Rogam Investment Limited v Canon Alluminium Fabricators & another (Environment & Land Case 391 of 2014) [2022] KEELC 13809 (KLR) (23 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13809 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 391 OF 2014

JO MBOYA, J

SEPTEMBER 23, 2022

BETWEEN

ROGAM INVESTMENT LIMITED ..... PLAINTIFF

AND

CANON ALLUMINIUM FABRICATORS ..... 1ST DEFENDANT

NATIONAL MANAGEMENT AUTHORITY ..... 2ND DEFENDANT

RULING

Background

1. *Vide* the Notice of Motion Application dated the February 18, 2022, the Plaintiffs' herein has approached the court seeking for the following Reliefs;

    a. .....spent

    b. The Honourable Court be pleased to Stay its orders made on the July 5, 2021, pending the hearing and determination of this Application.

    c. This Honourable Court be pleased to Stay Taxation proceedings in respect to the 1st Respondent Bill of costs dated the August 13, 2019, pending the hearing and determination of this Application.

    d. This Honourable Court be pleased to Stay Taxation proceedings in respect to the 1st Respondent's Bill of Costs dated the August 13, 2019, pending the hearing and determination of the reinstated Suit.

    e. The Honourable Court be pleased to Review and/or set aside the Orders made on the July 5, 2021 which Dismissed this suit for Want of prosecution and all the consequential orders thereto.

f. The Honourable Court be pleased to reinstate the Plaintiffs'/Applicants' suit and same be heard on merit

g. Cost of the Application be provided for.

2. The Application herein is premised and/or anchored on the basis on the grounds in the body thereof and same is further supported by the affidavit of Evans Gitobu, sworn on even date.

3. Upon being served with the application the 1st Defendant/Respondent filed Grounds of opposition dated the March 3, 2022, wherein same raised various grounds, inter-alia that the said application seeking to abuse the due process of the court.

4. On the other hand the 2nd Defendant/Respondent herein did not file any response to the subject application.

DEposition by the Parties:

a. A Plaintiff's/applicant's Case:

5. Vide supporting affidavit sworn on the February 18, 2022, one Evans Gitobu, hereinafter referred to as the deponent, has averred that on or about the July 22, 2014 the Plaintiffs'/Applicants' counsel filed an application seeking for Leave to amend the original Plaint and to join the 2nd Defendant/Respondent.

6. Further, the deponent has averred that upon obtaining leave to amend the Plaint an amended Plaint dated the June 22, 2015 was duly filed and the name of the 2nd Defendant/Respondent was duly included as a Party.

7. However, the deponent has added that on the 2May 2, 2019, counsel for the 1st Defendant/Respondent filed an application and in respect of which, same sought to have the Plaintiffs' suit be dismissed for want of prosecution.

8. It has further been averred that prior to and before the said application was canvased, the Plaintiffs/Applicant's counsel filed an application to cease acting and that the application for leave to cease acting was indeed allowed.

9. Owing to the foregoing, the deponent has averred that the Plaintiff/Applicant was therefore allowed to act in person, towards and in respect of the Application by the 1st Defendant/Applicant.

10. Nevertheless, it has been averred that owing to the nature of the suit beforehand, the Plaintiff/Applicant proceeded to re-instruct her current advocates to proceed with the prosecution of the suit and that in this regard, the Advocates thereafter filed a Notice of appointment.

11. Be that as it may, the deponent has added that the application dated the May 22, 2019, was thereafter heard and disposed of, culminating into a ruling being rendered on the July 5, 2021, whereupon the Plaintiff's suit was dismissed for want of prosecution.

12. It has been added that the decision to dismiss, the Plaintiff's suit for want of prosecution was erroneous and same deprived the Plaintiff/Applicant of a right to be heard on the merits.

13. At any rate, the deponent has averred that after the dismissal of the Plaintiff's suit, the Plaintiff felt aggrieved and thereafter same proceeded to and lodged a Notice of appeal.

14. Be that as it may, it has been averred that subsequently, the Notice of appeal was withdrawn and thus the subject application is meritorious.

15. In a nutshell, the deponent has implored the court to find and hold that the Dismissal of the suit for want of prosecution constitutes a denial of justice and that the suit ought to be reinstated.

b. Response by the 1st Defendant/respondent

16. The 1st Defendant/Respondent filed Grounds of opposition and wherein same raised the following grounds;

    I. The Application herein is an abuse of the court process since the application dated the February 18, 2022 is identical to the application dated October 28, 2021, which was withdrawn on the November 18, 2021 because the Applicant has excised the appeal option.

    II. The Nature of the ruling delivered by Hon Lady Justice K Bor necessitated that a person aggrieved with the decision should appeal against the decision rather than filing the review.

    III. The Threshold for an application for review has not been met.

    IV. Taxation came up on the November 11, 2021 and the Plaintiff participated in the taxation by filing its written submissions dated the January 7, 2022 and thus same acquiesced to the taxation proceedings.

    V. There is no basis for staying taxation proceedings.

    VI. The Plaintiff served it application dated the February 18, 2022 upon the 1st Defendant on the March 22, 2022 more than one month hence preventing the 1st Defendant from responding to the application on time.

    VII. The Application February 18, 2022 has been filed to keep the 1st Defendant away from enjoying the fruits of its judgment.

    VIII. The Application is an abuse of the Due process of the Honourable court and same is frivolous and devoid of merits.

    IX. The action by the Plaintiff herein are in blatant breach of Articles 48 and 159 of *the Constitution*.

Submissions by the Parties:

17. The subject application came up for hearing May 25, 2022 when the application was directed to be canvased and/or disposed of by way of written submissions. In this regard, timelines were thereafter prescribed within which the written submissions were to be filed and exchanged.

18. Pursuant to the directions to file and exchange written submissions, both the Plaintiff/Applicant and the 1st Respondent filed their respective written submissions.

19. Suffice it to point out that the two sets of written submissions are on board and same shall be considered and taken into account.

Issues for Determination:

20. Having evaluated the Application dated the February 18, 2022, the supporting affidavit thereto, the Grounds of opposition filed in response; and having similarly considered the written submissions filed, two issues do arise and are pertinent for determination;

i. Whether the Subject Application which seeks Review has been filed or mounted without unreasonable delay.

ii. Whether this Honourable Court is seized of Jurisdiction to entertain and/or adjudicate upon the subject Application.

Analysis and Determination:

Issue Number 1 Whether the subject Application which seeks Review has been filed or mounted without Unreasonable Delay.

21. It is common ground that the decision and or ruling that is sought to be reviewed and or impeached was rendered on the July 5, 2021.

22. On the other hand, there is no gainsaying that the subject application was filed on the February 18, 2022.

23. On the face of it, it is evident that the duration between the rendition of the impugned ruling and the filing of the subject application constitutes approximately eight months and thirteen days.

24. In the premises, the issue for determination herein is whether the duration alluded to in terms of the preceding paragraphs constitutes and or amounts to undue and/or inordinate delay and/or otherwise.

25. Before venturing to address the question of delay, it is appropriate to state that any litigant who is aggrieved by a decree or order of the Honourable court and who is keen to mount an Application for review, is obligated to do so timeously and with due promptitude. Simply put, an applicant seeking review must act with due diligence and dispatch.

26. Consequently, where an Applicant seeking Review does not act timeously and with due promptitude, such applicant may very well, subject to existence of exceptional circumstances, be deprived of a right to pursue Review.

27. Nevertheless, it is imperative to reproduce the provisions of Order 45 Rule 1 of the *Civil Procedure Rules* 2010, which provides the parameters, that must be satisfied by any Litigant seeking to partake of Review.

28. For convenience, the said provisions are reproduced as hereunder;

1. Application for review of decree or order [Order 45, rule 1.]

Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

29. To my mind, the length of time and or duration that was taken by the Plaintiff/Applicant to file and/or mount the subject Application falls within a definition of unreasonable and inordinate Delay.

30. Notwithstanding the foregoing, the Plaintiff/Applicant can very well argue that after the rendition of the impugned ruling, same filed a previous application seeking Review dated the October 28, 2021, but which was withdrawn on the November 18, 2021.

31. Granted, a previous Application was indeed filed but was later withdrawn, on the basis that same had been filed during the lifetime of an existing of Notice of appeal. Essentially, the Plaintiff/ Applicant conceded to the obvious fact that same could not pursue Review during the pendency of an Appeal before the Honourable Court of Appeal.

32. However, even assuming that time for the filing of the current application for Review was to be reckoned from the date when the previous application was filed, which to my mind was not the case, still it is evident that there was unreasonable delay.

33. If the Plaintiff/Applicant pleases to use the yardstick premised on the date when the previous application was withdrawn, then the Plaintiff/Applicant still needed to act with due diligence and promptitude.

34. Be that as it may, even though the Plaintiff was knowledgeable and conversant of the statutory requirement to act timeously and with due promptitude same still bid her time from the November 18, 2021 to the February 18, 2022, which is similarly inordinate and unreasonable, given the nature of the subject Application.

35. In view of the foregoing observation, it is my considered conclusion that irrespective of which side of the divide, one looks at the length of time taken by the Plaintiff/Applicant, prior to and before filing the subject Application, same was unreasonable.

36. To underscore what amounts to and constitutes unreasonable delay, it is imperative to take cognizance of the holding in the case of *Jaber Mohsen Ali & Another versus Priscillah Boit & Another* (2014)eKLR, where the Honourable Court stated and observed as hereunder;

> " The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of *Christopher Kendagor v Christopher Kipkorir* Eldoret E&L 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied."

37. Clearly, the current application was made and or mounted with inordinate delay and which delay, was neither accounted for nor explained. In this regard, the Doctrine of Latches is relevant and applicable.

38. Consequently, I find and hold that the application herein is defeated by the doctrine of latches. On this ground alone, I would have been constrained to dismiss the application. Nevertheless, for purposes for completeness I will venture to address the second issue.

Issue Number 2 Whether this Honourable Court is seized of Jurisdiction to entertain and/or adjudicate upon the subject Application.

39. It has been conceded, acknowledged and admitted by the Plaintiff/Applicant herein that upon the filing of the application dated the May 22, 2019, which sought to dismiss the suit, inter-alia for want of prosecution, same indeed responded to the application and filed appropriate Reply.

40. On the other hand, it has also been conceded that the said application was set down for hearing, whereupon directions were issued that same be canvased and disposed of by way of written submission.

In this regard, the record of the Honourable court shows that thereafter the Parties responded and filed their respective written submissions.

41. Subsequently, the Honourable court reserved her ruling and same was ultimately rendered on the July 5, 2021, whereupon the Application for dismissal for want of prosecution was granted.

42. At this juncture, it is appropriate to reproduce the pertinent aspects of the Ruling of the Honourable Court.

43. For coherence, same is reproduced as hereunder;

> "The issue for determination is whether the court should dismiss the suit for want of prosecution as the 1st Defendant sought. The court notes that the firm of Nyamu & Nyamu Advocates filed their application the July 10, 2019 seeking to cease acting for the Plaintiff. That application was allowed on the May 18, 2020. The same firm filed a notice of appointment of advocates dated the February 9, 2021 on behalf of the same Plaintiff. There is no evidence that the amended plaint which was filed on the July 16, 2015 was ever served on the 1st Defendant or that summons to enter appearance were extracted by the Plaintiff. The 2nd Defendant who was added to the suit when the amended plaint was filed on the July 16, 2015 has never been served.

The court is persuaded that the Plaintiff lost interest in this matter and failed to prosecute it for more that a year. Consequently is dismissed with costs to the 1st Defendant".

44. From the foregoing reproduction, it is apparent that the court consciously and deliberately dealt with the circumstances pertaining to the application for dismissal for want of prosecution and indeed, came to the conclusion that the Plaintiff had failed to prosecute the Suit for more than one year.

45. Having come to that conscious conclusion, the Honourable court proceeded to and allowed the application for dismissal of the suit and indeed Dismissed the suit for want of prosecution.

46. To the extent that the suit was dismissed for want of prosecution, after Inter-partes herearing, the question that now arises is whether such a conscious and deliberate explication of the law, can lend itself to Review pursuant to order 45 Rule 1 of the *Civil Procedure Rules*.

47. To my mind, the learned Judge arrived at a firm and deliberate conclusion and such a conclusion cannot be impugned by way of Review. Consequently, if the Plaintiff was aggrieved, the only recourse was to pursue an Appeal to the Honourable Court of Appeal.

48. Be that as it may, from the submissions filed by the Plaintiff, same has made various averments including the submissions alluded to at paragraph 14 of the written submissions.

49. For completeness, the said paragraph states as hereunder;

> "We submit that it was erroneous to find that the suit against the Defendants had abated whilst the proceedings in this matter were conducted in the presence of the 1st Defendant"

50. Clearly, where counsel is of the considered opinion that a decision was erroneous, can such a decision be reviewed by the same Judge or better still another Judge of concurrent Jurisdiction.

51. My answer to the foregoing question is in the negative. Any attempt to review an order that is submitted to be erroneous, would be tantamount to a Judge sitting on appeal on own decision, which is a legal anathema.

52. Premised on the foregoing, I come to the conclusion that this Honourable court would not be possessed of the requisite Jurisdiction to adjudicate upon and entertain the subject Application, which essentially would amount to sitting on appeal on a decision of a Judge of concurrent Jurisdiction.

53. To my mind, such an invite must be deprecated and be frowned upon, at all costs.

54. Finally, it is appropriate to adopt and reiterate the holding of the Court of Appeal vide the case *National Bank of Kenya Ltd versus Ndungu Njau* (1997)eKLR, where the court stated and observed as hereunder;

> In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favor of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review.
>
> Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.

55. The foregoing quote is apt, succinct and applies with Equal force to the issues beforehand.

56. Period.

Final Disposition:

57. Having reviewed and evaluated the highlighted issues for determination, I come to the conclusion that the application before hand is not only misconceived and Bad in Law, but similarly, legally untenable.

58. Consequently and in the premises, the Application dated the February 18, 2022 be and is hereby Dismissed with costs to the 1st Defendant/Respondent.

59. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Ms. Esami h/b for Nyamu for the Plaintiff/Applicant

Ms. Gikonyo h/b for Mr. Thuita for the 1st Defendant/Respondent

No appearance for the 2nd Defendant/Respondent