Mosonik v Mutai (Environment and Land Appeal 1 of 2018)
[2023] KEELC 17127 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17127 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT AND LAND APPEAL 1 OF 2018

MC OUNDO, J

APRIL 27, 2023

BETWEEN

SUSAN CHEMUTAI MOSONIK ..... APPELLANT

AND

ROBERT MUTAI ..... RESPONDENT

RULING

1. Vide an Application by way of a Notice of Motion dated 1st February 2022, brought under the provisions of Article 50 and 159 of the *Constitution*, Section 1A, 3, 3A and 63(c) (sic)of the *Civil Procedure Act*, Order 45(1)(b) (sic)and 51(1)(sic), the Applicant/Appellant herein sought for the following orders;

    i. Spent

    ii. That the Appeal be reinstated and be heard on merit.

    iii. That this Honorable Court be pleased to set aside orders issued on the 22nd May 2018 marking the Appellant's Appeal and Application dated 15th May 2018 as withdrawn.

    iv. That cost of this Application be in the cause.

2. The said Application was based on the grounds therein and a supporting affidavit of Susan Chemutai Mosonik thre Applicant sworn on the 1st February 2022 to the effect that her Appeal and Application herein above stated had been withdrawn on the 22nd May 2018 without her knowledge as she was never informed of the same by her former Advocates on record.

3. That her grievances have not been resolved and therefore there was need for her claim to be heard and determined as her Appeal had a high chance of success and the withdrawal of the same had been extremely prejudicial. That the Respondent would suffer no prejudice if the Application was allowed.

4. The Application was opposed by the Respondent's Grounds of Opposition dated 22nd June 2022 and Replying Affidavit dated the 22nd December 2022 to the effect that the Appeal had been withdrawn by consent with no costs by the Appellant's Counsel in the presence of the Appellant herself and Counsel for the Respondent, on 22nd May 2018 which was four years ago and therefore the Application was an afterthought and without justification whatsoever.

5. That the Application was an attempt to reinstate an Appeal after the Applicant Appellant failed to pay costs of the suit in the lower court where warrants dated 17th December 2021 had been issued in execution of the said costs. Therefore, the Application lacked merit, was an abuse of court process, was frivolous and vexatious and the same ought to be dismissed with costs.

6. By consent parties agreed to dispose of both the Application and Grounds of Opposition by way of written submissions to which only the Respondent complied.

Respondents' submissions.

7. In opposition to the Application and in support of their Replying Affidavit and Grounds of Opposition, the Respondent submitted that what triggered the Application for the reinstatement of Appeal after almost five (5) years was the fact that there was pending, an execution due for the recovery of costs of the suit in lower court where warrants of arrest had already been issued.

8. That the withdrawal of the suits is governed by the provisions of Order 25(1) & (2) of the *Civil Procedure Rules*. The Respondent also relied on the decision in the case of Beijing Industrial Designing Research Institute vs. Lagoon Development Ltd (Supra) (sic) where the court had laid down the principles in regard to withdrawal of claims. That in the instant suit, the Appellant/Applicant chose to withdraw the Appeal, in the presence of all parties and rightly so as provided by the law, before it had been set down for hearing.

9. The Respondent further relied on the decision in *Priscilla Nyambura Njue vs. Geovhem Middle East Limited; Kenya Bureau of Standards (interested Party)*[2021] eKLR to submit that a withdrawal is complete or effective as soon as it takes place and the right to revoke the withdrawal can only be allowed by legislature by expressly providing so in the rule and not by courts. That the rules do not confer the court with the power to reinstate a suit that was withdrawn and therefore, the Appellant/Applicant was estopped from reinstating her Appeal as the same was illegal and against the Rules of Civil Procedure, 2010.

10. The Respondent also submitted, that although the Appellant/Applicant's argument was that her former Advocate withdrew the Appeal without her consent, yet this argument was vague and was an attempt to conceal the material fact of this matter as at the time of withdrawal of the Appeal by the Appellant's Counsel, all the parties were present in court including the Appellant herein.

11. Reference was made to the decision in Hiten Kumar A. Raja vs. Green Span Limited & 4 Others [2022] (sic) to submit that an Advocate in the course of conducting the case was clothed with authority to compromise a suit in which (s)he has been retained as Counsel. That express authority is not needed for a Counsel to enter into a compromise within the scope of the suit and further that where there was limitation of authority and that limitation was communicated to the other side, consent by Counsel outside the limits of his authority would be of no effect. That that unless authority to act for a client was revoked and such revocation is notified to the opposite side, Counsel had by virtue of his retainer and without need of further authority, full power to compromise a case on his client's behalf and lastly, the authority to compromise was implicit in the appointment unless it was expressly countermanded.

12. That the argument that the Applicant's Advocate had no authority to withdraw her Appeal was not sustainable as it was an afterthought due to impending execution of payment of costs in lower court, hence an attempt to pre-empt the said payment by reinstating this Appeal. That the Application ought to be dismissed.

Determination.

13. I have considered the Application herein, the grounds in support as well as the Replying Affidavit and grounds of opposition thereto, not forgetting the authorities cited and the applicable law.

14. It is now a settled practice under the new Constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that an Applicant who fails to file his submissions on an Application as ordered by the court is deemed as a party who has failed to prosecute his/her Application and therefor that Application is liable for dismissal. The filing of submissions having been ordered, and this court having extended time for compliance without compliance, the failure by the Applicant to exercise the leave granted to her to file written submissions clearly demonstrates inertia and inordinate delay, lack of interest and/or seriousness on the Applicant's part in the prosecution of the matter.

15. The Court of Appeal in *Rowlands Ndegwa and 4 Others vs. County Government of Nyeri and 3 Others; Agriculture, Fisheries and Food Authority & Another (Interested Parties)* [2020] eKLR, citing with approval the decision of the High Court in, *Winnie Wanjiku Mwai vs. Attorney General & 3 others* [2016] eKLR, observed as follows:

> " With regard to dismissal for want of prosecution, there are indeed no hard and fast rules as to the manner in which the inherent power and discretion to dismiss an action for want of prosecution is to be exercised. It is however generally accepted that dismissal will be invited if there should be a delay in the prosecution of the action and the Respondent is prejudiced by the delay with attention also being paid to the reasons for the inactivity...."

16. Although I am minded to dismiss the Application herein for want of prosecution, I shall however the exercise my discretion and determine the same on merit.

17. The gist of the matter in question is that the Applicant/Appellant seeks for reinstatement of her Appeal that was withdrawn by her Counsel on 22nd May 2018 for the reason that the said withdrawal had been made without her consent and/or instructions.

18. The Respondent on the other hand has refuted the Applicant's claim stating that the withdrawal of the Appeal had been done by consent with no costs by the Appellant's Counsel and in the presence of the Appellant herself and Counsel of the Respondent on 22nd May 2018.

19. I have perused the proceedings of 22nd May 2018 wherein I note that on the said date, Counsel for the Appellant, Mr. Bii Advocate, in the presence of Counsel for the Respondent had informed the court as follows;

> ''The parties in this matter have agreed. We pray that the Application and the Appeal be withdrawn with no orders as to costs."

20. Both Counsel had then countersigned the said consent wherein the court had marked as withdrawn both the Application dated 15th May 2018 together with the Appeal, with no orders as to costs.

21. Four years and 10 months later, the Applicant/Appellant has now brought this Application seeking to set aside the consent order for the reasons herein above stated, so that the Appeal can be reinstated and be heard on merit. The matter for determination in the circumstance is whether the present consent order which had been adopted as an order of the court could be varied or set aside.

22. In the case of *Brooke Bond Liebig (T) Limited vs Mallya* (1975) E.A. 266, Law JA, stated the law at P. 269 in these terms:-

> The circumstances in which a consent judgment may be interfered with were considered by this court in *Hirani vs Kassam* (1952), 19 EACA 131, where the following passage from Seton on Judgment and order, 7th edition, Vol. 1 page 125 was approved;
>
> 'Prima facie, any order made in the presence and with the consent of Counsel is binding on all parties to the proceedings or action, and on those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court.... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.'

23. The Court of Appeal in the decision in *Munyiri –vs- Ndungunya* (1985) KLR 370 held as follows:

> ''..... will exercise its jurisdiction to review, vary or set aside a consent order if it is shown that such an order has been obtained by fraud or collusion, by agreement contrary to the policy of the Court, or the consent was given without sufficient material fact, or misapprehension or ignorance of material facts or for a reason which would enable a court to set aside an agreement or by the consent of the parties themselves.''

24. In the case of *Samuel Mbugua Ikumbu vs. Barclays Bank of Kenya Limited* [2015] eKLR the court of Appeal held that:

''The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.''

25. I find in present case and in relation to the holding herein above, that no such circumstances have been shown to exist. There is no suggestion of fraud or collusion in the consent entered into by the parties' Counsel herein. Indeed the compromise was in clear and unequivocal terms as to leave no room for any possibility of mistake or misapprehension.

26. It is equally an important principle of *the Constitution* that justice must be dispensed without undue delay. Article 159 of *the Constitution* enjoins the court to administer substantive justice. Sections 1A and 3A of the *Civil Procedure Act* through the overriding objective principle mandate the court to act justly and fairly and the overriding objective principle is not aimed at giving justice to one party at the expense of another but for ends of justice to be met to all the parties involved or stand to be affected by the matter. I find the filing of this Application more than four years and 10 months later, to have been inordinate. I am satisfied that in the circumstance of this Application, that there is no basis for restoring the Appeal which was withdrawn on 22nd May 2018. The Application dated the 1st February 2022 is totally lacking in merit and the same is hereby dismissed with costs to the Respondent.

27 It is so ordered.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 27TH DAY OF APRIL 2023

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE