Rop & another v Mursi (Legal administrator of the Estate of Kipselim Mursi (Deceased) & 2 others (Environment & Land Case 3 of 2016) [2023] KEELC 16254 (KLR) (9 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16254 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT & LAND CASE 3 OF 2016

MC OUNDO, J

MARCH 9, 2023

BETWEEN

JOSEPH ROP ..... 1ST PLAINTIFF

RICHARD RONO ..... 2ND PLAINTIFF

AND

SELINA CHEROP MURSI (LEGAL ADMINISTRATOR OF THE ESTATE OF KIPSELIM MURSI (DECEASED) ..... 1ST DEFENDANT

KABIANGA TEA FACTORY LIMITED ..... 2ND DEFENDANT

KERICHO LAND REGISTRAR ..... 3RD DEFENDANT

RULING

1. Vide an application by way of Notice of Motion dated 27th June 2022, brought under the provisions of Section 80 and 3A of the *Civil Procedure Act*, Order 45 rule 1, 2 and 3 of the *Civil Procedure Rules*, and all enabling provisions of the Law, the 2nd Plaintiff/Applicant herein sought for the following orders;

    i. That the Honourable court be pleased to review and/or set aside the order issued on 27th January 2022 which dismissed the Plaintiffs/Applicants suit for want of prosecution.

    ii. That the court be pleased to declare that since the Counsel for the Plaintiffs/Applicants died on 7th October 2020 the counsel holding brief acted without authority hence necessitating review of the order.

    iii. That this Honourable Court be pleased to make such further or other Orders as it may deem fit just and expedient in the circumstances of this case.

    iv. That costs of this Application be provided for.

2. The Application was premised on the grounds on the face of it and supported by an affidavit sworn by the 2nd Applicant on the 27th June 2022.

3. The Application was opposed through the Grounds of Opposition by the 1st Defendant dated the 1st November 2022 to the effect that it was premised on a glaring misapprehension of the dictates of Section 80 of the *Civil Procedure Act* and Order 45, Order Rule 9 of the *Civil Procedure Rules*, 2010 respectively. Secondly that the Application had been filed after a lengthy delay, which delay had not been explained hence inordinate and lastly that then application was fundamentally defective, misconceived, frivolous, vexatious, and constituted a flagrant abuse of the court process and, thus the same ought to be dismissed with costs.

4. By the directions of the 2nd November 2022 parties agreed to dispose of the Application through written submissions to which only the Applicant complied.

Plaintiffs/Applicants submissions.

5. The Plaintiffs/Applicants, being in support of their application, filed their issue for determination as to whether they were entitled to the orders for review. They thus relied on the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules* to submit that the present matter was dismissed for want of prosecution on the 27th January 2022. That at the time, Mr. Koskei Advocate had held brief for their deceased Counsel without their knowledge or instructions to prosecute the suit. That the said error by Mr. Koskei Advocate should not be visited upon them as he was acting void of their authority. Reliance was placed on the case in *Philip Chemwolo & Another v Augustine Kubede* (1982-1988) KAR 103.

6. That the demise of their counsel should not be visited on them given that death was a sudden event and left the people involved in a confused state. That the case should be reinstated and heard to its logical end as this was a land dispute and the rightful owners could only be determined by the court.

7. That the subject matter of this suit was a substantial property of land being parcel L.R No. Kericho/ Koitaburot 372 which measured 33.5 hectares and therefore it would be in the interest of justice to have the same heard and determined on merit rather than on technicalities. That justice would be served if the ruling dismissing the suit was set aside and the matter reinstated.

8. The Plaintiffs/Applicants relied on the provisions of Article 159 of the *Constitution* to submit that there should not be undue regard placed on procedural technicalities but rather, the provisions of Article 50 of the *Constitution* should be applicable so that they could have their right to have the dispute resolved by the application of law in a fair and public hearing.

9. Reliance was also placed on the provisions of Section 3A of the *Civil Procedure Act* which gave the court inherent power to make such orders as may be necessary for the ends of justice to be met. They argued that substantive justice was at the heart of this litigation and that the court should determine the matter on merit.

10. That the matter had not gone to full hearing and hence the dismissal would condemn them unheard which in turn would violate the principles of natural justice. That considering the circumstances of the case and its emotive nature, the court do exercise its discretion and allow the application. That they had demonstrated a sufficient cause to warrant grant of the orders sought as they were interested in prosecuting the suit.

Determination.

11. It is now a 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. The mode of hearing of the Application having been communicated to the parties wherein they had consented to the same and there having been no compliance, by the Defendants/Respondent herein I am persuaded to proceed with the determination of the Applications as unopposed and on its merits.

12. I have considered the Applicants' application as well as their submissions and cited authority. Indeed the Applicants' Application stems from the allegation that the matter had been dismissed because Counsel Mr. Koskei had held brief for their Counsel the deceased Mr. Kitur, without their knowledge or instructions to prosecute their suit and therefore the error by Mr. Koskei Advocate ought not to be visited upon them as he was acting in devoid of their authority.

13. I find the issue that arises for my determination herein as being, whether the Application is merited.

14. It is clear that the matter was filed as an Originating Summons on 22nd February 2016, the record speaks for itself that the Applicants' Counsel Mr. Kitur (deceased) appeared for them up to when directions were taken for the hearing of the Originating Summons on the 31st August 2016. In the meantime, on 26th February 2015 there had been interim orders of status quo to be maintained by the parties pending the hearing of the suit.

15. On the 4th May 2017 the matter was fixed for hearing wherein Counsel holding brief for Mr. Kitur Advocate (deceased) was one M/s Chelimo.

16. On the 23rd October 2017, when the matter came up for hearing, Mr. Koskei Advocate held brief for Mr. Kitur Advocate (deceased) and sought for an adjournment since Mr. Kitur advocate was engaged in an Election Petition No. 3 of 2017 in Eldoret High Court. The matter was subsequently fixed for hearing for the 11th April 2018 wherein on the said date, again Mr. Koskei Advocate informed the court that they had just come on record for the Plaintiffs (Applicants herein) and needed time to peruse the court record. The matter was taken out for hearing and re-scheduled for the 14th June 2018 on which day Mr. Koskei Advocate appearing for the Plaintiffs informed the court that he needed time to file their list of witnesses and their statements.

17. The matter was then fixed for hearing for the 8th October 2018 on which day a hearing date was taken in the registry for the 17th December 2018 and again the record is clear that Mr. Koskei Advocate appearing for the Plaintiffs informed the court that the 1st Defendant had passed on wherein Counsel for the Defendants sought to file an application for substitution and the matter was taken out of the cause list for hearing.

18. On the 26th March 2019 the record shows that Mr. Koskei Advocate appeared again for the Plaintiffs wherein he had sought to withdraw the suit against the 1st Defendant and proceed against the remaining two Defendants and on which day the hearing date was re-scheduled for the 20th June 2019. On the said day, after the file had been placed aside, Mr. Koskei Advocate appeared for the Plaintiffs at 11:30 am where he sought for an adjournment seeking to file witness statements and also for the review of the orders made on 26th March 2019 so as to reinstate the 1st Defendant to the suit. He also informed the court that they would be filing an application to have the 1st Defendant substituted and that they had agreed to pay the costs of Ksh.5,000/-to the 2nd Defendant.

19. By consent, the matter was taken out of the cause list for hearing and re-scheduled for mention for the 23rd September 2019, on which day the record is clear that Mr. Koskei Advocate was present for the Plaintiffs, although the matter did not proceed.

20. On the 30th October 2019, the record is clear that a mention date for the 3rd December 2019 had been taken, for the purpose of taking a hearing date, by one M/s Evelyne of Tengekyon Koskei & Advocates for the Plaintiffs. On the said date, Counsel Mr. Motanya held brief for Mr. Koskei Advocate for the Plaintiffs wherein they had agreed to take another date in the registry.

21. On 10th March 2020, the record is clear that Mr. Koskei Advocate for the Plaintiffs sought for 30 days to substitute the 1st Defendant (deceased.) The parties then went to slumber until the 6th December 2022 when in the presence of Mr. Koskei Advocate for the Plaintiffs, the matter was dismissed, with costs for want of prosecution and pursuant to the provisions of Order 17 Rule 2(5) of the *Civil Procedure Rules*.

22. The law governing dismissal of suit for want of prosecution cannot be called upon to justify itself, it is well settled. In the case of *Utalii Transport Company Limited & 3 others v NIC Bank & Another* [2014] eKLR the Court held that.

> 'It is the primary duty of the Plaintiffs to take steps to progress their case since they are the ones who dragged the Defendant to Court. Then exhorts that over one year has lapsed without the Plaintiffs taking any step to progress their case and makes a strong conclusion that the Plaintiffs' inertia runs contra to the overriding objective of the Court stipulated in section 1A, 1B and 3A of the CPA. The first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party. But, the law prohibits a Court of law from such impulsive inclination, and requires it to make further enquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the Plaintiff from the judgment-seat. It is, therefore, a matter of discretion by the Court. See the opinions of Danckwerts, LJ in *Nagle v Fielden* [1966] 2 QBD 633 at p 648, and Lord Diplock in *Birket v James* [1978] A.C. 297. A great number of cases in the Court of Appeal have adopted that approach but I do not wish to multiply them. Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by Court in an application for dismissal of suit for want of prosecution. These principles are:
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> 1) Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;
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> 2) Whether the delay is intentional, contumelious and, therefore, inexcusable;
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> 3) Whether the delay is an abuse of the Court process;
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> 4) Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;
>
> 5) What prejudice will the dismissal occasion to the Plaintiff"
>
> 6) Whether the Plaintiff has offered a reasonable explanation for the delay;
>
> 7) Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the Court"

23. I have weighed all the above principles against the Plaintiffs' allegation that the matter had been dismissed because Counsel Mr. Koskei held brief for their Counsel Mr. Kitur (deceased) without their knowledge or instructions and I find that this allegation it cannot possibly be true more so on the 11th April 2018 when he had informed the court that they had just come on record for the Plaintiffs and needed time to peruse the court record.

24. Indeed the record is clear that Mr. Koskei Advocate represented the Plaintiff/Applicants from the 23rd October 2017 before the death of their Counsel up to the 6th December 2022, a period of 5 years, wherein no alarm had been raised by the Plaintiffs. It was only after the dismissal of the matter that the Applicants now want to disown their Counsel and this again three months after the impugned action. No explanation was given for the delay.

25. Although it is not in dispute that Article 50 coupled with Article 159 of the *Constitution* constitutes the defined principles which should guide the court in making a decision on matters of reinstatement of a suit which has been dismissed/struck out by the court, however the Court is also under an obligation to consider whether there are reasonable grounds to reinstate such suit after considering the prejudice that the Respondent would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.

26. The Applicants have not explained why the suit was not prosecuted for more than two years (from 10th March 2020 – 6th December 2022.) but have now shifted blame to their previous Advocate whom they claim acted without instructions. Indeed if the Applicants finds that the said Counsel was negligent, then their remedy lies elsewhere and not in setting aside of the dismissal order herein.

27. In the case of *Shah v Mbogo & Another* (1967) EA 116 it had been held that;

> " The discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice".

28. I find that there was inordinate delay on the part of the Plaintiffs in prosecuting the case, which delay was intentional and inexcusable noting that there has been interim orders of status quo in place. Further the Plaintiffs have not offered any explanation for the delay and therefore this said and done, I find no merit in the application dated the 27th June 2022 and proceed to dismiss it with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 9TH DAY OF MARCH 2023

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE