IN THE COURT OF APPEAL
AT NYERI

(CORAM: O'KUBASU, AGANYANYA & NYAMU, JJ.A.)

CIVIL APPEAL NO. 241 OF 2005

BETWEEN

FRAMWA & JOYMU DISTRIBUTORS ……..… APPELLANT

AND

KENYA BREWERIES LIMITED ……..… RESPONDENT

(Appeal against ruling and dismissing the appellant's case against the respondent in the High Court of Kenya at Nyeri (Okwengu, J.) delivered on 31st May, 2005

in

H.C.C.C. NO. 199 OF 2000)
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JUDGMENT OF THE COURT

This is an appeal from the ruling of the superior court (*Okwengu, J.*) dated and delivered on *31st May, 2005* in which the learned judge dismissed the appellant's suit in the superior court for want of prosecution.

The background to this appeal is fairly brief and straightforward. The appellant herein, ***FRAMWA & JOYMU DISTRIBUTORS*** was the plaintiff while ***KENYA BREWERIES LIMITED*** was the defendant in the superior court in ***High Court Civil Case No. 199 of 2000***. The plaint was filed on *13th October, 2000*.

The record of appeal shows that on *17th October, 2000* the appellant herein (*plaintiff in the superior court*) applied for an order of temporary injunction. The learned judge who dealt with that matter made an order to the following effect:-

"Temporary injunction to issue and operate for 14 days. Matter be heard inter-partes on the 31st October, 2000 at Meru High Court."

It would appear that at a later date the temporary injunction was withdrawn since the Court made the following order:-

"By consent application for injunction dated 13th October, 2000, is hereby withdrawn with costs to the respondent."

After the foregoing order was recorded, nothing happened insofar as prosecution of the suit was concerned.

It would appear that the respondent *(as the defendant in the superior court)* had waited long enough and hence its advocates decided to file a Notice of Motion (*filed on 13th January, 2005*) seeking an order that the suit be struck out and dismissed on want of prosecution. In that application, the respondent maintained that the appellant had taken no action in the prosecution of the suit since *17th January, 2001*.

The learned judge considered what was urged before her by both sides and came to the conclusion that the Plaintiff (*appellant herein*) had indeed failed to prosecute its suit. She therefore dismissed the suit for want of prosecution. In the course of her ruling, the learned judge said:-

"Having considered this application it is apparent from the court record that from 17th January, 2001, there is no action that has been taken in the prosecution of this suit. Although the Respondent through an affidavit sworn by Francis Mwangi Githinji said to be a Director of the plaintiff Co. has claimed that efforts were made to have the case listed for hearing, there is no evidence that any of the letters copies of which are annexed as "FMG 2" were delivered to the offices of the applicant's advocate either by post or through any other means. Nor is there any evidence that copies of the letters were forwarded to the court, or any complaint made to the court about the difficulty experienced by the Respondent in fixing the case for hearing.

Secondly Francis Mwangi Githinji the deponent of the replying affidavit depones that he has been away since the year 2001, he does not however say where he has been nor does he annex any evidence in support of his alleged absence. Moreover, the Plaintiff is said to be a limited Co. and no explanation has been given as to why the absence of one director should affect the prosecution of this suit."

Having so stated, the learned judge proceeded to dismiss the plaintiff's suit for want of prosecution by stating:-

I find that the excuses given by the Plaintiff/Respondent cannot hold. The fact of the matter is that the plaintiff has failed to prosecute its suit and that no good reason has been given for this failure. There is no reason why the case should remain pending since the Plaintiff has apparently lost interest in the case. I do therefore grant the application dated 12th January, 2005 and dismiss the Plaintiff/Respondent's suit for want of prosecution."

It is the foregoing that has given rise to this appeal. Through its advocates, the appellant filed a Memorandum of Appeal setting out the following grounds:-

"1. The learned judge erred in law and fact in failing to hold that delay was excusable in that it was caused by fact that court diary was fully booked and was not caused by indolence on the appellant's side.

2. The learned judge erred in law and in fact in failing to note that the respondents had not as is required by law established before court that they suffered any prejudice as a result of the delay and further that they would suffer prejudice if trial proceeded.

3. The learned trial judge erred in law and fact in condemning the appellants unheard and failed to look at the justice of the case as a whole.

4. The learned trial judge erred in law in accepting a supplementary affidavit to be argued and yet it had been filed without leave as provided in the Civil Procedure Act."

When the appeal came up for hearing on *19th May, 2011*, Mr. Gacheru, appeared for the appellant while there was no appearance for the respondent. Since the advocates for the respondent had been served with the hearing notice, the hearing of the appeal proceeded.

In his brief address Mr. Gacheru simply went over the grounds of appeal and complained that the appellant was shut out of court without being given an opportunity to prosecute its case. Mr. Gacheru

referred us to the copies of the letters written on behalf of its client but he (*Mr. Gacheru*) admitted that these copies were not before the learned judge.

This appeal raises the issue of discretion of a judge of the superior court in striking out or dismissing a suit for want of prosecution. We have set out the background to this matter but it will be necessary to set out the grounds upon which the application for dismissal of the suit was brought. The grounds appear on the face of the Notice of Motion filed in the superior court. Those grounds were as follows:-

"1. THAT the Plaintiffs plaint dated 13th October, 2000 was filed on 13th October, 2000.

2. THAT the defendant herein filed its Statement of Defence dated 6th November, 2000.

3. THAT the matter was before this Honourable Court on 17th January, 2000 whereby it was stood over generally.

4. THAT it has been 3 years and 11 months since the last time the matter was heard.

5. THAT no action has been taken since 17th January, 2001.

6. THAT the plaintiff herein has not instituted this suit against the defendant since the above date, and has not set down the same for hearing or at all, and the record will bear this out in Court.

7. THAT in view of the aforesaid delay, loss of interest, refusal, neglect and/or failure by the Plaintiff to prosecute its cause to a conclusive determination, the Defendant continues to suffer prejudice and unnecessary costs.

8. THAT the provisions of Order XVI Rules 5 and 6 of Civil Procedure Rules allow the Court to dismiss the Plaintiff's case.

9. THAT the Plaintiff herein has lost interest and it is in the interests of justice that litigation must have an end.

10. THAT the delay in this matter is causing the Defendant unnecessary prejudice of costs."

Those appear to be factual matters which the appellant never sufficiently disputed. It was therefore upon the learned judge to consider these grounds together with the submissions by Counsel appearing for the parties and make a decision whether to allow the application for dismissal or not. The superior court judge was to exercise her discretion in the matter. She was satisfied that in the circumstances the suit was for dismissal. She gave reasons for doing so. Can we interfere with that discretion? It is only in rare cases that this Court would interfere with the exercise of discretion by the superior court judge. In ***MBOGO V. SHAH [1968] E.A. 93*** at p.96 ***Sir Charles Newbold P.*** said:-

"We come now to the second matter which arises on this appeal, and that is the circumstances in which this court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

In this regard, we consider that the exercise of the discretion by the superior court was in line with the overriding objective in that it resulted in the expeditious disposal of the suit.

In view of the foregoing and taking into account the conduct of the appellant (*and its legal advisers*), we

are satisfied that the learned judge cannot be faulted in the manner she reached her decision to dismiss the appellant's suit for want of prosecution. It therefore follows that we find no merit in this appeal which we accordingly dismiss but with no orders for costs since the respondent's advocates, although served with the hearing notice, failed to appear.

Dated and delivered at Nyeri this 8th day of July, 2011.

E.O. O'KUBASU

……
JUDGE OF APPEAL

D.K.S. AGANYANYA

……..…..
JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR