to be heard.

Learned Counsel for the respondent Mr. J. O. Soire submitted in opposition that part of the delay in prosecuting the suit was taken up by various applications before the court like the application to set aside judgement which had been entered in default of appearance. Counsel submitted further that delay in prosecuting the case was also caused by the parties inability to access the court file which had gone missing. He cited a persuasive judgement of the High Court of Kenya in ***Ivita v Kyumbu [1984] KLR 441*** for the proposition that the test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay. That is to say that even if the delay is prolonged, the court, if satisfied with the plaintiffs cause for the delay and that justice can still be done to the parties, the suit with not be dismissed but the appropriate order will be that the suit be set down for hearing at the earliest available time, discretion always remaining with the court.

On the procedure adopted by the learned judge in making orders without hearing parties counsel for the respondent submitted that the same could not be faulted as the judge acted in the presence of the parties who apparently consented to the procedure adopted by the learned judge. The judge, according to counsel, had occasion to peruse the application and then make a Ruling, a Ruling seemingly accepted by the parties and no prejudice could be suffered by any party, thought counsel.

The right to be heard by a fair and impartial tribunal is a fundamental right protected by the Constitution of Kenya . Article 50 of the said Constitution enshrines this right when it states:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

This right has been jealously guarded even before the promulgation of the said Constitution.

In ***Matiba v Attorney General [1995-1998] 1EA 192*** the application for leave to apply for an order of certiorari was heard and granted but a prayer that the leave would operate as a stay of the decision was refused. The appellants counsel was not heard on submissions for the prayer for stay. The appellant appealed to the Court of Appeal on the ground that the High Court judge had not afforded his counsel an opportunity to address him on the prayer for stay in respect of which he had denied the appellant without any representation being made to him. It was held by this court differently constituted that on the face of the record it appeared that the appellant's counsel had made no submissions before the learned judge in the court below, since if they had been made they would have been reflected in the record. There was thus an order on record made in the presence of the appellant's counsel but without affording him an opportunity to address the judge. This was a fundamental breach of the rule that no man will be condemned unless he has been given a fair opportunity to be heard, which is a cardinal principle of natural justice. Any order that flowed from such a fundamental breach could not be sustained.

See also this courts judgement in ***Kiai Mbaki & Others v Gichuhi Macharia & Anor [2005] e KLR 1*** where the same observations were made.

According to learned counsel for the respondent the learned judge was entitled to proceed as he did as the judge had read the application and made a Ruling which was accepted by the parties.

We have reproduced the proceedings that transpired when the application was called for hearing. Both counsel indicated that they were ready to proceed. This means that they were ready to make submissions from which the learned judge would draw and consider to enable him determine the application. The record shows that instead of hearing the parties the learned judge, with due respect, took over the matter without affording the parties an opportunity to make submissions. The judge was clearly not entitled to do this and in so doing he fell into error. A breach of natural justice was committed where orders flowed

and were made without hearing the parties.

Counsel for the appellant has submitted that we should take over the application, determine it and dismiss the suit in the High Court. We are not persuaded that that is the correct course to adopt.

The correct approach is that the appeal succeeds but the suit and the application remain within the jurisdiction of the High Court.

In the event we allow the appeal and set aside the order of the learned Judge and order that the application by Notice of Motion dated 10th March, 2009 be fixed for hearing before a High Court Judge and be heard and determined on the merits. Costs to the appellant.

Dated and Delivered at Kisumu this 18th day of October 2013

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR