Amuka v Memba & 3 others (Environment and Land Appeal E003 of 2022) [2023] KEELC 20454 (KLR) (4 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20454 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

ENVIRONMENT AND LAND APPEAL E003 OF 2022

GMA ONGONDO, J

OCTOBER 4, 2023

BETWEEN

PAUL ODHIAMBO AMUKA ..... APPELLANT

AND

JACOB AMUKA MEMBA ..... 1ST RESPONDENT

ODERA OBAR KENNEDY ..... 2ND RESPONDENT

THE LAND REGISTRAR, HOMA BAY ..... 3RD RESPONDENT

THE HON ATTORNEY GENERAL ..... 4TH RESPONDENT

(Being an appeal from the ruling of Hon. T. Olando, Principal Magistrate, delivered on 22nd December 2021 in Homa Bay Chief Magistrate's Court Environment and Land Case No. 6 of 2020)

JUDGMENT

1. This is an appeal that arises from the trial court's ruling delivered on the 22nd December, 2021 by the Honourable T Olando, Principal Magistrate, in Homa Bay Chief Magistrate's Court Environment and Land Case No 6 of 2020 where he held, inter alia;

   " ... it is clear that the plaintiff has no interest in prosecuting this matter and as such I find no basis for reinstating the matter..."

2. The appellant namely Paul Odhiambo Amuka through the firm of H. Obach and Partners Advocates mounted the appeal by way of a memorandum of appeal dated January 28, 2022 and duly filed on February 7, 2022. The Appeal is anchored on grounds 1 to 5 as set out on the face thereof and the same include:

a. The learned magistrate erred in law and in fact in failing to satisfy the principles governing and/or what constitutes reinstatement of a suit thereby arriving at an erroneous decision with regard to the application for reinstatement brought by the plaintiff/applicant to be applied in coming to his impugned ruling.

b. The learned magistrate erred in law and in fact in entertaining and/or delving into issues of facts while making a determination on the application for reinstatement.

c. The learned magistrate erred in law and in fact in failing to properly and constructively evaluate the entire evidence on record.

3. Wherefore, the appellant has sought the order that the instant appeal be allowed and the judgment of the learned trial magistrate be set aside, with costs of this appeal and in the trial court to the appellant.

4. The 2nd respondent is represented by the firm of Odera Obar and Company Advocates.

5. The appeal was heard by way of written submissions pursuant to this court's directions of December 8, 2022.

6. Learned counsel for the appellant filed submissions dated May 17, 2023 on May 31, 2023 and identified twin issues for determination thus: whether the appellant demonstrated reasonable grounds for the reinstatement of his suit and whether the respondents will suffer prejudice if the suit is reinstated. Counsel submitted, *inter alia*, that at the time the suit was dismissed, the plaintiff was present in court, although the plaintiff's counsel was absent and there was no counsel in court to hold brief. Counsel relied on Articles 48 and 50 of *the Constitution* of Kenya, 2010, Sections 3, 4 and 13 of the *Environment and Land Court Act*, 2015 (2011) as read together with Sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya. Counsel also relied on the case of *Richard Ncharpi Leiyagu -vs- Independent Electoral Boundaries Commission and 2 others* (2013) eKLR among other authoritative pronouncements, to buttress the submissions.

7. The 2nd respondent's counsel filed submissions dated June 14, 2023 on June 16, 2023. Counsel framed four issues for determination thus: whether the honourable court was justified in dismissing the suit for non-attendance and want of prosecution, whether the appellant has placed any sufficient material before this court to warrant the reversal of the ruling and/or order made on December 22, 2021, whether the suit as drawn, filed and taken out discloses any reasonable cause of action in any event and whether the appeal is competent or has merit in any event.

8. Learned counsel submitted that when the matter came up on September 7, 2021, Ms Obwanda who was holding brief for Mr Obach indicated to the court that Mr Obach would be ready to proceed with the prosecution of the suit at 10:30 am. That however, when the matter was called out at 10:35am, neither the appellant nor his counsel was present in court. That the trial court considered the history of the matter and dismissed the same for non-attendance and want of prosecution, pursuant to the provisions of Order 12 of the *Civil Procedure Rules, 2010*. That the appellant is misleading this honourable court by alleging that the appellant was present in court when the matter came up at 10:35am.

9. Further, counsel stated that the suit filed at the trial court does not disclose a reasonable cause of action and is an abuse of the court process. That although the appellant contends that the trial court did not grant him an opportunity to call witnesses during hearing of the application, he did not make such an application at the trial court. That the 2nd respondent stands to suffer immense prejudice if the instant appeal is allowed as he purchased the properties in issue more than ten years ago and has since been

unable to access the same. To buttress the submissions, counsel relied on the case of *Shah -vs- Mbogo* (1968) EA 96, among other authoritative pronouncements.

10. Notably, counsel for the 1st, 3rd and 4th respondents did not file any submissions in respect to the appeal herein.

11. In the foregone, the issues for determination are as captured in the grounds of appeal and compressed to:

    a. Whether the suit at the trial court ought to be reinstated

    b. Who should bear the costs of this application?

12. The instant appeal being the first one from the trial court in the matter, this court is obliged to review the record of the trial court, evaluate it and arrive at its own conclusions herein; see *Mwanasokoni-vs Kenya Bus Services Ltd* (1982-88) 1KAR 278 applied in the case of *Titus Ong'ang'a Nyachieo-vs-Martin Okioma Nyauma and 3 others* (2017) eKLR.

13. Originally, the appellant filed an application by way of a notice of motion at the trial court dated September 15, 2021 on September 20, 2021, seeking the following orders;

    a. That the order of the honourable court made on the 7th day of September 2021 dismissing the suit for non-attendance of the plaintiff's advocate be reviewed, varied and/or set aside.

    b. That the main suit filed herein on the 18th day of February, 2020 be reinstated.

    c. That the cost of application be provided for.

14. The application was grounded on a supporting affidavit of even date and sworn by Ms Linah Obwanda, an Advocate of the High Court of Kenya, then practicing as an Associate Advocate at H Obach and Company Advocates. Counsel stated that on September 7, 2021, she was holding brief for Mr. Obach, the appellant's counsel. That initially when the matter came up, she indicated to the court that Mr. Obach would be ready to proceed with the prosecution of the suit at 10:30 am. That however, when the matter was called out at 10:35am, she was still held up in court 2 and Mr. Obach had also not arrived.

15. Counsel averred that she tried getting a different counsel to hold brief to no avail. That however, the applicant/appellant was in court and ready to prosecute the suit. That the mistakes of the advocates should not be visited upon the litigant. That the applicant/appellant stands to suffer irreparable harm if the suit is not heard on merit since he stands to lose his property to the 1st defendant/respondent.

16. Counsel also filed a supplementary affidavit dated October 14, 2021 on October 21, 2021 and stated that the delay in filing the application for reinstatement was occasioned by her being indisposed after suffering a fall.

17. The 2nd respondent opposed the application by way of a replying affidavit sworn on September 30, 2021 wherein he averred that Ms. Linah Obwanda ought not to have sworn the supporting affidavit as it raises contested matters of facts. He insisted that the plaintiff was not present in court when the matter was called out hence the dismissal. That further, there was delay in filing the application for reinstatement. Thus, he urged the court to dismiss the application.

18. In his ruling, the learned trial magistrate stated that the plaintiff was not present in court when the file was called out. That the plaintiff had been granted several adjournments in the past. That the application was full of falsehood and misstatement. That in any event, the plaintiff had been ordered on August 4, 2021, to pay costs to the defendant before the next hearing date, which costs had not yet been paid.

19. I have keenly examined the entire record and proceedings of the trial court and note the following:

    a. The matter at the trial court was filed on February 18, 2020 and summons to enter appearance issued on February 19, 2020.

    b. On November 4, 2020, the matter came up for mention for direction, parties were granted a further mention date of December 2, 2020.

    c. On December 2, 2020, the parties were present. Matter was fixed for hearing on February 9, 2021 but on that day the court was not sitting and it was further adjourned to March 23, 2021.

    d. On March 23, 2021, although the plaintiff was ready to proceed, the matter was adjourned at the instance of the 1st respondent herein who requested to file his documents out of time. The 1st respondent was condemned to pay costs of 10,000/= to the 2nd defendant. The matter was adjourned to June 9, 2021.

    e. On June 9, 2021, the matter was adjourned at the request of the 2nd defendant/respondent to August 4, 2021, who was condemned to pay costs of Kshs.2,000 to the 1st defendant.

    f. On August 4, 2021, the matter was adjourned at the request of the plaintiff/appellant to September 7, 2021. The plaintiff was condemned to pay costs to the 2nd defendant.

    g. On September 7, 2021, the matter came up for hearing but when it was called out by the court, neither the plaintiff nor his advocate was present in court. Hence, the trial court dismissed the suit for non- attendance and want of prosecution.

    h. Aggrieved by the trial court's decision, the plaintiff filed an application to reinstate suit but the same was disallowed hence, necessitating the instant appeal.

20. It is important to note that the plaintiff had not paid throw-away costs of 10,000/- to the 2nd defendant when the matter came up for hearing on September 7, 2021. Therefore, it is unlikely that the same would have proceeded.

21. This court is cognizant of the provisions under Article 159 (2)(b) of the *Constitution* of Kenya, 2010 thus:

    > " Justice shall not be delayed"

22. Indeed, it is the duty of the court, litigants, as well as advocates, to ensure that matters are concluded expeditiously without inexcusable delay; see Section 3 of the *Environment and Land Court Act*, 2015 (2011) and Sections 1A and IB, of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.

23. Further, Section 3A of the *Civil Procedure Act* (*supra*) gives the court wide discretion over matters and issues that are before it, including the question as to whether it should or should not reinstate a suit dismissed on account of want of prosecution and non-attendance.

24. In *Ivita vs. Kyumbu* (1984) KLR 441, the court laid down the factors taken into account for the purpose of reinstatement of suits. The court stated infra:

    > " The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must, however, satisfy the

court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

25. This court is conscious of the rights of the appellant under Articles 48, 50 (1) as read with Article 25 (c) of the *Constitution* of Kenya, 2010. So, it is not the intention of this court to deprive the appellant his rights as enshrined in the said Constitutional provisions.

26. The appellant avers that he stands to suffer irreparable harm if the suit is not heard on merit since he stands to lose his property to the 1st defendant/respondent. Also, I note that the failure of the appellant to have the matter prosecuted and being absent from court will not bar him from accessing justice and a fair hearing of the suit. Thus, this appeal has merit.

27. A fortiori, I hereby allow the instant appeal, set aside the judgment of the trial court and reinstate the suit for hearing on merit.

28. The appellant is directed to pay throw-away costs of Kshs. 10, 000/- to the 2nd defendant within twenty-one days from this date, in default of which the reinstatement order shall lapse.

29. The Chief Magistrate, Homa Bay Law Courts, shall allocate this matter a hearing date on priority basis consistent with Article 159(2)(b) (supra).

30. The costs of this appeal to be borne by the appellant herein.

31. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 4TH DAY OF OCTOBER 2023.

G.M.A ONG'ONDO

JUDGE

Present

1. Ms. Otieno, holding brief for H. Obach, learned counsel for the appellant

2. 1st respondent- present in person

3. Luanga Terrence, Court Assistant