Case Number:	Civil Appeal 76 of 2019
Date Delivered:	15 Dec 2021
Case Class:	Civil
Court:	High Court at Embu
Case Action:	Judgment
Judge:	Lucy Mwihaki Njuguna
Citation:	Peterson Majau Mbae v Antonisio Njue Njeru [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Embu
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 76 OF 2019

PETERSON MAJAU MBAE.....APPELLANT

VERSUS

ANTONISIO NJUE NJERU.....RESPONDENT

JUDGMENT

1. Before this court is the appellant's memorandum of appeal dated 02.12.2019 and premised on the grounds on the face of it wherein the appellant seeks for orders that:

i. This appeal be allowed.

ii. The entire ruling against the appellant delivered by Hon. J.W.Gichimu on 05.11.2019 be set aside.

iii. This Honourable Court be pleased to compel the plaintiff to undergo second medical re-examination within thirty days failure to which, the suit will stand dismissed.

iv. The costs of the appeal and that of the trial court be awarded to the appellants.

v. Such further orders may be made by this Honourable Court as it deem fit to grant.

2. The appellant's case is that the trial magistrate failed to consider the appellant's submissions in delivering a ruling delivered on 05.11.2019 and further that, the court failed to consider the impact of the suit proceeding to conclusion without the plaintiff/respondent undergoing second medical examination.

3. The appeal was canvassed by way of written submissions.

4. It was the appellant's case that the respondent was first informed of the requirement for re-examination by the appellant's doctor on 25.09.2017 and both advocates sought for time to have the respondent re-examined. That on 06.03.2018, the court was not sitting and the appellant did not attend court. However, a date was fixed for pre-trial on 29.05.2018.As per court proceedings of 06.03.2018; Mr. Ogweno was present for the plaintiff while a Mr. Patrick was present for Khan for the defendant. It was their case that Khan is the law firm on record for the plaintiff/ respondent in this appeal. That, the persons who fixed the matter for pre-trial on 29.05.2018 are all from the firm of Khan & Associates. They proceeded to submit that the matter came up again on 29.05.2018 for pretrial and an advocate unknown to the applicant in the name of Mr. Gichuki indicated to court that he was present for the defendant and proceeded to confirm that the matter was ready and that the parties had complied; that it is of importance to note that the appellant has never instructed the said Mr. Gichuki and his appearance for the appellant without instruction is a cause for investigation. Reliance was made on the case of **Japheth Kitili Mutisya v Mbukoni Bus Services [2019] eKLR** where the court ordered reinstating the suit and that the parties to resolve matters of re-examination within 30 days after the matter was first mentioned for directions by the trial court.

5. It was their prayer that the court compel the respondent to undergo second medical re-examination with the requisite

documentation within 30 days failure to which the suit stands dismissed.

6. The respondent on the other hand opposed the motion and submitted that the notice of motion dated 16.09.2019, which motion is not even in the record of appeal infringes the law as set in Order 42 Rule 13 (4) of the Civil Procedure Rules 2010. That the appeal arose from the dismissal of the application dated 16/09/2019. It was their case that, plaintiff/respondent in fact presented himself before the defendant's doctor who declined to examine him on grounds that he did not have treatment notes.

7. It was their case that the respondent presented himself for the re-examination which the court noted, and the defendant/appellant does not deny and further that, the issue of liability is not in contest. That the trial court exercised its discretion judiciously in noting that a similar motion had been lodged and not prosecuted and that the proceedings show that the second application, a notice of motion dated 16.09.2019 was lodged five months after dismissal of the initial motion and the same amounted to an abuse of court process. It was their case that, the same defendant was intent on delaying the prosecution of the case and that equity cuts both ways and is not available to the indolent. They faulted the appellant for having brought before this court an appeal that is frivolous, vexatious and otherwise an abuse of court process. Reliance was made on the case of **Tana and Athi Development authority v Jeremiah Kimigno and 3 Others (2015) eKLR**.

8. The respondents thus prayed that the appeal be dismissed with costs to the respondent.

9. I have considered the record of appeal herein, the party's rival submissions and the central issue for consideration is whether the trial court exercised its discretion in a judicious manner in dismissing the appellant's application. It is of importance to note that this court can only interfere with the trial court's discretion if the appellant demonstrates that the court misdirected itself in some manner and as a result has arrived at a wrong decision, or it is manifest that the trial court was clearly wrong as a result of which an injustice occurred. (**Mbogo & Another Vs Shah [1968] EA 96**). Similarly, **United India Insurance Co Ltd Vs East African Underwriters (Kenya) Ltd [1985] EA 898**.

10. The court notes that on 12.02.2019 at the registry, one Ms. Wanjiru and Mr. Ogweno by consent fixed a hearing date on 23.04.2019 for the application dated 27.01.2019; and on the date of the hearing, one Ms. Muriuki was present holding brief for Ogweno for plaintiff/respondent while there was no appearance for the applicant. The court proceeded to dismiss the application dated 27.01.2019 for want of prosecution upon being moved by counsel for the plaintiff/respondent. The defendant/appellant cries foul that the person who fixed the hearing date on their behalf equally came from the firm as that of the plaintiff/applicant's firm; but to the contrary, having perused the record, it is evident that Mr. Patrick appeared for Kairu Mccourt for the defendants hence not Khan and Associates.

11.The defendant/appellant further filed an application dated 16.09.2019 seeking for the plaintiff/respondent to undergo a re-examination by the insurer's doctor. The court thus made directions that the application be canvassed by way of written submissions upon which the trial court delivered a ruling on 05.11.2019.

12. It is of importance to note that having filed the first application to move court for re-examination of the plaintiff/respondent; the defendant/appellant failed to prosecute the very first application and thereafter, took another period of almost five months to file another application seeking the same orders as was the previous.

13. It is not disputed that the plaintiff/respondent did avail himself for the said re-examination to be carried out and that it was the insurer's doctor who failed to carry out the procedure.

14. From the evidence before the court, clearly the defendant/appellant has failed to offer cogent explanation why he deserves the orders he is seeking having in mind that he had failed to prosecute the previous application when in fact, he was aware of the date, the same having been taken by consent.

15. The power to set aside ex parte orders is discretionary and the Court must use its discretion to come to a conclusion while also ensuring that justice has been done. This was stated in **Patel v E.A Cargo Handling Services Ltd (1974) EA 75,** where the court held that:

"**There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgment except that if he does**

vary the judgment, he does so on such terms as may be just. The main concern of the Court is to do Justice to the parties and the court will not impose conditions on itself to fester the wide discretion given it by the Rules.''

16. The court via a ruling dated 05.11.2019 addressed the fact that the application dated 16.09.2019 was similar to the previous application dated 27.01.2019 and that the defendant/appellant failed to prove why they deserved the orders sought. It was the view of the trial court that the action by the defendant/appellant was an abuse of the court process.

17. The doctrine of abuse of process, based upon the inherent authority of every court to control its process and those persons who come before it, is a power incidental and necessary to the exercise of substantive jurisdiction. That power, together with rules of court and statutory provisions, enables the court to dismiss or strike claims which are frivolous and vexatious.

18. The Court of Appeal in **Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others** (supra) opined that:

"In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine.

Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice…We approve and adopt the principles so ably expressed by both Lord Roskil and Lord Templeman in the case of Ashmore v Corp Of Lloyds [1992] 2 All E.R 486 at page 488 where Lord Roskil states:

'It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges' time as is necessary for the proper determination of the relevant issues.'

Unless a trial is on discernable issues it would be farcical to waste judicial time on it."

19. Ultimately, and taking the foregoing matters into account, I am not persuaded that the appellant has given sufficient reasons for this court to interfere with the trial court's decision.

20. The upshot being:

i. The appeal is bereft of merit and is dismissed.

ii. Costs to the respondent.

21. It is so ordered.

DELIVERED, DATED AND SIGNED ATEMBU THIS 15TH DAY OF DECEMBER, 2021

L. NJUGUNA

JUDGE

……..……for the Appellant

…….for the Respondent