Wekesa v Murunga (Environment and Land Appeal 23 of 2021)
[2024] KEELC 5185 (KLR) (4 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5185 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT AND LAND APPEAL 23 OF 2021

EC CHERONO, J

JULY 4, 2024

BETWEEN

JOSEPH BARASA WEKESA ..... APPELLANT

AND

BRAMWEL MURUNGA ..... RESPONDENT

(Being an appeal arising from the ruling delivered by Hon. G. Adhiambo (PM) in Kimilili PM's ELC Case No. 17 of 2018 on 25th November, 2021)

JUDGMENT

1. The Appellant was aggrieved with the Judgment/Decree of Hon. G. Adhiambo PM delivered on 25th November, 2021 and preferred an Appeal vide a memorandum of appeal dated 22nd December, 2021 seeking to set aside and/or quash the impugned decision of the trial court dismissing his application dated 16th July,2021 and urged this court to allow the application and reinstate the application dated 15th May, 2019.
2. The appeal is based on the following grounds;
    a. The trial magistrate erred in law and in fact in dismissing the Appellants application dated 16th July,2021 for reinstating the application dated 15th May, 2019 as the Appellant will be deemed to have been condemned unheard.
    b. The trial magistrate erred in law and in fact in dismissing the Appellant's application for reinstating the Appellant's application did not put into consideration that the failure to act communication of court proceedings and failure to attend court that led to the dismissal was occasioned by the advocate not the Appellant.

c. The trial magistrate erred in law and in fact by failing to consider that the Appellant herein has a good defense with a probability of success hence denying the Appellant orders of reinstating his application to be heard was taking away his constitutional rights.

d. The trial magistrate's decision of dismissing the Appellants application dated 16th July, 2021 did not put into consideration that the advocates had to seek leave procedurally to come on record and the Appellant had all rights to defend himself through another counsel.

e. That the trial magistrate was biased without putting into consideration submissions and pleadings submitted by the Appellant and authorities.

3. By way of background, the Respondent herein who was the Plaintiff filed a plaint dated 13th June, 2018 seeking a mandatory injunction compelling the Appellant/Defendant herein to remove structures he had allegedly constructed on an access road and into the Respondents parcel of land. The Respondent entered appearance but failed to file a defence and the matter proceeded to hearing by way of formal proof and ultimately, judgment was entered in favour of the Respondent against the Appellant on 14th December, 2018.

4. The Appellant vide an application dated 15th May, 2019 filed through the firm of M/S J. B.Otsiula &Associates sought orders for inter alia stay of execution of the decree, orders setting aside the ex parte judgment and leave for the Appellant to file a defence. The said application came up for directions on various dates with the Appellant herein at first proposing to have the application canvassed by way of written submissions and later asking to have the same heard orally. Eventually, the Court directed the parties to have the application dispensed of by way of written submissions. On 5th December 2019, the trial Court dismissed the application referred to above for want of prosecution and subsequently a decree was issued on 20th February, 2020. The Appellant appointed a new Firm of Advocates now on record M/S A.W.Kituyi &Company who filed the application dated 16th July, 2021seeking orders for inter alia leave to come on record, temporary stay of execution of the trial court's judgment, lifting/ setting aside of warrants of arrest against the Appellant and reinstatement of the application dated 15th May, 2019.

5. Upon hearing the said application dated 16th July 2021, the trial court delivered a ruling on 25th November, 2021 where it dismissed the said application with costs to the Respondent. It is that ruling which is now the subject of this appeal. The parties took directions and agreed to canvass this appeal by way of written submissions.

6. The Appellant filed submissions dated 6th May, 2024 where he submitted that the mistake of the Appellants advocate at the time should not be visited upon the Appellant and asked the court to apply the rules of natural justice. The court was also urged to consider the provisions of *the Constitution* which guarantee a litigant a right to be heard. The Appellant stated that the payment of costs for the application dated 15th May, 2019 cannot be considered as a concession to the court's ruling on the same. Reliance was place in the case of Charles *Mureithi & Anor vs. Daniel Kimutai Cheruiyot & Another Machakos Civil Appeal No. E10 of 2020* and CMC Holdings Ltd vs. Nzioki (2004) KLR 173 which made reference to the case of Onjula Enterprises Ltd vs. Sumaria (1986) KLR 65.

7. The Respondent on the other hand filed submissions dated 24th April,2024 in which he submitted on four issues. According to the Respondent, the application dated 15th May, 2019 remained pending for 7 months despite being certified ready for hearing and that both the Appellant and his advocate on record at the time were indolent and they cannot be excused. It was also argued that the Appellant paid the Respondents costs for the application and by this conceded to the dismissal. It was also argued that the Appellant took one year and 7 months to file the application dated 16th July, 2021 which duration was

inordinate in the circumstances. He cited the case of Christopher Murithi Ngungu vs. Eliud Ngungu Evans (2016) Eklr and Tana & Athi River Development Authority vs. Jeremiah Kimigho Mwakio & 3Others (2015) eKLR.

8. It was the Respondent's further submission that the Appellant cannot cling onto the rules of natural Justice due to the fact that at all material times, he was aware of the position of his case but decided to sleep on his rights. Reliance was place on the case of Titus vs.Jackline Mutindi (2020)eKLR. In conclusion, the Respondent urged the Court to dismiss the appeal with costs.

Analysis And Decision

9. I have carefully considered the abstract of the appeal and pleadings as summarized hereinabove.

10. I am reminded that mandate as the first appellate Court is to analyze and evaluate the evidence on record afresh and to reach my own independent decision. In doing so, I must bear in mind that the trial Court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that. This duty was succinctly put in Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123.

11. It is also settled law that an appellate court will not ordinarily interfere with the findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in Mbogua Kiruga v Mugecha Kiruga & another [1988] eKLR where the Court held:-

> " An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution."

12. The Application subject of this appeal is dated 16th July, 2021 whereby the Appellant had sought the following orders;

    a. The service of this application be dispensed with in the first instance.

    b. That leave be given to the firm of A.W.Kituyi & Co Advocates to come on record instead of the firm of J.B Otsiula & Co Advocates .

    c. That there be a temporary stay of execution and/or enforcement of warrant of arrest issued against the Defendant/Applicant herein pending the hearing and determination of this application.

    d. That warrants of arrest issued be lifted and/or set aside.

    e. That the trial court be pleased to reinstate the defendant/applicant's application dated 15th May, 2019 which sought to set aside the courts ex-parte judgment and to have the said application heard and determined on merit.

    f. That the said application upon reinstatement be heard on merit and the same be concluded expeditiously.

    g. That costs of the application be provided for.

13. The said application was opposed vide a replying affidavit sworn by the Respondent on 30th July, 2021. Upon considering the said application, the trial Court disallowed the same on merit with costs.

14. It has been argued by the Appellant that the court should not punish him as an innocent litigant for an error/mistake made by his advocate and urged the court to apply the rules of natural justice. The Respondent on the other hand argued that the Appellant was afforded sufficient time to prosecute his application dated 15th May, 2019 but failed to do so leading to the same being dismissed for want of prosecution. The trial court allowed prayers 1 and 3 at the interlocutory stage and after inter-parties hearing, the application was allowed in terms of prayer 2 but declined to allow the prayer for reinstating the application dated 15th May, 2019.

15. Upon examination of the proceedings leading to the dismissal of the application dated 15th May 2019, I note that indeed the said application was mentioned for directions ten (10) times i.e. 23/5/2019, 20/6/2019, 25/7/2019, 22/8/2019, 19/9/2019, 3/10/2019, 17/10/2019, 24/10/2019, 21/11/2019 and 5/12/2019. On these occasions, directions were taken to have the application canvassed by way of written submissions. At some point, the Appellant herein informed the court that parties were negotiating to pay thrown away costs while directions were also taken to have the application heard orally. At the end, the parties agreed to have the said application canvassed by way written submissions. After the said application was dismissed, the Respondent filed party and party bill of costs which was taxed at Kshs.25,000/= wherein the Appellant settled in part by paying Kshs. 20,000/= leaving Kshs. 5,000/= The Respondent thereafter filed a Notice to show cause and warrants of arrest were issued against the Appellant herein. From the foregoing, there is no doubt that the Appellant was given many opportunities to prosecute his application

16. It is now settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that a party who fails to comply with any order/direction(s) given by a Judge on any matter before him/her is deemed to have been given a right to be heard but chose to exercise that right to remain silent. A party who fails to prosecute an application which is subsequently dismissed for want of prosecution cannot he heard to say that he/she was not given a right of hearing. Equally, the giving of directions of a suit or an application to be heard by filing of written submission within given timelines as a mode of hearing and determination and there being no compliance by either party clearly demonstrates lack of interest and/or seriousness on the defaulting party. In my view, the Appellant herein had been afforded an opportunity to be heard by way of written submissions but failed to take it up.

17. The Court of Appeal in Rowlands Ndegwa and 4 Others vs. County Government of Nyeri and 3 Others; Agriculture, Fisheries and Food Authority & Another (Interested Parties) [2020] eKLR, citing with approval the decision of the High Court in, Winnie Wanjiku Mwai vs. Attorney General & 3 Others [2016] eKLR, observed as follows:

> "With regard to dismissal for want of prosecution, there are indeed no hard and fast rules as to the manner in which the inherent power and discretion to dismiss an action for want of prosecution is to be exercised. It is however generally accepted that dismissal will be invited if there should be a delay in the prosecution of the action and the Respondent is prejudiced by the delay with attention also being paid to the reasons for the inactivity...."

18. This Courts attention is further drawn to the turn of events after the application dated 15th May, 2019 was dismissed. The Appellant herein still represented by the same advocate appeared in court on various dates and not once did he intimate that he was aggrieved by the decision of the court dismissing

his application. Indeed, the rules of equity which the Appellant has called upon the court to consider do not assist the indolent. These principles which establish the courts discretion are such that they are meant to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

19. In the present suit and looking at the Appellant's conduct from the inception of this suit, I find that he deliberately failed to prosecute his case by failing to file a defence, failed to prosecute his application dated 15th May, 2019 by refusing to avail themselves to the court process and further filed the application subject of this appeal 18 months after the previous one was dismissed. The Appellants simply did not act with promptness upon discovery of the mistake they wish this court to believe was made by his hitherto counsel he is now seeking to correct. Although the right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law, I find that the overriding objective for the courts in dispensing justice must be to ensure expeditious, fair, and just proportionate and economic disposal of cases.

20. Courts have held time and again that suits do not belong to the Counsel or the court but to parties who should show interest by following proceedings in court and not laying back and waiting for things to happen. I therefore find that the present Application dated 16th July, 2021is an afterthought and an abuse of the court process and is also intended to vex the Respondents and put them to expense. I also find that the Respondent is being gravely prejudiced by the Appellant and therefore there is need for this court to balance the rights of the appellant vis-à-vis that of the Respondent in dispensing justice. Therefore, it is my finding that the trial magistrate did not err in her ruling dated 25th November, 2021 and therefore the Appellants appeal fails.

21. The upshot of my finding is that the Appellants appeal lacks merit and the same is hereby dismissed with costs to the Respondent.

22. Orders accordingly.

DATED, READ, DELIVERED AND SIGNED AT BUNGOMA THIS 04TH DAY OF JULY, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Okaka for the Respondent.

Mr. Kituyi for the Appellant.

Bett C/A.