Munyanga v Royal Star Limited & another (Civil Appeal 161 of 2017) [2024] KEHC 708 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KEHC 708 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 161 OF 2017

MW MUIGAI, J

JANUARY 25, 2024

BETWEEN

JOSEPH MAKAU MUNYANGA ..... APPELLANT

AND

ROYAL STAR LIMITED ..... 1ST RESPONDENT

ABDALA JUMA BARAKA ..... 2ND RESPONDENT

RULING

Notice of Motion Application

1. Vide a Notice of Motion Application dated 18th January 2021, the Applicant seeks he following orders;
    a. Spent
    b. That the Honourable Court do set aside and/or review the orders issued on 8.3.2017 together with all the proceedings thereon.
    c. That the suit be reinstated and determined on its own Merit
    d. That the costs of this application be in the cause.
2. The application is supported by the affidavit of Joseph Makau Munyanga who deposed that he filed the matter in 21.10.2010 through a plaint seeking special damages of kshs 5,200, general damages for pain and suffering and loss amenities, cost and interests of all items. He was advised by his advocate that the suit was subject to order 11 of the *Civil Procedure Rules* 2010 and that pretrial directions were never taken in the matter and the suit was prematurely dismissed as the same was never certified for hearing.
3. He deposed that he sought the court's leave to have the matter reinstated so as to have it concluded in a just manner and determined on its merit and that he would be greatly prejudiced if the orders sought were not granted.

4. He further deposed that he had in no way contributed to the dismissal of the matter.

Replying Affidavit Dated 29th July 2017

5. Pauline Waruhiu, the Claims manager of the Defendant Company responded vide way of a Replying Affidavit in which she contended that the matter was dismissed on 31/01/2017 for non-attendance on the part of the plaintiff or his advocate because the matter was listed for hearing but there was non appearance on the part of the plaintiff.

6. She deposed that upon the dismissal the plaintiff filed an application for review of the order issued on 8/3/2017 and that the application was an afterthought since the applicant is guilty of inordinate delay in prosecuting the suit and which delay was not explained thus undeserving of the orders

7. It was contended that the delay in prosecuting the suit gives rise to substantial risk to a fair trial and causes serious prejudice to the defendants and that the application was frivolous, inept, time wasting, intentional and contumelious and abuse of the court process.

8. She opined that the issues of pre trial raised were never replied to when the application for dismissal came up for hearing and have thus been overtaken by events hence clear that the applicant was not willing to even avail the plaintiff for re-examination.

9. She contented that it has been 15 years without the applicant taking any step to advance the prosecution of his case and that the application was scandalous, vexatious and an otherwise abuse of the Court Process.

Trial Court Ruling dated 22nd November 2017

10. The Trial Court delivered its ruling on 22nd November 2017 in which it dismissed the plaintiff's application.

The Appeal

11. Aggrieved by the ruling of the Trial Court delivered on the 22nd November, 2017, the Appellant appealed against the said decision based on the following grounds:-

    (1) That the Learned Trial Magistrate erred in law and in fact in holding that Order 12 Rule 7 was not applicable herein thus arriving at the wrong finding.

    (2) That the Learned Trial Magistrate erred in law and in fact in holding that the orders sought could only be granted through review thus arriving at the wrong finding.

    (3) That the Learned Trial Magistrate erred in law and in fact by totally disregarding the appellant's submissions

    (4) That the Learned Trial Magistrate erred in law and in fact by in dismissing the application when the same was unopposed

    (5) That the Learned Trial Magistrate erred in law and in fact by failing to apply the objective and overriding the spirit of the *Civil Procedure Rules* 2010

    The Appellant sought the following orders;

a) That the appeal be allowed and the application dated 10/3/2017 be allowed and the suit be reinstated for hearing and final determination.

Applicants Submissions

12. The Appellant/Applicant filed submissions dated 11th July 2023 where it was submitted that the issues for determination were Magistrate erred in law by holding that Order 12 Rule 7 was not applicable it was submitted that Order 12 Rule 7 accords the court discretion to set aside its own orders.

13. Reliance was made in the case of *Njue Njagi v Ephantus Njiru & Another* [2016]eKLR and *Shah v Mbogo & Another*[1967] EA 116 and *Patel v EA Cargo Handling Services Ltd* [1974] EA 75.

14. It was submitted that guided by the above cited authorities, the appellant submits that it was proper case where the court's discretion ought to have been exercised in favour of the appellant so as to afford it an opportunity to be heard as in his case.

15. It was submitted that allowing the respondent's application in the absence of a response was premised on a wrong principle of law and that courts have held that notwithstanding the absence of a response, courts must go into the merits of an application in order to make a determination.

16. Reliance was placed in the case of *Gideon Sitela Konchellah v Julius Kekakeny Ole Sunkuli& Others* [2018].

17. It was submitted that the Trial Magistrate failed to appreciate the legal position by not rightly proceeding to fully analyze the merits of the application based on the prevailing circumstances.

18. On Ground 2 that the Trial Magistrate erred in holding that the orders sought could not be granted through review thus arriving at a wrong finding- it was submitted that Order 45 Rule 1 gives the Court discretionary power to allow review on 3 limbs stated therein and that there existed sufficient reason or cause to warrant the court to review ruling by having it set aside and ordering pre trial directions be taken and the case be heard to conclusion.

19. Reliance was made in the case of *D Chandulal K Vora & Co Ltd v Kenya Revenue Authority* (2017) eKLR and *Wilson Cheboi yego v Samuel Kipsang Cheboi* (2019) eKLR.

20. It was submitted that the bulk of the delay was contributed by the respondent and thus the court should strike a balance in exercising its discretion by allowing the parties to proceed on merit. It was wrong for the court to lay blame on the appellant and dismiss his application.

21. On ground 3 that The Trial Magistrate erred by totally disregarding the Appellant's submission, it was submitted that the appellant posited that the respondent ought to have the appellant examined by its own doctor to enable it comply with the provisions of order 11 however no invitation was ever sent to the appellant. The delay was thus on the part of the respondent as much as the appellant.

22. It was submitted that the appellant was trying to ensure compliance with order 11 yet the respondent sought for time for him to be examined. That the Trial magistrate made several references to the respondent's replying affidavit but did not make references to the appellant's submissions and that had the trial magistrate considered the same it would have come to a totally different conclusion.

23. It was submitted that the appellant sought leave file a response to the defendant's application but leave was denied and that condemning a party unheard was a punitive decision which courts use sparingly and in extreme circumstances. Reliance was placed in the case of *The Management Committee of Makondo Primary School and Another v Uganda National Examination Board*, HC Civil Misc Application No 18 of 2010.

24. It was submitted that the appellant was denied the right to properly present his case and prosecute by calling witnesses and producing documents further to his case and that courts are bound by Article 159(2)(d) in exercise of their judicial authority.

25. It was submitted that the respondent stood to suffer little or no prejudice if the same was not granted and that the appellant ought to have been granted an opportunity to prosecute his suit.

26. On ground 4 and 5 on failing to apply the objective and overriding spirit of the *Civil Procedure Rules* 2010 it was submitted that section 3A of the *Civil Procedure Act* gives the court inherent powers to issue orders as may be necessary to meet the ends of justice. Reliance was placed in the case of *Wachira Karani v Bildad Wachira* [2016]eKLR to buttress this point.

27. Reference was made further to Section 1A and 1B of the *Civil Procedure Act* which enjoins the court to ensure that there is just determination of dispute and that the court should always opt for lower rather than the higher risk of injustice. The court was urged to find that overriding objectives over shadows all technicalities, precedents, rules and actions which are in conflict. Reliance was made in the case of *Stephen Boro Gitiha v Family Finance Building Society and 3 others* , CANo. 263/2009.

28. It was the appellant's final submission that for costs it s trite that costs follow the cause or event to buttress this point reliance was made in the case of *Joseph Oduor Anode v Redcross Society*, Civ No. 66 of 2009 (2012) eKLR.

29. It was submitted that the instant appeal is merited and ought to be allowed with costs to the appellant

Determination

30. I have considered the memorandum of Appeal, the submissions by the parties on record and I find that the issue for determination is whether the Appeal should be allowed and the matter be reinstated and determined on its own Merit.

31. The Court of Appeal in *Murtaza Hussein Bandali t/a Shimoni Enterprises v. P. A. Wills* [1991] KLR 469; [1988-92] held that there is inherent power to restore a case for hearing after it has been dismissed. However, the decision whether or not to reinstate a dismissed appeal is no doubt an exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders.

32. In this case the appellant agrees that indeed he did not attend Court when the matter was listed for hearing. The respondent then made an application to court for the matter to be dismissed for want of prosecution and there was still no response from the appellant. This matter being one that was filed in 2010, I find that the delay is inordinate. No attempt at all was made to explain the delay which was obviously inordinate. Without explanation, it has been held, there can be no indulgence.

33. In the case of *Ivita v. Kyumbu* [1984] KLR 441), where the court observed that:

> " 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 it 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."

34. The appellant then averred that the matter was never listed for pre trial as provided and required under Order 11 of the *Civil procedure Rules* 2010, while I agree that Pre Trial is essential to any suit, I find the timing of the bringing it to be a bit delayed as this should have been an issue that he should have raised from the onset.

35. It is not in contention that the appellant was to be examined by the respondent's doctor and the appellant contended that he never got any invitation from the respondent thus the examination could not be undertaken. The appellant also does not show what steps he took if any to engage the respondents as to the issue of examination by their doctor. The appellant cannot simply justify that the reason he never prosecuted the matter was because he never got any communication from the Respondents so he also decided to wait to eternity. As he claims that he stands to be prejudiced, I feel he should have taken all the necessary measures possible to ensure that Order 11 is complied with.

36. The appellant has invoked Article 159(2)(d) of the *Constitution*, Section 1A, 1B and 3A of the *Civil Procedure Act* to persuade the Court not to condemn him unheard and in the interest of justice. While these provisions of the law are persuasive, I still find that the appellant did not do enough to ensure that his suit was prosecuted. Instead it has only donned on him that his goose is cooked after seeing that the Trial Court was not willing to entertain his lack of aggressiveness in ensuring the matter is heard and determined to its finality. While it may seem that the respondents stand to be a little or not prejudiced at all, am not prepared to allow the appeal based singularly on that reason.

37. I am not entirely convinced by the arguments put forward by the Appellant to explain his failure to prosecute the matter as and when required. In those circumstances, the Court can only conclude that the Applicant is seeking either by evasion or otherwise to obstruct or delay the cause of justice conduct. Such a party does not deserve any assistance from the Court. I tend to think the appellant was given a lot of chance sin the Trial Court in which he admittedly did not utilize. In the premises I find that the appellant has not made out a case to warrant favourable exercise of discretion.

Disposition

38. In the circumstances, I issue the following orders;

    a. The Appeal is unmerited and thus fails.

    It is so ordered.

RULING DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 25TH JANUARY, 2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W. MUIGAI

JUDGE