Githinji v Nduati (Environment and Land Appeal 3 of 2018) [2023] KEELC 18620 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18620 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ENVIRONMENT AND LAND APPEAL 3 OF 2018

YM ANGIMA, J

JULY 6, 2023

BETWEEN

STEPHEN KIHARA GITHINJI ..... APPELLANT

AND

JACKSON MUIRURI NDUATI ..... RESPONDENT

RULING

A. Introduction and Background

1. The material on record shows that the respondent obtained an ex-parte judgment against the appellant on July 4, 2017 in Engineer PM ELC No 22 of 2017 – *Jackson Muiruri Nduati v Stephen Kihara Githinji*. The record further shows that vide an application dated November 13, 2017 the appellant sought the setting aside of the ex parte judgment before the trial court on the grounds that the summons to enter appearance had not been served and that the court had no jurisdiction to entertain the suit.

2. Vide a ruling dated March 6, 2018 the trial court dismissed the appellant's said application. The trial court found and held that appellant had no reasonable defence to the action. The court further held that it had jurisdiction to entertain the respondent's claim.

3. Being aggrieved by the said ruling the appellant filed the instant appeal on March 26, 2018. Simultaneously with the filing of his memorandum of appeal, the appellant filed a notice of motion dated March 20, 2018 seeking, inter alia, a stay of execution of the judgment of the trial court and the setting aside of the said ex parte judgment. By a ruling dated January 28, 2019 this court dismissed the said application but granted leave to the appellant to appeal against the ex parte decree of the trial court within 14 days from the date of the ruling. The appellant was further granted 45 days to file and serve his record of appeal upon lodging his memorandum of appeal.

4. It would appear that the appellant did not comply with the orders made on January 28, 2019 with the consequence that the court dismissed the appellant's appeal with costs to the respondent on March 21, 2019.

5. The record shows that vide a notice of motion dated May 3, 2019 the appellant applied for setting aside of the dismissal order made on March 21, 2019 dismissing his appeal for want of prosecution. The appellant contended that there was an oversight on the part of his advocate in seeking copies of the proceedings of the trial court to enable him comply with the orders made on January 28, 2019. By its ruling dated November 6, 2019 the court allowed the appellant's said application and granted him a further 45 days to file and serve his record of appeal.

6. It would appear that once again, the appellant did not file and serve his record of appeal as directed on November 6, 2019 in consequence whereof the appeal was dismissed by the court on December 17, 2019. Consequently, he filed the instant application seeking re-admission of the appeal.

B. Appellant's Instant Application

7. By a notice of motion dated September 9, 2020 brought under the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act* (Cap 21) Laws of Kenya, Order 42 Rule 21 and Order 51 Rule 1 of the *Civil Procedure Rules*, Article 159 of the *Constitution* and all other enabling provisions of the law the appellant sought an order for re-admission of the appeal which was dismissed on December 17, 2019. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavits sworn by the appellant and his advocate on September 9, 2020. It was contended that the failure to comply with the earlier orders was occasioned by illness on the part of the appellant's advocate. It was further contended that the appellant was desirous of prosecuting his appeal and that it had good chances of success.

C. Respondent's Response

8. The respondent filed grounds of opposition dated April 19, 2021 raising the following objections to the application:

    a. The appeal is misconceived and a waste of judicial time since the earlier appeal was dismissed for want of prosecution.

    b. The application is res judicata.

    c. The application is an afterthought and bad in law.

    d. That litigation must come to an end.

D. Directions on Submissions

9. When the application was listed for inter partes hearing the parties were directed to file and exchange their respective submissions thereon. The record shows that the appellant filed his written submissions on April 7, 2021 whereas the respondent filed his on June 17, 2021.

E. Issues for Determination

10. The court has considered the appellant's notice of motion dated September 9, 2020, the respondent's grounds of opposition as well as the material on record. The court is of the opinion that the following key issues arise for determination herein:

    a. Whether the appellant has made out a case for the reinstatement of his appeal.

    b. Who shall bear costs of the application.

F. Analysis and Determination

Whether the appellant has made out a case for the reinstatement of his appeal

11. The court has considered the material and submissions on record on this issue. The main ground upon which the application is based is that the appellant was unable to comply with the orders made on November 6, 2019 due to his advocate's illness. The appellant's advocate, Mr. Njehia Njoroge, exhibited copies of a medical report dated 2015 indicating that he was under treatment for depression. He also exhibited 3 prescription notes dated May and August, 2019. He also exhibited copies of various laboratory results which were not accompanied by any medical reports or interpretation notes.

12. The court has noted from the record of proceedings that the appellant's advocate, Mr. Njihia Njoroge, attended a court session on June 17, 2019 but neither he nor the appellant attended court on November 6, 2019 when the appellant was granted a further 45 days to file and serve his record of appeal. There is no medical report on record to demonstrate that the appellant's advocate was incapacitated between November 6, 2019 and 24.09.2020 when the instant application was filed. In fact, there are no medical records for the year 2020 which would enable the court to conclude that the appellant's advocate was receiving medical attention.

13. It is also strange that the appellant did not take any steps to follow up on the progress of his matter knowing very well that he had previously been granted indulgence by the court. It is not clear why the appellant did not even deem it fit to inform the court, even by letter, that he could not comply with the orders of November 6, 2019 on account of his advocate's medical condition. The court is thus far from satisfied that the appellant is a diligent litigant in the circumstances of this case. The court considers that there was unreasonable delay in bringing the instant application.

14. For the foregoing reasons, the court is not satisfied that the appellant has made out a case for the reinstatement of his appeal. There is no evidence on record to demonstrate that the appellant was unable to comply with the orders of November 6, 2019 for sufficient cause since there is no evidence on record to demonstrate that the appellant's advocate was incapacitated during the period in question. There is also no evidence on record to demonstrate that the appellant ever diligently followed up on his appeal for a period of over 10 months.

15. Finally, the court has considered the material on record on the appellant's claim that his appeal stands good chances of success. The material before the trial court shows that the appellant had sold one half (½) of an acre of land to be excised from Title No Nyandarua/Mikaro/253 (Parcel 253). It would appear that at the material time it was the appellant's late father who was the registered owner thereof. In due course, the appellant was unable to complete the sale and transfer the said portion of land to the respondent despite receiving the purchase price in full.

16. It is apparent from the ruling of the trial court dated March 6, 2018 that the appellant conceded having sold the said portion of land to the respondent when he had no capacity to do so. The appellant had

been given the option of either undertaking succession proceedings and transferring the portion of ½ acre to the respondent or of paying the respondent the current market value of the land being Kshs. 500,000/=.

17. It is not clear why the appellant is aggrieved by such decision which gives him the option of taking legal steps to transfer the land he sold to the respondent or of compensating the respondent for the market value of the land. Clearly, the appellant should not be allowed to keep both the land and the money. He can only keep one and give away the other. In the premises, the court is not satisfied that the appellant has any serious issue to be tried in an appeal against the judgment and decree of the trial court. The judicial process is intended to be used to achieve substantive justice for the concerned litigants. It is not intended to be turned into a game of musical chairs.

Who shall bear costs of the appeal and the suit before the trial court

18. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd* [1967] EA 287. The court finds no good reason why the successful party should not be awarded costs of the application. Accordingly, the respondent shall be awarded costs of the application.

G. Conclusion and Disposal Order

19. The upshot of the foregoing is that the court finds no merit in the appellant's application for reinstatement of the appeal. Consequently, the notice of motion dated September 9, 2020 is hereby dismissed with costs to the respondent.

    It is so ordered.

JUDGMENT DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 6TH DAY OF JULY, 2023.

In the presence of:

Mr. Njihia for the Appellant

Jackson Nduati the Respondent – present in person

C/A - Carol

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Y. M. ANGIMA

JUDGE