Matunye & 2 others v Hussein (Environment and Land Appeal 106 of 2019) [2023] KEELC 16034 (KLR) (1 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16034 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL 106 OF 2019

CK NZILI, J

MARCH 1, 2023

BETWEEN

OMAR WARIO MATUNYE ..... 1ST APPELLANT

ABDI DIDA ANSHARE ..... 2ND APPELLANT

HUSSEIN DECOSTA ..... 3RD APPELLANT

AND

HAWO HUSSEIN ..... RESPONDENT

RULING

1. Before the court is the application dated December 6, 2022, in which the court is asked by the appellant/applicants to set aside the order issued on July 5, 2021 dismissing the appeal, all the subsequent orders and reinstate the appeal for hearing on merits. The application is supported by the grounds on its face and an affidavit in support of Omar Wario Matunya & Hussein Degosta sworn on the even date. In the said affidavit, the 1st & 3rd applicants averred that they paid the law firm then on record and rested assured that it would adequately represent their interest by arguing the appeal. It was averred that it was recently that the respondent started bragging that she had won the appeal and would evict them from the suit land as well as tax her bill of costs. On November 30, 2022, the applicants averred that they sought the services of the present law firm representing them only to learn that the appeal was dismissed for want of prosecution yet the former law firm did not notify them. The applicants averred that the mistakes of the law firm should not be visited upon them. Similarly, the applicant averred that no prejudice would be occasioned to the respondent if the orders sought are granted or otherwise, they would be condemned unheard contrary to the rules of natural justice. The applicant attached copies of receipts showing that they paid legal fees on September 24, 2019.

2. The application as opposed by Hawo Hussein, the respondent through a replying affidavit sworn on January 10, 2023 for inordinate delay of 16 months for a suit which has been pending for more than 12

years; that the applicants were playing the victim card to seek the sympathy of the court; the applicants are knowledgeable people who cannot plead ignorance of their obligations to follow up on their case; no explanation on why they did not follow up on the appeal has been given; that the applicants authored their ignorance and inertia; courts files are open for scrutiny by the parties; the applicants failed to visit both the court and their advocates' offices for no good reasons; no documentary evidence by way of correspondence or complaints for being kept in the dark by their former advocates have been filed and lastly; that the court should not believe this ploy to try and hoodwink it to prolong her agony of not enjoying the fruits of her judgment at the lower court.

3. Parties with the leave of the court agreed to canvass the application by way of written submissions dated February 3, 2023 and January 31, 2023 respectively. The applicants submitted that as laymen and after paying legal fees for the appeal to the erstwhile law firm, they continuously visited the said offices for updates believing that all was well and that their interests were being taken care of until only later to discover that the appeal had been dismissed for lack of action on the part of their lawyers. The applicants urged the court not to visit the mistakes of counsel upon them as held in *Belinda Murai & 9 others vs Amos Wainaina* (1978) eKLR, on the proposition that doors of justice should not be closed out of mistakes of counsel for the interest of justice to be met.

4. Further, the applicant relying on *Philip Chemwolo & another vs Augustine Kubede* (1982-1988) KLR 103 and *Itute Ingu & another vs Isumael Mwakavi Mwendwa* (1994) eKLR, urged the court to examine the nature or quality of the mistake(s) and find that it was a reasonable or bonafide mistake which has been explained to the satisfaction of the court.

5. On the other hand, the respondent submitted that the judgment in the lower court was delivered on August 13, 2019 and an appeal was filed dated August 28, 2019 which was not prosecuted until it was dismissed on July 5, 2021 for want of prosecution. The respondent submitted that the applicants could not plead ignorance of court procedures having fully participated in the trial court and were therefore expected to exercise the same diligence in the appeal. The respondent submitted that no reasonable explanation has been offered for the lack of follow-up for two years since the last contact with the law firm as per annexure OWR "1" was on September 24, 2019 with no follow-up documentary evidence thereafter, meaning that the applicants did not bother to follow up their case post 2019. The respondent submitted that a delay of 1 ½ years after the dismissal of the appeal and 3 years since the last communication was inordinate. Interestingly the respondent submitted that the applicants current lawyers were the recipients of the record of appeal dated February 12, 2000 then representing the 2nd defendant in Isiolo CMELC No 12 of 2009, in which the present appellant case is preferred hence it can fairly be concluded that the present lawyers were not wholly ignorant of the proceeding before filing the notice of appointment dated 30.11.2022. Given that the applicants are guilty of laches, the respondent submitted that the court should not exercise any discretion in favor of the applicants since equity aids the vigilant and not the indolent. Reliance was placed on *Mbogo & another vs Shah* (1968) E.A 93.

6. The respondents submitted that the applicants were also to blame for lack of diligence and vigilance and hence cannot wholly blame their lawyers after 2019 to December 6, 2022, since no credible evidence was adduced to disapprove the notion that the applicants deliberately tried to obstruct or delay the course of justice. Reliance was placed on *Savings and Loans Ltd vs Susan Wanjiru Muritu* NRB Milimani HCC NO 397 of 2002 on the proposition that a case belongs to a party who has to pursue its prosecution by constantly checking with the advocate on the progress of the case.

7. In this application, the respondent urged the court to find that it was not enough to blame the former law firm without showing tangible steps taken in following up, especially when litigation must be conducted efficiently. The respondent submitted that, the applicants should bear responsibility for

the lackadaisical way they handled the appeal and should not turn around to heap blame on their previous lawyers on record, since their alleged readiness to prosecute the appeal is negated by their lack of diligence post-2019.

8. The court has gone through the application, the response and the written submissions. At issue is whether the applicants are entitled to the exercise of the court's discretion to vacate the dismissal orders and reinstate the appeal for hearing on merits.

9. Order 42 Rule 20 of the *Civil Procedure Rules* grants the court powers to dismiss an appeal if the appellant does not appear at the hearing or for non-filing of written submissions according to directions given under Rule 16 (1) & (2) thereof. Rule 21 thereof grants the court the power to re-admit for hearing an appeal dismissed under Rule 20 thereof, where a party proves that he was prevented by a sufficient cause from appearing when the appeal was called out for hearing, in which case the court would reinstate the appeal on such terms as to costs or otherwise as it thinks fit.

10. The guiding principles to consider while exercising the discretion on whether to reinstate an appeal or not have been discussed in several cases. In Philip Chemwolo & another (*supra*), the court held that a party should not suffer the penalty of not having his case heard on merits and that a broad equity approach of the matter should be taken unless there was fraud or intention to overreach since no error or default should be beyond being put right by way of payment of costs since a court exists to decide the rights of parties and not for purposes of imposing discipline.

11. In the case of *Director General, National Employment Authority vs AL Hujra Agencies Ltd* (Civil Application) E185 of 2020 (2023) KECA 379 (KLR) (KLR) (4th March (2022) (Ruling), the reason for non-attendance in court was an inadvertently misquoted hearing notice occasioned by the court's registry. The applicant had relied on *Racheal Mukami Ngugi vs Mercy Wanjiru Thogo* (2021) KECA 88 (KLR), Articles 50 (1) and 159 2 (a) of the *Constitution*. The court cited with approval *Richard Ncharpi Leiyagu vs IEBC & 2 others* (2013) eKLR, *Mbaki & others vs Macharia & another* (2005) 2 E A 206, where it was held that a right to be heard was a valued right which is not only a constitutional right but also the cornerstone of the rule of law to be withheld only in exceptional circumstances. The court cited with approval Sections 3A & 3B of the *Appellate Jurisdiction Act* and held that it was trite law that, the overriding objective of the court were principles have now crystallized in several cases for a court to act justly and fairly with greater latitude for the ends of justice to be met for all parties involved in litigation.

12. The court also cited with approval *Joseph Kinyua vs G.O Ombachi* (2019) eKLR, on the need for litigation to be ended after all parties have been heard on merits, so that substantive justice is met to all parties before court, if there was demonstration of the existence of a reasonable explanation for any default to or non-compliance with a procedural step in the litigation. Further, the court held that there would also be a need to balance the requirements as to whether reasonable grounds have been proffered for reinstatement and the prejudice to be suffered by the opposite party if reinstatement were to issue, the nature of substratum of litigation is a primary consideration. The court went on to state that a dismissal order was a draconian step that should only be employed sparingly.

13. Applying the foregoing principles to the instant application, the appeal herein was filed on August 28, 2019 alongside an application for a stay of execution. A conditional stay was granted pending inter-partes hearing on September 4, 2019. However, the applicants were unable to comply with the conditional stay even after the court reviewed the conditions downwards. Eventually, an order for the status quo to be maintained was issued by consent of the parties on December 6, 2019. The record of appeal was ordered to be filed in 60 days and the matter was to be mentioned before the Deputy Registrar on January 29, 2019. The appeal was admitted for hearing on February 19, 2020 and the

record of appeal was ordered once again to be filed with pre-trial directions slated for March 19, 2020. The record of appeal was duly filed on February 12, 2020.

14. On September 8, 2020, parties appeared before the court and consented to canvass the appeal by way of written submissions to be filed within 30 days from the said date. A mention for directions was fixed for January 28, 2021. On January 28, 2021 the court gave further directions since the parties had not complied. The appellants were ordered to file their submissions by February 28, 2021 and the respondent to do so by March 28, 2021. The matter was given a mention for April 14, 2021. Come that day, for the third time, the parties sought for 14 more days to file written submissions. The court ordered that the parties comply by 14.May, 2021 and June 14, 2021 respectively and if the appellants defaulted, the appeal was to stand dismissed. A mention date was fixed for July 5, 2021.

15. On July 5, 2021, the appellants failed to show up or comply with the court orders previously issued. The respondent had filed written submissions dated June 25, 2021. Therefore, the court had no option but to find default directions given on April 14, 2021 to have been self-executory. The appeal was marked as dismissed with costs.

16. Looking at the court record, it is quite clear that the applicants consistently defaulted to comply with stay orders even after an application to review the terms downwards was allowed. The respondent in order to fast-track the appeal consented to an order for the maintenance of the status quo which was to subsist until the appeal was heard and determined. Even after the appeal was dismissed for non-compliance, the respondent still averred that the applicants continue to deny her the fruits of her judgment made in 2019.

17. The court record is clear that counsel then appearing for the applicants attended court consistently in 2019, 2020, and 2021 and went to an extent of seeking the review of the conditional stay orders as per the ruling by this court delivered on 18.9. 2019. This date appears to be around the time the applicants paid Kshs 30,000/= to their lawyers then on record.

18. After that date, the matter was mentioned on November 13, 2019 when a ruling was delivered and the court declined to reinstate the stay order which also had lapsed for non-compliance. Nevertheless, counsel for the applicants prevailed upon the respondent's counsel and a consent to maintain the status quo was recorded on December 2, 2019. Thereafter, the matter was mentioned four times, on January 29, 2020, September 3, 2020, January 28, 2021 & on April 14, 2021, in the presence of the applicants then lawyers on record. It was only on July 5, 2021, when the said lawyers failed to turn up.

19. Given this clear record the court is unable to believe the contents of the applicants' averments on oath that it was their lawyers on record who kept them in the dark and failed to execute their instructions to prosecute the appeal. If the appellants were diligent, vigilant, or serious litigants they would have attended court at least once or known the efforts the said lawyers were frantically making to not only represent their interests, but also attend court to seek more time to comply with the court directives. To my mind, it is the appellants who simply went to slumber after knowing that the orders of status quo were issued in their favor. Between 2019 and 2021, there is no evidence that the applicants either visited the chambers of their then advocates on record, made calls to seek updates and or facilitated the said lawyers so as to file written submissions and or attend court.

20. It is not enough to blame lawyers for all manner of transgressions by parties. It is bad practice for lawyers to always be the escape route, or be the parking bay where parties come to court, park matters therein and fail to perform their contractual duties so as to cause the wheels of justice to move. In this application, the inordinate delay of close to four years has not been explained. It was the appellants who dragged the respondent to court and engaged their lawyers. The appeal belonged to them and not the lawyers. Lawyers have to be instructed and equipped fully to safeguard the interests of their clients.

21. The applicants instead of owning up their mistakes have chosen the route of misleading the court and playing the victim card. Unfortunately, this court has unmasked the inaction and or the indolence by the appellants which boarders on obstruction of the cause of justice without an explanation. The discretion of the court as held in Mbogo vs Shah (*supra*) is not to aid parties who have deliberately chosen to derail and delay the course of justice.

22. In the circumstances and given the inordinate delay which has not been explained at all, I find the application lacking merits. The same is dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 1ST DAY OF MARCH, 2023

In presence of:

C/A: Kananu

Gichunge for applicants

HON. C.K. NZILI

ELC JUDGE