



Kipkeu ((Suing on his behalf and as personal legal representative and administrator of the Estate of the Late Kipkeu Kipkoros (Deceased)) v Chesum & another (Environment and Land Appeal 10 of 2022) [2023] KEELC 17464 (KLR) (16 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17464 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL 10 OF 2022
L WAITHAKA, J
MAY 16, 2023
FORMERLY ELDORET ELC APPEAL NO.53 OF 2021

BETWEEN

PAUL KANDIE KIPKEU APPELLANT
(SUING ON HIS BEHALF AND AS PERSONAL LEGAL REPRESENTATIVE
AND ADMINISTRATOR OF THE ESTATE OF THE LATE KIPKEU KIPKOROS
(DECEASED)

AND

JACOB KIPTUM CHESUM 1ST RESPONDENT
SANGURUR DISPENSARY 2ND RESPONDENT

*(Being an appeal against the orders of C. A. Kutwa SPM
issued on 27th October 2021 in Iten SPM ELC No. 61 of 2021)*

JUDGMENT

1. By a Memorandum of Appeal dated 26th November 2021, the appellant herein filed the instant appeal seeking to set aside the order of Hon. C.A Kutwa (SPM) made on 17th October, 2021 dismissing his suit, Iten Magistrate Court's ELC Case No. 61 of 2018 for want of prosecution. The appellant prays that the suit be reinstated and remitted for hearing before another court other than Hon. Kutwa's court.
2. The appeal is premised on seven grounds which can be reduced to one broad ground that the Learned Trial Magistrate (TM) erred by dismissing the suit when it was not ripe for dismissal under Order 17 Rule 2 of the Civil Procedure Rules, 2010 and without according the appellant an opportunity to be heard on the notice to show cause why the suit should not be dismissed for want of prosecution.



3. Pursuant to directions given on 16th February, 2023 to the effect that the appeal be disposed of by way off by way of written submissions, parties filed submissions which I have read and considered.

The Appellant's Submissions

4. In his submissions filed on 20th March 2023, the appellant submits that the suit was not ripe for dismissal under Order 17 Rule 2 of the Civil Procedure Rules as the conditions set therein had not accrued and/or were not complied with. In that regard, it is contended that the suit had not been inactive for 12 months; that the period of inactivity was three months only and that there is no evidence or indication in the court record that the parties were served or notified of the notice.
5. The appellant has cited many cases where the principles that undergird an application for notice to show cause why a suit should not be dismissed for want of prosecution are discussed and submitted that those principles were not complied with in dismissing the suit hereto.
6. Terming the TM'S exercise of discretion in dismissing the suit hereto improper, the appellant urges this court to allow the appeal in its entirety.

The Respondents' Submissions

7. In their submissions filed on 6th March 2023, the respondents submit that the issues raised in the appeal are not weighty. Terming the appeal a delaying tactic and an afterthought, the respondents submit that the TM was justified in dismissing the appeal as the conduct of the appellant was dilatory.

Analysis and determination

8. As the first appellate court, it is the duty of this court to examine and re-evaluate the evidence on record, assess it and make it's own conclusion, bearing in mind that this court has neither seen nor heard the witnesses and make due allowance for that. This court has also to take into account the circumstances upon which this court may differ with the Trial Court on findings of fact namely, if it appears either that the Trial Magistrate has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistency with the evidence in the case generally. See the case of *Selle & Another v. Associated Motor Boat Co. Ltd & others* (1968) EA 123 where the Court of Appeal stated:-

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

9. The court record shows that on 6th October 2021, the court assistant, Purity, in the absence of parties, fixed the suit for dismissal under Order 17 Rule 2(1). She fixed the notice to show cause on 27th October, 2021. Notice was to be issued to the parties.
10. The court record indicates that on 27th October, 2021 the matter was dismissed.
11. The court record further shows that on 30th June, 2021 there was an activity or action in the case. Directions on the mode of disposal of the plaintiff's application dated 10th February 2021, were given to the effect that the application be disposed off by way of written submissions. The matter was listed for mention to confirm compliance on 14th July,2021.



12. On 14th July 2021, when the matter was called for mention, the parties were absent. The court referred the matter to the registry and ordered that Court Adjournment Fee (CAF) be paid.
13. After the matter was referred to the registry, it was fixed for notice to show cause why the suit should not be dismissed on 27th October 2021 when the suit was dismissed for want of prosecution.
14. As pointed out herein above, the court record indicates that the notice was to be issued to the parties. There is nothing in the court record to show that notice was issued as intended. There is also no indication of the mode of service or notification of the notice on the parties, if any was ever issued.
15. In the absence of any evidence in the court file capable of showing that notice to show cause was issued and served or notified to the parties, I have no reason to doubt the appellant's claim that he was not served with any notice to show cause.
16. Whilst the issue of issuance and notification/service of the notice to show cause is central to this appeal, as without proof of issuance and notification or service of the notice to show cause the proceedings of 27th October, 2021 cannot be said to be legally sustainable on account of breach of the principles of natural justice, the respondents have, in their submissions avoided the issue.
17. In the case of *Trade Circles Limited v. Family Bank Limited & Another* (2021)eKLR it was held:-“it is unfair and unjust to lock out a party from access to justice if it is not abundantly clear that it is the party that was indolent and delayed after being properly informed and/or served by the Court on the next mention/hearing date.”
18. In the case of *Celyne Odembo & another v Evaline T Omware & 6 others* [2019] eKLR it was held:-

“Dismissal of suit for want of prosecutions is governed by Order 17 Rule 2(1) of *Civil Procedure Rules*, 2010 which provides:

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.” (emphasis added)

On the importance of the giving notice to parties, it was held in *Eunice Soko Mlagui v Suresh Parmar & 3 others* [2018] eKLR, it was held that;

“The rules of natural justice require that before an order adverse to any party is made by a court, that party ought to be heard and be allowed to make representations.”
19. In the circumstances of this case, in addition to there being no evidence of issuance of notice to show cause on the parties and/or evidence of service or notification of the notice to the parties, if ever issued, the court record shows that the suit was inactive for only 3 months and not 12 months as contemplated under Order 17 Rule 2(1) of the *Civil Procedure Rules*.
20. In view of the foregoing, I find and hold that the appeal has merit. Consequently, I set aside the order issued on 27th October, 2021 dismissing the suit for want of prosecution and remit the file to the lower court for the case to be heard by a court other than the court presided by Hon. Kutwa.
21. On costs, because the circumstances giving rise to the appeal are blamable on the court as opposed to the parties, I order that parties bear their own costs of the appeal.
22. Orders accordingly.



JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 16TH DAY OF MAY, 2023.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:

Mr. Nabasenge for the appellant

Mr. Maritim for the respondents

Court Asst.: Christine

