



IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: OMOLO, O’KUBASU, J.J.A & ONYANGO OTIENO, AG. J.A)

CIVIL APPEAL NO. 250 OF 2003

BETWEEN

SALKAS CONTRACTORS LIMITED APPELLANT

AND

KENYA PETROLEUM REFINERIES LIMITED RESPONDENT

**(Appeal from the ruling and order of the High Court of Kenya at
Mombasa (Hayanga, J) dated 14th February, 2002
in
H.C.C.C No. 346 of 2000)**

JUDGMENT OF THE COURT

This appeal arises from the ruling of Hayanga, J. delivered on the 14th day of February, 2002 in which the learned Judge allowed an application by way of notice of motion dated 6th April, 2001 under **Order XVI rule 5** of the Civil Procedure Rules and section 3A of the Civil Procedure Act for orders that the appellant’s suit be dismissed for lack of prosecution. In allowing the same application, the learned Judge stated:

“The test in a case of this type is whether delay is prolonged and inexcusable, and if it is can justice be done despite such delay.

I think in this case delay will in fact cause injustice to the Defendant looking at both sides of the case and I believe there is no good reason shown for the delay. I therefore allow this application and dismiss the case for lack of prosecution.”

The facts giving rise to this appeal, briefly stated, are as follows: By a plaint dated 14th September, 1999, the appellant, through its advocates, Mohamed Madhani & Co., sued the respondent seeking judgment against the respondent at Milimani Commercial Courts for **Ksh.774,816/=** being special damages for breach of contract, interest on the same at court rates from the date of filing the suit until payment in full, costs and interest thereon at court rates from the date of judgment until payment in full. That plaint was amended but the amendment only affected the particulars of loss of damages. The claim remained the same. The amended plaint was filed on 6th October, 1999. The respondent filed memorandum of appearance on 23rd November, 1999 and filed defence on 30th November, 1999. The appellant filed reply to defence on 3rd December, 1999. Thus, pleadings closed on or about 17th December, 1999. The appellant took no action to set the case down for hearing. On 6th March, 2000, the

respondent filed an application in the court seeking the transfer of the case from Milimani Commercial Courts to High Court at Mombasa. That application was allowed on 8th May, 2000 and the file was transferred to the High Court at Mombasa for disposal. The appellant, though served with that application seeking transfer, did not file any documents objecting to the same application and did not attend the court on the date the same application was heard. The case, as we have stated, was transferred to Mombasa Court. Vide a letter dated 31st July, 2000 addressed to the Deputy Registrar, High Court Nairobi, and copied to both counsel, the Deputy Registrar High Court Mombasa did acknowledge receipt of the original record from Nairobi and informed the Deputy Registrar Nairobi of the serial number assigned to the suit at Mombasa Court. It was assigned **H.C.C.C No. 346 of 2000**. Both Advocates were aware of these facts as the letter was copied to them. We hasten to add that, that letter did not specifically state when the same file was received at Mombasa Court, but it is certain that it was received before the date of the same letter, i.e. before 31st July, 2000. Be that as it may, the appellant, notwithstanding that it knew of the receipt of the file at Mombasa registry about 31st July, 2000, did nothing to set down the case for hearing. On 18th May, 2001, about ten months after the letter of 31st July, 2000 referred to above, the respondent filed notice of motion dated 6th April, 2001 under Order XVI rule 5 of the Civil Procedure Rules seeking one main order and that was an order that the appellant's (plaintiff's) case be dismissed for want of prosecution. It also sought costs to be provided for. That was the application that was heard by Hayanga J. and was allowed prompting this appeal. The appellant filed five grounds of appeal which were as follows:-

“1. THAT the learned Judge erred in fact and in law in that he based his decision on extraneous consideration which are not relevant to the dispute between the Appellant and the Respondent and/or should not have at that stage of the proceedings influenced his decision namely that the victims of the accident having been paid and discharged the Respondent (sic) the suit in the superior court was an abuse of the Court process.

2. THAT the learned Judge of the High Court erred in fact and in law basing his finding on contentions of fact in respect of which no or no proper evidence had been adduced in court to the extent that it was not competent for the Respondent's advocates to depone to the said factual matters.

3. THAT the learned Judge erred in failing to find any merit in the Appellant's reasons for the delay in setting down the matter for hearing and/or failing to consider the reason advanced at all.

4. THAT the learned Judge erred in fact and in law in dismissing the suit notwithstanding the fact that the Defendant did not show any prejudice which it had suffered and/or the plaintiff had suffered.

5. THAT the learned Judge erred in fact and in law in that he exercised his discretion capriciously.”

We have carefully considered these grounds of appeal, the rival submissions by both counsel and the law. The application that was before the superior court called for the exercise of discretion by the same court. That being so, the law is now settled that in the exercise of the appellate jurisdiction, we will not interfere with the exercise of a discretion by the superior court unless we are satisfied either that the superior court in exercise of its discretion, was wrong in principle or that it acted perversely on facts and was clearly wrong in its decision - (See the case of **Jackson Gatere vs. Mount Kenya Bottlers Limited – Civil Appeal No. 107 of 1995 (unreported)**). In the case of **Mbogo and Another vs. Shah [1968] EA 93, Newbold, P**, had this to say:

“a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

It is with the above principle in mind that we now proceed to consider the appeal. The application that was before Hayanga J. was made under Order XVI rule 5 of the Civil Procedure Rules which states as follows:

“5. If, within three months after:

(a) the close of the pleadings or

(b) (deleted)

(c) the removal of the suit from the hearing list; or

(d) the adjournment of the suit generally, the plaintiff, or the court on its own notice to the parties does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal.”

In the case that was before the superior court, pleadings closed on 17th December, 1999. This was not in dispute. It was also not disputed that the appellant had taken no steps whatsoever to set the suit down for hearing. The respondent alleged this at paragraph 3 of the supporting affidavit sworn by one Caroline Katisya where she stated:

“That the plaintiffs have taken no steps in fixing this matter for hearing.”

The appellant in the replying affidavit sworn by Shabudin Kassan did not rebut or attempt to deny that allegation by the respondent. The respondent also alleged in its affidavit in support of the application before the superior court that it was greatly prejudiced by the delay in the suit by reason that the appellant’s employees were fully compensated by the respondent. It annexed Discharge Vouchers which were marked **CK 1**. The appellant’s reply to that was that those were matters purely between the respondent and the appellant’s employees and had little or no bearing in relation to the appellant’s claim against the respondent. Those were the matters that prompted the application and were the matters that were before the superior court for consideration. We have set out hereinabove the pertinent decision of the superior court on those matters. In the case of **Allen vs. Sir Alfred McAlpine & Sons Limited [1968] 1 ALL ER 543**, Salmon, L.J. stated as follows on the principles to be applied in a case such as before us:

“A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff’s failure to comply with the Rules of the superior court or (b) under the court’s inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows: In order for such an application to succeed, the defendant must show:

(i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognise inordinate delay when it occurs.

(ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.

(iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.”

The above principles have been followed in Kenya consistently. In the case of **Inter vs. Kyumba (1984) K.L.R 441**, it was held as follows inter alia :-

“3. The test applied by the courts in an application for 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 delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court.”

That was a decision of the superior court and is thus only of persuasive authority to us, but it will be clear that it consistently followed the decision of Salmon, L. J. in the case of **Allen vs. Sir Alfred McAlpine** (supra). The principle that pervades these decisions is that the court has to be satisfied that the inordinate delay is excusable and if so satisfied, then the court has to consider whether justice can still be done to the parties notwithstanding the inordinate delay. If the court is satisfied that justice can still be done, then it will, in the exercise of its discretion, refuse the application for dismissal for want of prosecution. It follows that if the court is not satisfied that the inordinate delay is excusable, then it will, again in its discretion, allow the application and dismiss the suit for want of prosecution.

In the matter before us, the appellant states that the learned Judge considered extraneous matters namely, that the accident victims had been paid. From what was in the record in the superior court, it is clear to us that the issue of the victims having been paid was raised by the respondent in its affidavit and the appellant replied to it. The matter was canvassed before the court during the hearing of the application as the learned counsel for the respondent made submissions on it which the appellant’s counsel did not challenge. It was left to the court and it was relevant, on the question of whether or not the respondent or any party had suffered prejudice. We are not satisfied that it was an extraneous matter and consequently, we do not accept that the learned Judge exercised his discretion wrongly in considering that matter. In our mind, nothing turns out on the first ground of appeal.

Equally, on the second ground, there was no application before the superior court to expunge the alleged offending affidavit and the issue of the same affidavit was not canvassed during the hearing of the application before that court. We can see no reason to interfere with the superior court’s discretion on that ground. The appellant’s only reason or excuse offered for the delay after the file was transferred to Mombasa Court which, in the circumstances of this case, we feel was inordinate, was at **paragraph 4** of the replying affidavit where its Managing Director stated:-

“4. THAT to the contrary the plaintiff has been going through its records with its insurers, the Jubilee Insurance Company Limited with a view to availing all documents in support of this claim to enable our advocates proceed further with this matter. I annex copies of correspondence between our insurers and our advocates marked “SK”.”

The superior court, in its discretion considered this and rejected it. In our own view, we feel the learned Judge was justified in rejecting that excuse as indeed, tracing relevant documents in support of a claim, which should have been done before the suit was filed, could not, by any standards, be considered a reason for not setting down the case for hearing. We venture to say that such documents could still be traced even after taking a date for hearing the case. In any case, we note that no letter was availed to the court in support of any attempt to have the case fixed for hearing and the appellant never claimed that it made any attempt to have the case set down for hearing. In our independent opinion, based on the record before us, no excusable grounds were advanced for the delay after 31st July, 2000 and the learned Judge was plainly right in rejecting that excuse. We have dealt at length with the matters covered in ground 4.

What we have stated above demonstrates that in our mind, the learned Judge exercised his discretion properly and arrived at a proper decision. We do not see any element of capricious use of discretion. Under these circumstances, we cannot interfere with the exercise of that discretion.

The upshot of all the above is that this appeal must be dismissed. It is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 23rd day of July, 2004.

R.S.C OMOLO

JUDGE OF APPEAL

E.O. O'KUBASU

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR