Kokwo v Akokor (Environment and Land Appeal E016 of 2022)
[2023] KEELC 20783 (KLR) (18 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20783 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL E016 OF 2022

FO NYAGAKA, J

OCTOBER 18, 2023

BETWEEN

SOLOMON PKIACH KOKWO ..... APPELLANT

AND

VERONICA C. AKOKOR ..... RESPONDENT

(An appeal from the Ruling of the Principal Magistrate, Hon. B.O. Ondego, delivered on the 8/03/2023 in Kapenguria PMC Land Case No. 5 of 2020)

JUDGMENT

Introduction

1. The present Appeal arises out of a Ruling and Order of the trial court delivered on 8/03/2022. The gist of the Ruling was that the Appellant's case, being Kapenguria ELC Case No. 5 of 2020 (suit in Kapenguria), was dismissed for want of prosecution. The court further awarded costs of the suit to the Defendant (the Respondent herein).

2. Aggrieved by the decision the Appellant, who was the Plaintiff then, filed a Memorandum of Appeal on 3/10/2022. In precis, he decried the error by the trial court in dismissing the suit for want of prosecution without due regard to known principles for consideration. He listed them as an explanation given for the delay, hardship, if any, to the Defendant and whether the prolonged delay alone should prevent the court from doing justice to the parties. He accused the Court of failing to make a finding on each of the elements. Furthermore, he contended that the trial court erred in failing to consider clear evidence tendered to it via a Replying Affidavit evidencing that after the institution of the suit in Kapenguria, the Defendant (Respondent) instituted a suit in Kitale being ELC Misc. Civil Application No. 7 of 2020 as against the Appellant.

3. In the suit she sought the cancellation of the Appellant's title to the land which was the subject of the suit that gave rise to the instant appeal. He argued that that necessitated the determination of the Kitale

suit first before the Kapenguria one. He argued that as a result of the above, the trial court erred in failing to find and hold that the explanation given by the Appellant for the delay in the prosecution of the Kapenguria suit was satisfactory and justified. He prayed that the instant appeal be allowed and the order issued on 8/03/2022 dismissing the suit for want of prosecution be set aside, and the suit be reinstated before the magistrate in Kapenguria other than Hon. B. O. Ondego. He further prayed for costs of the Appeal.

The Submissions

4. This Court directed the parties to dispose of the Appeal by way of written submissions. In their submissions filed on 6/06/2023, the Appellants gave a synopsis of how the Kapenguria suit was instituted and the orders sought in it. He contended that it was after the Respondent filed her defence in the Kapenguria case that she instituted another suit in Kitale. It challenged the Appellant's title to parcel No. West Pokot/Keringet 'A'/2728, the subject matter in the Kapenguria suit. He asserted that he filed a preliminary objection to the Kitale suit. That it was during its prosecution the Respondent filed an application seeking to dismiss the Kapenguria suit. According to the Appellant he opposed the said application via a Replying Affidavit explaining the reasons for the delay in prosecuting the suit in Kapenguria on account of that other case instituted by the Respondent. Further that there was no way he could prosecute the suit in Kapenguria yet there was a suit in the High Court (sic) challenging his interest in the subject matter and whose outcome had a great impact on the suit before the lower court.

5. The Appellant argued that the delay in prosecuting the suit in Kapenguria was excusable since an explanation had been given to the lower court to the effect that it was necessary for the ELC Misc. Application No. 7 of 2020 to be determined first as it had a direct impact on the Kapenguria Suit. However, the trial court failed to consider the reasons for the delay. To this end he placed reliance on the cases of *Ivata Vs Kyumba* (1984) eKLR, *Eco Bank Ghana Limited Vs Triton Petroleum Company Limited & 5 Others* (2018) eKLR and *Graham Vetch Vs Calvin Burgess & Another* [2012] eKLR on the circumstances a court ought to consider before dismissing a suit for want of prosecution.

6. The Appellant submitted it was also a requirement for court to consider whether the Respondent would face any prejudice and or hardship as a result of the said delay. According to the Appellant, the Respondent failed to demonstrate any prejudice she would face as a result of the delay because she actually was in possession and occupation of the disputed one-acre parcel of land. He argued that the dismissal would be more prejudicial to him than her since he would have lost one acre of land on account of the suit being dismissed. He relied on the case of *Susan Gachambi Kanuri & Another vs British American Insurance Company Limited* [2014] eKLR on the need for the Defendant to demonstrate the prejudice she would suffer as a result of the delay. He further submitted that the trial magistrate failed to consider whether justice could still be done despite the delay since the Respondent did not tender any evidence that as a result of the delay circumstances had changed and a fair trial could not be conducted.

7. The Appellant contended further that the trial court had failed to appreciate the evidence tendered before it and to take into consideration the above enumerated guiding principles for dismissal of suits for want of prosecution thereby denying the Appellant a chance to having a fair trial. They placed reliance on the case of *Pkiech Chesimaya Vs Limakorwai Achipa* [2020] eKLR. Furthermore, the Appellant pointed out that the suit in Kitale was struck out with costs hence the Kapenguria one could now be heard without any further delays. Flowing from the above, the Appellant submitted that the magistrate wrongly exercised his discretion and thus prayed that the appeal be allowed as prayed.

8. The Respondent filed submissions on 7/06/2023. She asserted that the trial court was correct in dismissing the Appellant's suit which had been dormant in court for more than one year. She placed

reliance on Order 17 Rule 1 and 2 of the *Civil Procedure Rules* which elaborates on instances a court may dismiss a suit for want of prosecution. The Respondent argued that the Appellant filed the suit on 6/02/2022 and she filed her defence on 27/02/2020. However, for two years the Appellant took no action in prosecuting his case. He did not fix the matter for a mention to take directions. The Respondent assert that she was within her right to apply for the dismissal of the suit, that the trial court rightly found that the Appellant had failed to take any action to prosecute his suit until 3/12/2021 when the Respondent filed her application for its dismissal.

9. The Respondent further submitted that no amount of explanation could justify a part's conduct of filing a suit and failure to take steps to prosecute the same for more than two years as was the case for the Appellant. Furthermore, it was the Appellant's duty to move the court under Section 6 of the *Civil Procedure Act* to stay either one of the suits in order for one to be first determined before the Respondent filed its application for dismissal.

10. Additionally, the Respondent relied on Order 12 Rule 6(1) of the *Civil Procedure Rules*. She asserted that the remedy available to the Appellant after dismissal of a suit was that provided in the Rule and not to appeal. She contended that a dismissal of a suit for want of prosecution under Order 17 of the *Civil Procedure Rules* was not subject of appeal under Order 43 of the *Civil Procedure Rules*. Thus, she argued that the Appellant's appeal lacked merit and it be dismissed with costs.

11. Equally, the Appellant filed supplementary submissions on the issue of not having a right to appeal, the Appellant submitted that he had a right to appeal, that a dismissal under Order 17(2) (3) gave rise to a decree and under Section 65(1) (b) of the *Civil Procedure Act*, an appeal from a decree lies to the High Court on either question of fact or law. The Appellant submitted that an appeal lay as of right from the ruling delivered on 8/03/2022.

12. He argued that the explanation given on why he could not prosecute the suit was sufficient for the trial court to exercise its discretion in the favour of the Appellant. Further that there was no demonstration of any impediment to a fair hearing of the suit if the Appellant had been given an opportunity to prosecute the Kapenguria suit. Consequently, he prayed that the appeal be allowed with costs and the order of dismissal be set aside to pave way for the hearing of the suit in the trial court.

Analysis And Disposition

13. This court has considered grounds stated in the Memorandum of Appeal and the rival submissions filed by the parties in this matter, the relevant law, both substantive and procedural and the facts of the case. This court has also taken time to scrutinize the record of appeal. The Appeal emanates from the trial court's exercise of discretionary power in dismissing a suit for want of prosecution. In determining the instant appeal, this Court has to determine whether the trial court properly applied the laid down principles in dismissing the Appellant's suit. This was the rendition in the case of in *Mbogo & Another v Shah* [1968] EA 96 which stated as follows: -

> " I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion..."

14. The power to dismiss a suit for want of prosecution is governed Order 17 of the *Civil Procedure Rules*. Under Order 17 Rule 2(1) of the *Civil Procedure Rules*, provides as follows:

> " 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."

15. Further Order 17 Rule 2(3) of the *Civil Procedure Rules*, states thus:

> " Any party to the suit may apply for its dismissal as provided in sub-rule 1"

16. Evidently, the statutory threshold of Order 17 Rule 2 of the *Civil Procedure Rules* is that a suit qualifies to be dismissed for want of prosecution if either party makes no application in it or fails to take steps in it for at least one year preceding the presentation of a notice to show cause for dismissal by the court or an application by a party who seeks dismissal of the suit.

17. I am alive to the fact that before any court can dismiss a suit for want of prosecution, the test to be applied is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. In other words, if the court is satisfied with the Appellant's excuse for the delay and the parties are still keen and interested in pursuing their matter going forward in the fullness of time, justice can still be done to the parties, and hence the action would be not to dismiss the suit but direct that it be heard at the earliest time possible and available.

18. This test was elucidated in the case of *Nilesh Premchand Mulji Shah & Another T/A Ketan Emporium v MD Popat and Others & Another* [2016] eKLR, the court stated as follows:

> " Nonetheless, Article 159 of the *Constitution* and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of *Ivita v Kyumbu* [1984] KLR 441 espoused that:
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> "The test applied by the courts in the 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 the 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 of and in the discretion of the court."

19. Simply put in *Invesco Assurance Co. Ltd v Oyange Barrack* [2018] eKLR, regarding the exercise of discretion in the circumstances where a dismissal of this nature would be raised, the court stated:

> " Nonetheless, Article 159 of the *Constitution* and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice, regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in

prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay."

20. Guided by the aforementioned authorities, it is clear to me that the discretion of Court to set aside an order for dismissal ought to be exercised judiciously. When a suit is dismissed for a want of prosecution, it means that the parties therein failed to aid court in meeting its overriding objective. The party seeking to reverse this order must explain sufficiently to court as to why his application is merited and persuade court to exercise its discretion.

21. The circumstances that led to the dismissal of the suit by the Respondent are that the Appellant filed the suit on 6/02/2020 and the Respondent equally filed its defence on 27/02/2020. However, from then the Appellant took no action to prosecute or fix the matter for directions. This prompted the Respondent to file an application for the dismissal of the suit. In the given circumstances, the trial court was left with no alternative on the basis of the said application to have the suit dismissed for want of prosecution.

22. The Appellant gave an explanation that the Respondent engaged the High Court (sic) with an Application filed therein to cancel his title to the land. The Respondent does not deny that she did so, and that indeed the objection raised by the Respondent in the High Court (sic) matter led to its being struck out. The correct position in regard to the Kitale ELC Misc. Civil Application No. 7 of 2020 is that it was filed in ELC Kitale. The Respondent does not also deny that these events happened during the pendency of the suit that was dismissed for want of prosecution.

23. Section 6 of the *Civil Procedure Act* contemplates a situation where a matter is filed between the same parties litigating under the same title over the same subject matter subsequent to another one. The Rules provide that a party may apply to stay the subsequent one until the one previously instituted is heard and determined and not vice versa. If that provision is to be read holistically in relation to the circumstances that led to the dismissal of the suit from which the instant appeal has been preferred, it is clear that when the Respondent filed the Kitale High Court Application the Appellant focused his mind on the disposal of the said suit before the suit appealed from herein could be determined. The Rules do not provide for simultaneous proceedings where a matter falls under Section 6 of the *Civil Procedure Act*. Rather than applying to stay the proceedings in the High Court (sic), the Appellant took time to apply to dispose of the same with finality, which is not barred by law.

24. Therefore, applying the principles outlined in the previous paragraphs, I find that the learned magistrate erred in law and fact in failing to consider that the Appellant had given a sufficient explanation as to the delay in prosecuting the suit which the trial Court dismissed for want of prosecution. While the delay in prosecuting it may be said to be inordinate there was sufficient cause for it and the Appellant had shown it through the depositions in the Replying Affidavit that he filed as an explanation thereof. His explanation that there was no way he could prosecute the suit in Kapenguria yet there was a suit in the High Court challenging his interest in the subject matter and whose outcome had a great impact on the suit before the lower court was good reason.

25. On the question of whether either party is likely to be prejudiced as a result of the delay, it is upon the party making the application to show the court the prejudice it would suffer as a result of the delay. In *John Harun Mwau v Standard Limited & 2 others* [2017] eKLR, on the issue of the Respondent facing prejudice as a result of the delay it was observed:

> "But, the appellant's complaint was that in arriving at this conclusion, the learned judge failed to consider whether indeed the respondents had suffered prejudice, as no evidence was tendered to support the findings that the respondents' witnesses had suffered a memory loss

or ill health. The case of Ngwambu *Ivita v Akton Mutua Kyumbu* (supra) makes it clear that:

"The Defendant must however satisfy the court that he 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."

While it is true that the learned judge appreciated the respondents' assertion that the nature of the suit required that it be promptly prosecuted when the evidence was fresh and the witnesses were available and able to clearly recollect the facts of the case, this conclusion was reached without the benefit of any evidence in support. Nothing was shown by the respondents to demonstrate what prejudice they suffered due to unavailability of witnesses, or that due to the prolonged delay, a key witness had suffered memory loss or did not have a clear recollection of the events leading to the suit. Without evidence to show that the prolonged delay was prejudicial to the respondents' case, such that a fair trial was thereby rendered impossible, we are not persuaded that the two requisite tests for dismissal were sufficiently fulfilled. We are also cognizant that justice is better served by having matters determined on their merits, unless delay and inaction has resulted in intolerable prejudice. In view of the above, we are not satisfied that the learned judge took into account all the pertinent matters in dismissing the appellant's suit for want of prosecution. We therefore allow the appeal." Emphasis mine.

26. In the instant case, the Appellant stated that the Respondent did not adduce any tangible evidence of any prejudice that they were likely to face as a result of the said delay. The burden did not shift to the Respondent to show that he would suffer prejudice. Nevertheless, Article 159(2)(d) of the *Constitution* of Kenya obligates this Court to determine suits based on substantive justice rather than technicalities. But each case has to be decided on its merits. I am of the view that the merits of this case warrant substance to be placed over procedure, especially given that the Respondent caused a distraction of the Plaintiff's actions by filing another suit. Whatever may have motivated her to file another suit and then apply for dismissal of the instant one at the same time is a mystery that may be unravelled by a deduction that she misused the Court process. She cannot be permitted to reap from such ingenuity.

27. Contrasting the circumstances of the suit that is appealed from herein, where the Plaintiff takes no steps at all and gives no reason for the delay, the courts will not hesitate to swing the knife and cut the subject into pieces. This was the court's view in the case of *Nzoia Sugar Company Limited v West Kenya Sugar Limited* [2020] eKLR where it held:-

> "Balancing the positions of the two parties, I take the view that delay of two years in prosecuting a matter is inordinate and unreasonable. The plaintiff has not explained it. The mere fact that the defendant has not demonstrated prejudice is not sufficient to sustain a suit that the plaintiff has shown no interest in prosecuting for the two years before the application for dismissal was made. It would appear that the suit was filed for the sole purpose of obtaining injunctive orders, and once the same were denied the plaintiff lost interest in the matter."

28. The upshot is that given the analysis above, this court finds the appeal herein merited. The Ruling delivered and subsequent order by Hon. B. O. Ondego on 8/03/2022 in Kapenguria ELC Case No. 5 of 2020 is hereby set aside and the suit reinstated. Costs of the Appeal shall be to the Appellant.

29. The suit shall be set down for hearing within two (2) months of the original lower Court file being taken back to and received in the Kapenguria Registry.

30. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 18TH DAY OF OCTOBER, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE