



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL APPEAL NO. 33 OF 2008

JOSHUA MUDENYO APPELLANT

VERSUS

AMOS CHILO RESPONDENT

JUDGMENT

After judgment was delivered by the learned trial magistrate on 3/9/1998 in Kakamega CMCC No. 200 of 1996, execution of the court decision proceeded through Gidfry Auctioneers Court Brokers Ltd. The parties in the subordinate court were the plaintiff decree holder (now respondent herein) Amos Chilo and Bright Investments & Credit Trading Co. Ltd. (not a party in this appeal) as the defendant. Judgment was entered by the learned magistrate against the defendant in favour of the plaintiff decree holder.

Some of the items attached by the auctioneers and court brokers attracted the filing of the Notice of Objection dated 12th July 2000 by the objector who is the appellant herein JOSHUA MUDENYO, against the decree holder (the respondent herein) claiming wrongful attachment of his properties.

That Notice of Objection was filed in person under Order XXI Rule 53 of the Civil Procedure Rules. The objection was in the following terms –

“**TAKE NOTICE** that **JOSHUA MUDENYO** hereby objects to the attachment of the following
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a. Welding workshop at Keveye, at Chavakali market.

THIS OBJECTION is based on the grounds that the said business belongs to the said JOSHUA MUDENYO whose business is neither party to this suit nor was he notified of the institution of the suit hereof.”

The objection remained pending before the subordinate court for sometime until 2008 which was about 8 years down the line. On 7th May 2008 the respondent’s advocate Mrs. Osotsi, appeared in court for the hearing of the objection. She stated that she had fixed the objection for hearing and served a hearing notice. She informed the court that the objection filed therein by the appellant had remained pending for a long time since 2000 when interim orders were granted. Counsel informed the court that the objector (the appellant herein) and his advocate had not made efforts to prosecute the same. Counsel further stated that the known counsel for the appellant was then not in practice. She asked that the objection be dealt with by the court and that it be dismissed for want of prosecution.

The appellant was in court. He claimed that his lawyer on record was Aburili & Company. He asked for

an adjournment apparently to trace his advocate. Mrs. Osotsi responded to the request and stated that she had not been served with a notice of appointment of a new advocate, and that in any event the subject attached goods had already been released, which was confirmed by the appellant. The court then gave the appellant time to avail his lawyer before the court rose on that day.

Later the same day, Mr. Munyendo appeared for the appellant, holding brief for Mr. Aburili. Mr. Munyendo informed the court that the appellant's lawyer had been instructed only the previous day and needed time to go through the file. He sought an adjournment, which was opposed by Mrs. Osotsi on grounds *inter alia*, that further delay would be unjust to the decree holder.

The court thereafter made a short ruling declining to grant an adjournment and dismissing the notice of objection, for reasons *inter alia*, that granting a further adjournment would mean condoning the neglect of the appellant. Therefrom, arose this appeal, which was filed on 9th May 2008 through Munyendo, Muleshe & Company advocates. The appellant's counsel thereafter also filed written submissions on 9th April, 2010. The respondent did not file written submissions, but counsel who appeared in court for him Ms Imwene, made oral submissions. I have considered both the written and oral submissions of both parties counsel.

This appeal is against the summary dismissal of the notice of objection of the appellant for want of prosecution.

The objection of the appellant was dismissed on a technicality. The technicality was the delay in prosecuting the same. Its merits were not considered. The learned trial magistrate had discretion under Order XVI of the Civil Procedure Rules, especially rule 6 therein to dismiss the pending notice of objection for want of prosecution. However, the facts disclosed herein, in my view, did not justify the exercise of the discretion the way the subordinate court did. All parties were present in court through counsel at the time of the said dismissal of the objection. The advocate for the objector had applied for an adjournment.

In my view, what the court should have done was either to decline to grant of the adjournment requested and hear the objection on the same day, or allow the adjournment and give conditions for the expeditious determination of the objection. Dismissing the objection for want of prosecution when counsel for all parties were present in court was uncalled for and draconian. I am also mindful that I am determining this appeal when the overriding objective in Civil Proceedings under Section 1A and 1B of the Civil Procedure Act is in existence, even though it came to effect as a statutory amendment in 2009. The Kenya Constitution 2010 also under Article 159 (2) requires courts to administer substantive justice without undue regard to technicalities. Even before these legal and Constitutional provisions came into force, courts were slow to dismiss actions or application on technicalities. Such dismissals were only resorted to in situations which could not otherwise be saved, such as when the prosecuting party or his counsel has not attended court and no reason is given for that absence. This was not one of those situations.

Consequently, I find merits in the appeal. I allow the same and order as follows –

1. I set aside the decision of the subordinate court dismissing the notice of objection, and reinstate the same.
2. The appellant (Objector) or his advocate will fix the objection for hearing without delay, and a hearing date will have to be obtained by them within this year 2013, otherwise the objection will stand dismissed.
3. Costs will follow the decision to be made by the court in the objection proceedings.

It is so ordered.

Dated and delivered at Kakamega this 25th day of July, 2013

George Dulu

JUDGE