



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. 1 OF 2021**

**MUNDUSI INVESTMENT LTD.....APPELLANT**

**VERSUS**

**PATRICK KIMATHI M'MUGAMBI.....1<sup>ST</sup> RESPONDENT**

**DAVID MUTHEE M'MUGAMBI.....2<sup>ND</sup> RESPONDENT**

(Being an appeal from the Ruling of Hon. J. Irura (P.M.)

delivered on 8<sup>th</sup> January, 2020, in Nkubu PMCC No. 76 of 2007)

**JUDGMENT**

1. By a memorandum of appeal dated 7.2.2020, this court is asked to find the lower court order faulty in fact and in law on the basis:- the court should have reinstated the suit for hearing on merits; the scene visit report as previously directed to be undertaken was crucial and a condition precedent; earlier scene visit by the court had established it would have been difficult to determine the matter without the input of the two expert evidence; it was a travesty of justice to dismiss the matter when previous court orders over scene visit had not been complied with; the set timelines for the hearing were unrealistic given the scene visit previous orders and lastly the holding was against the law and evidence obtaining in the circumstances.
2. This being the first appeal, it is expected this court shall re-appraise itself of the lower court file, pleadings and evidence and come up with independent findings and conclusions. ***See Selle -vs- Associated Motor Boat Company Ltd & Another (1968) EA 123.***
3. By a plaint dated 6.10.2007, the appellant as the sole registered owner of **Plot No. 6 Kithirune market** sued the respondents for encroachment and trespass and sought for declaratory orders; that the plot belonged to it and for a permanent injunction restraining them from entering, interfering, pulling down and in any way whatsoever dealing with the suit premises.
4. Simultaneously, the appellant sought for and obtained temporary orders of injunction on 24.10.2007.
5. The respondents filed a defence dated 26.10.2007 and averred they shall raise a preliminary objection that the suit lacked merits and was an abuse of the court process.
6. Through a consent dated 15.11.2007, parties obtained an order dated 30.1.2008 for the District Physical Planner Meru Central and County the Council surveyor to visit **Plot No's 6, 5b and 7 Kithirune market**, mark the boundaries and present a report to the court.
7. Even though the respondents had not pleaded over plot No's 5b and 7 thereof, a report that was filed in court through a covering letter dated 17.2.2008 clarifying the existence of plot No. 6 measuring 37 by 80 ft with developments thereof on the side abutting plot No. 7 and had some semi-permanent structures on the side abutting plot No. 5b. The report was duly signed by M'mbai D.K., the District Physical Planner and a Mr. Ntharamba H.G the licenced County Surveyor.
8. It appears the suit was dismissed for non-prosecution on 30.9.2015, and by an application dated 5.2.2016 the appellant sought for the reinstatement which the respondents opposed vide a replying affidavit sworn on 23.3.2016.
9. The court dismissed the aforesaid application on 21.2.2018 for non-compliance with the court's directives namely non-payment of court adjournment fees and secondly for lack of good reason for non-prosecution of the suit.

10. Vide an application dated 25.6.2018 the appellant sought for review of orders given on 21.2.2018 on the basis that it had not been served with a notice to show cause under **Order 17 rule 2 of the Civil Procedure Rules**.
11. The respondent opposed the application through a replying affidavit sworn on 18.7.2018.
12. The court allowed the application vide a ruling delivered on 21.11.2018 in the presence of Miss Mamu for the plaintiff but in the absence of the respondents' counsel.
13. In allowing the application, the conditions given that the appellant pays Kshs. 1,000/= court adjournment fees and Kshs. 5,000/= throw away costs to the respondents before setting down the suit for hearing.
14. There is no indication if the appellant ever paid the court adjournment fees as ordered by the court. Nevertheless, a date for hearing was given in the open court for 10.12.2018. The appellant did not attend court on 10.12.2018 neither was the respondent's present hence the court proceeded to dismiss the suit for non-prosecution under **Order 17 rule 2 (1) of the Civil Procedure Rules**.
15. The appellant brought on board M/s Gichunge Muthuri & Co. Advocates on 26.8.2019. They filed an application dated 2.9.2019 seeking for the review and or setting aside of the orders made on 10.12.2018 on the basis that the time given for the prosecution of the suit was limited; the scene visit had not occurred; the plaintiff had no control over the two officers; the evidence of the two officers was fundamental to the determination of the suit; the former advocate on record had not informed the appellant of the strict directions given on 21.11.2018, mistake of counsel should not be visited upon a party and it was in the interest of justice that the matter be heard on merits.
16. The respondents opposed the motion through a replying affidavit sworn on 5.11.2019 on the grounds of indolence; litigation must come to an end; no error had been occasioned by the previous law firm; the sword of justice cuts both ways; there was inordinate delay in seeking for the review and that the appellant had been accorded its rights.
17. The court declined to issue the orders sought hence this appeal.
18. With leave, parties agreed to canvass the appeal through written submission dated 6.10.2021 and 22.10.2021.
19. The appellant urges the court guided by the reasoning in *Ivita -vs- Kyumba (1984) KLR 441* to find there was a valid and reasonable excuse for the delay in prosecuting the suit, vis a vis the need for expert witnesses whose control at the time the matter was set down for hearing was beyond it.
20. Secondly, it is submitted the dismissal would occasion the appellant irreparable damage as he would have no recourse to reclaim part of the plot from the respondents. The court is urged to be guided by the reasoning in *CMC Holdings Ltd -vs- Nzioki [2004] 1 KLR 173* on the proposition that a court should exercise its discretion bearing in mind that it should not allow a party to suffer injustice or hardship out of mistakes or error of its counsel on record and in *Philip Chemwolo & another -vs- Augustine Kubede (1982-88) KAR/03* on the proposition that courts exist for the purpose of deciding rights of parties and not for the purpose of imposing discipline. The court is urged to be guided by *Joshua Chelelgo Kulei -vs- Republic & 9 others [2014] eKLR* on the proposition that expeditious trial process, fair trial and irreparable prejudice must be balanced along other factors so as to do justice to both parties.
21. On the part of the respondent's, it is submitted the appellant did not comply with the conditions set out by the trial court.
22. Secondly, it is submitted the appeal was filed on 7.2.2020 yet the order of dismissal was made on 10.12.2019 with no leave of court.
23. Thirdly, it is submitted the appellant has been indolent despite being accorded all rights as to fair hearing and being given warrants of execution against the two officers yet it neither executed nor brought the officers to court if it required their input.
24. The respondents relies on *Argan Wekesa Okumu -vs- Dima College Limited & 2 Others [2015] eKLR* on the proposition that a party has the duty to get on with his case and every year that passes prejudices the fair trial hence denial of justice and courts must enforce expedition and stem out excessive delay: *Daniel Kimani Njihia -vs- Francis Mwangi Kimani & Another [2015] eKLR* that a court is of law and not of mercy, bound by law whose ignorance is not a defence at all.
25. Lastly the respondents rely on *Sum Model Industries Ltd -vs- Industrial & Commercial Development Corporation & Another A.G [2010] eKLR* on the proposition that there must be finality to litigation and the appellant must learn to live with the judgment.
26. Having looked at the pleadings, evidence, memorandum of appeal and written submissions, the issues for determination are:-
- a. **If the appeal is properly before this court.**
  - b. **If the trial court was right in dismissing the application for review and reinstatement.**
  - c. **If the trial court was right in dismissing the application for review and reinstatement**
27. There is no dispute the appeal relates to the ruling delivered on 8.1.2020. The appeal was filed on 7.2.2020. My finding is the appeal was filed within time and the order appealed against forms part of the record of appeal. The trial court dismissed the suit under **Order 17 rule 2 (1)**.

28. In my view, **Order 17 Rule 2 (1) of Civil Procedure Rules** was not the applicable law in the circumstances obtaining since the court had just reinstated the suit for hearing on 21.11.2018 and set a hearing for 10.12.2018. The applicable law was **Order 12 Rule 3**. See *Toroitich Misoi Mereng –vs- Simeon Kiprotich Katam [2019] eKLR*.

29. The decision to dismiss a suit is to exercised judiciously. See *Ivita -vs- Kyumbua (1984) KLR 441* and *Argan Wekesa Okumu –vs- Kimia College Ltd & 2 Others [2015] eKLR*.

30. The court has powers to act **suo moto** as held in *George Gatere Kibata –vs- George Kuria Mwaura & Another [2017] eKLR*.

31. On the other hand, while exercising the discretion on whether to reinstate a suit, in *Mwangi S. Kaimenyi –vs- Attorney General & Another*, the court held a prolonged delay alone should not prevent the court from doing justice to all parties and what should matter is to serve substantive justice guided by the issue that the delay has not been intentional or contumelious; whether the delay or conduct of the party amounts to abuse of court process, inexcusable and gives a risk of substantial risk to fair trial and serious prejudice to the defendant and what prejudice will the dismissal occasion to the plaintiff.

32. In *CMC Holdings –vs- Nzioki [2004] 1 KLR 173*, the court held, on deciding whether or not to set aside an ex parte order the court is looking into ensuring a party does not suffer injustice or hardship for excusable mistake or error, inadvertence, or accident.

33. The instant suit was dismissed for want of prosecution. The appellant has not stated that it was not aware of the hearing date. In the application for review and reinstatement at the lower court, the appellant did not give reasons why there was no appearance yet the date had been taken in their presence. See *Bilha Ngonyo Isaac –vs- Kembu Farm & Another [2018] eKLR*.

34. There was also no explanation why the conditions for the reinstatement of the suit were not complied with, as ordered by the court.

35. Court orders are not made in vain and a party seeking the court's discretion must show good faith and compliance with previous court orders. Similarly in this appeal there has been no explanation and or submission on whether or not those court's conditions were ever complied with and if not so reasons thereof. See *Kenya Power & Lighting Co. Ltd –vs- Alliance Media Kenya Ltd [2014] eKLR*.

36. Having made a finding elsewhere in this judgment that the County surveyor and the County planning officer had already filed a report vide a letter dated 17.2.2008 it is obvious the appellant has deliberately omitted the information in the record of appeal.

37. Therefore, grounds 2, 3, 4, 5 and 6 of the appeal are not only misleading but are also lacking merits. Additionally if indeed the appellant was basing his claim and could only prove the same using for the scene visit reports, there is no indication of any efforts to seek for issuance of witness summons upon the two officers, at the time the court reinstated the suit and issued a hearing date.

38. The appellant's counsel did not bring to the attention of the trial court at the time the ruling was read on 21.11.2018 that they needed witnesses summons to issue and for the court to visit the scene. The court had previously dismissed the suit for want of prosecution. It couldnt therefore be assumed the suit once reinstated was together with all the previous orders such as those of a scene visit.

39. As indicated above, the order for the scene visit was by the consent of parties. There is therefore no indication that once the suit was reinstated, the appellant revived the request and sought for the concurrence of the respondents for a scene visit report and or for the court to visit the **locus in quo**. The court is under no obligation to order **suo moto** for scene visits and or expert reports, more so in this matter when there was already a report regarding the boundaries.

40. Similarly looking at the plaint, the appellant was seeking for declaratory orders and a permanent injunction and not for the beaconing and or reinstatement of boundaries.

41. In *Richard Ncharpi Leiyagu –vs- IEBC & 2 Others [2013] eKLR*, the Court of Appeal held a hearing is a well-protected constitutional right which is the cornerstone of law and even if courts have inherent jurisdiction to dismiss a suit, this should be done in circumstances that would protect the integrity of the court process from abuse and that would amount to injustice and lastly that at the end of the day there should be proportionality.

42. Looking at the circumstances of this case, the court was for the second time being called upon by the appellant to review an order dismissing the suit for non-prosecution on the very same reasons of inordinate delay and inaction. See *Elosy Murugi Nyaga –vs- Tharaka Nithi County Government & another [2020] eKLR*.

43. The saying is once bitten twice shy. The appellant did not show vigilance and or urgency in expediting the prosecution of the suit once it was given a second chance. Instead it went back to slumber and failed to attend court and prosecute the matter. The court had a duty to protect the integrity of the court process and guard against abuse.

44. Under **Order 12 Rule 1** where a suit is fixed for hearing and a party fails to attend and prosecute the suit, the court has discretion to dismiss the suit for non-prosecution.

45. The appellant has been silent throughout this appeal if it knew of the date and why there was no attendance to prosecute the suit. The appellant instead blames counsel for the mistake. The said counsel has not signed an affidavit to own up the mistake. Even if counsel was the one to blame, what about non-compliance with the conditions for the revival of the suit?

46. Further, the duty to procure the attendance of witnesses belongs to the appellant and not its lawyers on record. The case belong to the appellant and so is the duty to pursue prosecution of one's by constantly checking with the advocate the progress of the case.

47. The appellant does not state how soon it came to know the outcome of the application to reinstate the suit. It is also not clear why it took the appellant a lot of time to apply for the review and reinstatement of the suit for the second time.

48. In Ruga Distributors Limited –vs- Nairobi Bottlers Limited [2015] eKLR Aburili J cited Savings & Loans Ltd –vs- Susan Wanjiru Muritu [2002] eKLR on the need for a party to a suit to be diligent so as to monitor the progress of its case.

49. Litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. See **Sections 1A, 1B, 3 and 3A of the Civil Procedure Act** and **Article 159 of the Constitution**. See Gidion Sitelu Konchella –vs- Daima Bank Ltd [2013] eKLR.

50. Justice must also be balanced over all the parties and therefore the court has an obligation to check on the prejudice to be occasioned to the respondents.

51. The appellant submits if the appeal is not allowed, they will have no recourse to recover part of its land allegedly taken away by the respondents.

52. The memorandum of appeal has not listed such a ground and similarly the appellant did not raise that issue in the application dated 2.9.2019.

53. In sum I find the appeal lacking merits. The same is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 26<sup>TH</sup> DAY OF**

**JANUARY, 2022**

**In presence of:**

Mbubuya holding brie for Ondieki for respondents

Gichunge Muthuri for appellants – absent

Court Assistant – Kananu

**HON. C.K. NZILI**

**ELC JUDGE**