Makokha v Ongaka (Environment and Land Appeal E001 of 2020)
[2022] KEELC 3629 (KLR) (17 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3629 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ENVIRONMENT AND LAND APPEAL E001 OF 2020

DO OHUNGO, J

MAY 17, 2022

BETWEEN

VERONICA MUKHWANA MAKOKHA ..... APPELLANT

AND

SYPHRINE MAKOKHA ONGAKA ..... RESPONDENT

(Being an appeal from the ruling of the Chief Magistrate's Court at Kakamega (E Malesi, Senior Resident Magistrate) delivered on 10th December 2019 in Kakamega MCL & E No. 172 of 2018 Veronica Mukhwana Makokha v Syphrine Makokha Ongaka)

JUDGMENT

1. The appellant was the plaintiff in the subordinate court. On February 5, 2019, the subordinate court dismissed her suit for non-attendance. In an effort to reverse that state of affairs, she filed notice of motion dated April 24, 2019, seeking setting aside of the order of dismissal.

2. Upon hearing the application, the subordinate court (E Malesi, Senior Resident Magistrate) delivered a ruling on December 10, 2019 and dismissed the application. Dissatisfied with the outcome, the appellant filed this appeal through memorandum of appeal dated January 9, 2020.

3. The following are the grounds of appeal as listed on the face of the memorandum of appeal:

    1. That the learned trial magistrate erred in law and fact in failing to set aside the orders for dismissal made on February 5, 2019.

    2. That the learned trial magistrate erred in law and fact in failing to reinstate the suit in Kakamega MCL & E No 172 of 2019 and fix it down for hearing.

    3. That the learned trial magistrate erred in law and fact in failing to consider the appellant's / applicant's submissions.

4. That the learned trial magistrate erred in law and fact by dismissing appellant's application for reinstatement of suit without considering that appellant's failure to attend court or her advocate was not deliberate.

5. That the learned trial magistrate erred in law and fact in failing to consider that the power to dismiss a suit should only be exercised sparingly and an aggrieved party ought to be given a chance to prosecute his or her case.

6. That the learned trial magistrate erred in law and fact in failing to consider that the Appellant's suit was not hopeless and disclosed reasonable cause of action which needed to be heard on merit and be fairly determined.

4. On the basis of those grounds, the appellant urged the court to set aside the ruling and, in its place, make an order setting down the suit in Kakamega MCL & E No 172 of 2018 for hearing.

5. The appeal was canvassed through written submissions. The appellant in her submissions reiterated the grounds of appeal and further submitted that the subordinate court did not apply the correct test which is whether the delay is prolonged and inexcusable and even if it is, whether justice can still be done. That the reason for failure to appear in court was that the appellant was bereaved and that the advocate who was instructed to hold brief failed to attend court as instructed. That the mistake was excusable and there was no prejudice to the respondent. Reliance was placed on *Pkiech Chesimaya v Limakorwai Achipa* [2020] eKLR. The appellant therefore urged the court to allow the appeal.

6. The respondent in his submissions argued that the supporting affidavit in respect of the application ought not to have been sworn by the appellant's counsel and that since filing the suit, the appellant had not been keen on pursuing it, thereby leading the subordinate court to ultimately dismiss it. It was further argued that whereas each party to a suit has a right to be heard, where the party deliberately chooses to deny themselves that right, they have nobody else to blame. That the court should not punish the respondent for the appellant's indolence, omissions and errors and that the remedy sought is intended to avoid injustice resulting from an inadvertent or excusable mistake but not designed to assist persons like the appellant who deliberately choose to delay the course of justice. The respondent therefore urged the court dismiss the appeal with costs.

7. I have carefully considered the grounds of appeal and the parties' respective submissions. The issue for determination is whether notice of motion dated April 24, 2019 was merited.

8. The appeal is against an order made in exercise of discretion. The circumstances in which an appellate court can interfere with exercise of discretion were discussed by the Court of Appeal in *Mbogo and another v Shah* [1968] EA 93. Simply put, an appellate court should not interfere with the exercise of discretion unless it is satisfied that the court appealed from has misdirected itself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the court appealed from has been clearly wrong in the exercise of discretion and that as a result there has been mis-justice.

9. The appellant was aware of the proceedings scheduled for February 5, 2019. The principles applicable while considering an application for setting aside in a situation where a party was aware of the proceedings sought to be set aside are well settled. They were laid down in *Mbogo and another v Shah* (*supra*) and were reiterated as follows in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR:

> ... In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or

to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other.

10. The explanations offered by the appellant for failure to attend court were that she was bereaved and that the counsel instructed to attend court and hold brief by her advocates on record failed to do so. The respondent who swore a replying affidavit did not expressly dispute bereavement. The learned magistrate in the ruling stated that there was no proof of bereavement and wondered whether the court was required to summon sympathy. With respect, no proof was required, much the same way that the court does not always insist on medical proof whenever ill health is cited as a reason for adjournment. The court exists and operates within the society and renders its services to persons who are subject to the highs and lows of life, including sickness and even death. Taking note of such events whenever they affect a court user and his ability to participate in the court's processes is not sympathy.

11. I note that the parties herein have close family connections and that the dispute involves family land. If indeed there was no bereavement, nothing would have been easier than a denial by the respondent accompanied by details. While competency of the appellant's advocate to swear the supporting affidavit has been raised, I note that the advocate could competently swear on the fact of having instructed another counsel to hold his brief. Although the learned magistrate doubted whether instructions were indeed given to another advocate to hold brief, I note that it was specifically stated in the supporting affidavit that Mr Obilo had been instructed. Failure to state the name of the counsel Mr Obilo had in turn instructed was neither critical nor fatal to the application.

12. Another issue to consider is the length of delay. The application for setting aside was filed on April 25, 2019, some two and a half months after the dismissal. I do not consider that period to constitute inordinate delay in the circumstances of this case.

13. Lastly, the all-important consideration is the overall mission of the court to do justice as between the parties. Looked at from that prism, the appellant has a suit in which she seeks nullification of titles to land. The dispute revolves around family land and the parties are members of one family. Given the reasons for failure to attend court, the justice of the situation called for hearing and determining the suit on the merits, with a view to resolving the underlying dispute as disclosed in the pleadings. The learned magistrate highlighted the history of the matter and the appellant's failure to prosecute the suit. I agree that the appellant has not been diligent. Yet here we are, she has approached the court and is pleading to be given a chance to prosecute the suit. Given those circumstances, a setting aside coupled with an award of costs of the application to the respondent and directions to expedite hearing and determination of the suit on the merits would have served the cause of justice better.

14. I have said enough to demonstrate that there are enough reasons to warrant interfering with the exercise of discretion by the learned magistrate.

15. In the result, I make the following orders:

    a. This appeal is allowed.

    b. The orders of February 5, 2019 dismissing the suit in the subordinate court are set aside.

c. The suit shall be mentioned before the subordinate court on June 7, 2022 for directions to facilitate its early hearing and determination.

d. Costs of notice of motion dated April 24, 2019 are awarded to the respondent.

e. Considering the family relationship between the parties, I order that each party shall bear own costs of this appeal.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 17TH DAY OF MAY 2022.

DO OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the appellant

Ms Aligula for the respondent

Court Assistant: E Juma