Mutembei & another v M'Turuchiu (Environment and Land Appeal 27 of 2020) [2022] KEELC 13312 (KLR) (5 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13312 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL 27 OF 2020

CK NZILI, J

OCTOBER 5, 2022

BETWEEN

SOLOMON MUTEMBEI ..... 1ST APPELLANT

WILSON KINOTI M'RINGERA ..... 2ND APPELLANT

AND

SIMEON MWATHE M'TURUCHIU ..... RESPONDENT

(Being an appeal from the Ruling/orders/decision of Hon. L.N Juma SRM delivered on 23.4.2020 in Meru ELC case No. 93 of 2015)

JUDGMENT

A. The Grounds of Appeal

1. This appeal arises from a ruling by the trial court in which the court declined to set aside or vacate an order on withdrawal of the suit. The appellant complaints are that the trial court:- failed to find the application for the setting aside and reinstatement of the suit without merits contrary to law; failed to find that the advocate who withdrew the suit acted without instructions and in an unprofessional manner; failed to properly exercise discretion and find the land matter sensitive and lastly failed to give the matter the due attention under the circumstances.

2. This being a first appeal the court's duty is to rehearse, rehear and re-appraise itself on the facts, law and come up with its own independent findings on law and finding mindful that the trial court had the opportunity to hear and see first-hand. See *Peters vs Sunday Post* (1958) EA 424.

B. Lower Court Pleadings

3. The appellants, as registered owners of LR No's Nyaki/Kithoka/3719 and 1767 sued the respondent who was the registered owner of LR No Nyaki/Kithoka/2156 for interfering with an access road by

trying to relocate it to a different position without their consent, approval or any legal authority with a view of blocking it.

4. They sought for a permanent injunction barring and restraining the respondent from interfering with the access road. The suit was accompanied by witness statements and a list of documents among them a mutation form, protest letter to the lands office, and a demand letter.

5. Alongside the suit, the appellants filed an application dated April 9, 2015 seeking for interim orders of injunction which were issued on April 15, 2015.

6. In his defence dated April 30, 2015, the respondent denied that the suit parcels were served by the alleged demarcated access road as the official one appearing in the land's office, maps and or records, or that they had the intention of closing the alleged road as averred or at all.

7. Further, the respondent averred that he lacked any powers in law to relocate an access road hence the appellants suit was not merited. Additionally, the respondent denied the existence of LR No Nyaki/ Kithoka/2156 and stated that the appellants intention was to maliciously, forcefully, unlawfully and unjustly obtain orders to enable them demarcate a non-existent access road.

8. The lower court record indicates that a series of directions were issued for a scene visit to be undertaken but for one reason or another, this was not done until February 23, 2016 when the court directed that the parties to proceed with the application dated April 9, 2015 by way of written submissions.

9. The suit was mentioned on August 22, 2017 when the trial court was told the plaintiff's counsel on record wished to cease acting. A date for August 29, 2017 was fixed to hear the application.

10. Before the ruling of the application dated April 9, 2014 and the one to cease acting were heard and determined or withdrawn, the matter came up on October 3, 2017 when Mr Mugambi advocate made an application to withdraw the suit. This request was not opposed by Miss Mutinda advocate for the respondent save for the issue of costs.

11. The court proceeded to allow the request with costs to the respondent. It appears that on May 12, 2018, a notice to show cause dated May 2, 2018 was issued for May 30, 2018 after which the appellants filed an application dated November 27, 2019. In the said application brought under order 12 rule 7 of the *Civil Procedure Rules*, the grounds were that the former advocate on record had no such instructions to withdraw the suit more when the dispute at the time remained unresolved; that he had complaints with the Advocate Complaints Commission and that it was in the interest of justice to allow the application.

12. In reply, the respondent attacked the application on the basis that there had been inordinate delay in prosecuting the pending application together the suit for over two years; that it took the applicants another two years to apply for the setting aside until a notice to show cause was issued on account of the assessed costs; service of the notice to show cause had been effected severally but the applicant never took action and that the application was an afterthought only meant to avoid the payment of the costs.

C. Oral Submissions

13. Mr Mwirigi advocate for the appellant submitted that order 25 *Civil Procedure Rules* presupposes three instances on withdrawal of a suit among them, where a suit has not been marked for hearing. In his view, the current scenario fell under the 2nd limb which freedom is curtailed since the court has to accept or reject the request altogether.

14. Counsel submitted that the leave of the court had to be sought for which was not a mere formality and that the claim could only be withdrawn on a written consent. Counsel relied on *Karissa Chengo Nguma vs Kalama & another* (2019) eKLR, *Beijing Industrial Designing and Researching vs Lagoon*

(2015) and submitted that the discontinuance of a suit was aimed at curbing the abuse of a court process, but the court should endeavor to ensure the necessary ends of justice are attained. Given that the suit was not heard on merits, access road had been blocked, and the appellants as landlords prone to suffer being landlocked, counsel urged the court to find that the land registrar at page 61 of the record of appeal had made a recommendation hence the reason the parties came to court to forestall the impeding action.

15. Counsel urged that the trial court should have looked at all the circumstances and found the application to withdrawal the suit was in bad taste.

16. Further counsel urged the court to take judicial notice that the said advocate had been struck off the Roll of Advocates and was still serving him sentence for misconduct. Counsel urged the court have been present in court, before the withdrawal of the suit.

17. In this scenario, counsel urged the court to find that the appellants were unaware of the developments or the hearing dates. Similarly, the record of court did not indicate if the parties were present or were aware of the hearing date.

18. Mr Mwirigi Advocate urged the court to find it was contradictory where on one hand the erstwhile advocate had said he was lacking instructions to act and at the same time withdraw the suit without instructions.

19. As to the delay, counsel for the applicant submitted the appellants only came to know about the outcome of the suit after they were served with a notice to show cause hence the delay could be attributed to them.

20. Counsel submitted that it was unfortunate his clients fell into the hands of a rogue lawyer who did not act in their best interest hence urged the court to breathe life to the matter, allow the appeal so that the case could be heard on merits, since the appellants were still landlocked and have had to rely on one of their neighbors to gain access to the suit land.

21. Mr Njindo, counsel for the respondent urged the court that this was not a dismissal of the suit for want of prosecution and when a party withdraws a suit the question is; can a dead suit be resuscitated especially when the trial court found the application without merits? Counsel submitted that the trial court guided by the holding in *Bahati Shee Mwafundi vs Elijah Wambua and another* (2015) eKLR was right in its findings based on the decision in *Beth Wanja Njoroge vs Simon Mwangi Njoroge & another* ELC No 190 of 2009.

22. Mr Njindo Advocate relying on article 159 of the *Constitution* urged the court to consider the principles of justice to all regardless of their situations in life and in this scenario the respondent also deserves justice as per sections 1A & 1B of the *Civil Procedure Act*.

23. Rely on *Deynes Murithi & 4 others vs Law Society of Kenya and another* (2015) eKLR counsel submitted, that the interference with courts discretion could only occur if there was misapplication of the law and facts or if discretion was exercised whimsically.

24. In this case counsel urged the court to find on several hearing dates between 2015 – 2017, it was only the respondent who was keen to have the matter proceed which was a clear indication that the appellants were guilty of laches yet the case belonged to them, especially as regard their application which had been brought under certificate of urgency on April 9, 2015 and was delayed inordinately.

25. Counsel urged the court to find the fact that the advocate on record wanted to cease acting depicts that the appellants had failed to give him adequate and sufficient instructions to prosecute their matter.

26. Counsel urged the court to find that there was no evidence of the appellants facilitating the said lawyer or to back the allegations that he had been struck out of the Roll of Advocates. Counsel urged the court to find the delay inordinate in the circumstances.

27. On the inaccessibility, counsel urged the court to find that the appellants were insincere for they were trying to get a shorter route.

28. Relying on *Eliud Mukisa Nalianya & another vs Joseph Wanjala Fulavu & another* (2019) eKLR Mr Njindo advocate urged the court to find that land disputes do not absolve the parties from following legal rules including the expeditious prosecution of the matter.

29. In a rejoinder Mr Mwirigi advocate urged the court to find that under order 25 rule 1 of the *Civil Procedure Rules*, a notice to withdraw must be in writing and that the case law of *Karissa Chengo Nguma* (*supra*) was distinguishable in that the suit was marked for hearing but parties put a notice in writing for the withdrawal.

30. As to the delay, counsel urged the court at page 13 of the record of appeal to find that there had been no service of the notice to show cause and that guided by *Beijing Industrial Designing* case (*supra*) the court should avoid the literal application of the law and adopt an interpretation which ensures the end of justice are met.

D. Issues for Determination

31. The issues commending themselves for my determination are:

    i. If an advocate who has indicated to the court he lacks instructions to act and would like to cease acting for the party can at the same time apply for withdrawal of the suit on behalf of his clients.

    ii. What are the considerations by the court in allowing an advocate to withdraw a client's suit.

    iii. If the appellants should have been condemned for the inordinate delay or lack of diligence and for mistakes of their advocate on record.

    iv. What are the considerations for the setting aside a withdrawal of the suit by consent of counsels for the parties.

    v. If the appellants are entitled to the prayers sought.

E. Determination

32. There is no dispute from the court record of August 22, 2017 that counsel then on record for the appellants had made an indication that he was no longer seized with instructions to proceed with the matter from the appellants and that he was going to file a formal application to cease representing them. When the matter came up for hearing of the application dated April 9, 2014 on October 3, 2017, counsel then on record, told the trial court that he wished to withdraw the suit for and on behalf of his clients. He did not however indicate under what section of the law he was doing so or whether his clients had instructed him to do so and for what reasons or grounds he was doing so.

33. It is trite law that a case belongs to the parties and not the advocates on record. The advocate draws his mandate and authority from his client so as to represent him or her in safeguarding his or her interest/ legal rights in line with the law. See *Utalii Transport Co. Ltd & others vs NIC Bank and another* (2014) eKLR.

34. In *Kitale Industries vs AG and County Government of Transzoia* (2020) eKLR, the issue before the court was whether a withdrawal of a suit amounted to a consent of all the parties and secondly the implications of the three scenarios as posed by Mr Mwirigi advocate herein.

35. The court took the view that when the suit is set down for hearing under order 25 (2) of the *Civil Procedure Rules*, only a written consent signed by parties can ensue unlike under order 25 (1) *Civil Procedure Rules* which only requires a party to file and serve a notice on all the parties.

36. The court held that a consent remains a consent whether written or not and proceeded to apply the doctrines of equity which deems as done that which ought to have been done given that the circumstances of the case showed that prior to this, parties had intimated to the court that they were negotiating a possible out of court settlement.

37. On the issue of the setting aside a consent, the court cited with approval the holding in *Flora Wasike vs Destimo Wamboko* (1988) eKLR and *KCB vs Benjoh Amalgamated Ltd & another* (1998) eKLR, where it was that stated the grounds of setting aside as including fraud, collusion, public policy or where the consent was given without sufficient material facts, misrepresentation or ignorance of such facts.

38. The court applied the reasoning in *SMN vs ZMS & 3 others* (2017) eKLR and *Lenima Kemigisha Mbabazi Star Fish Ltd vs Jing Jeng International Trading Ltd* (HCT – 00- MA- 344 – 2012) where it was stated that material must be brought before the court to show that the advocate entered the consent without specific or general instructions to either prosecute the suit or enter the consent, or to show that he had no full control over the matter or the apparent authority to compromise all matters connected with the action.

39. In *Washumbu (DA) co Ltd vs City Building Ltd & another* (2019) eKLR the court was faced with a scenario where an advocate withdrew a suit based on an alleged recent event tantamount to the suit being overtaken by events.

40. Relying on *Beijing Industries Designing and Researching Industries* (*supra*) where the Court of Appeal held that seeking the leave was not a mere formality under order 25 of the *Civil Procedure Rules*, the court held that under order 25(1) of the *Civil Procedure Rules*, a plaintiff in doing so is exercising an absolute right to withdraw his suit and a court after being informed has no questions of the exercise of the right to revoke such a withdrawal of the suit.

41. The court took the view that under order 45 of the *Civil Procedure Rules* and section 80 of the *Civil Procedure Act*, a party who seeks to set aside such an order must demonstrate sufficient cause to warrant the exercise of the court's discretion in its favour.

42. In *SMN vs ZMS* (*supra*) an appeal was made against the refusal by Lenaola J as he then was, to set aside or vacate a consent order. The Court of Appeal held that the onus of proving lack of instructions of counsel which are serious assertions, is on the party for these are imputations bordering on crime which must be proved on a balance higher than on a balance of probability.

43. The court said that allegations made against an advocate of High Court of Kenya that *inter alia*, he subverted the cause of justice was of outmost gravity since it destroys the advocates honour and respect capable of undoing his entire legal practice and attracts censure from his legal professional body. The court held that there must be cogent and truthful evidence of such charges.

44. Applying the above principles, and the case law, the appellants have submitted that they had not given general or specific instructions to withdraw or compromise the suit to their erstwhile advocate in the manner he did nor did he notify them of the developments thereafter.

45. Further the appellants submitted that the status of the matter had not changed to their favour such that it could be said that the erstwhile advocate was acting in their best interests while withdrawing the suit on their behalf.

46. There is always a general presumption that an advocate appearing before a court of law has full instructions to act in a matter especially where he has filed pleadings duly signed by the party he claims to be representing. In this matter the pleadings prior to the withdrawal of the suit were all signed by the appellants.

47. The supporting affidavit to the application has not given any details on the last time the appellants got in touch with their erstwhile lawyer especially after he obtained orders of temporary injunction which were in favour of the appellants.

48. The said application remained unprosecuted for close to four years with the erstwhile lawyer diligently attending court to act for and defend the rights of the appellants.

49. Looking at the record of the trial court, this court has no reason to doubt that the appellants had given their counsel then on record full instructions to act for them. The supporting affidavit to the application for setting aside was scanty on details particularly as to whether the appellants were calling on the advocate on record to know the progress of their case and or facilitating him so as to continue discharging his mandate.

50. Similarly, after the withdrawal of the suit, there is no indication if the appellants ever visited the chambers of their lawyers to establish the progress of their case or perhaps through other means to get in touch with him as expected of a diligent litigant.

51. The appellants seem to have given no credit to the work their erstwhile advocate undertook up to the time he withdrew the case. The appellants have not even told this court if they ever visited his chambers after the withdrawal to establish the circumstances leading to the withdrawal of the suit since under order 25 rule (1) *Civil Procedure Rules* the withdrawal of the suit was not a bar to re-institution of the suit.

52. The appellants have not cast any aspersion into the integrity of their former advocate in terms of collusion and or fraud.

53. In *KCB Ltd vs Benjoh Amalgamated Ltd* (*supra*) the Court of Appeal cited with approval the Supreme Court Practice (1976) col 2 paragraph 2013 page 620 that a lawyer has a general authority to compromise a suit on behalf of his client, if he acts bonafide and not contrary to any express negative direction.

54. The court held that an advocate has ostensible authority to compromise a petition in the interest of his client unless there was proof to the contrary to impeach the advocates bonafide.

55. In *Washumbu (DA) Co Ltd* (supra), unlike in the instant case and the KCB case *supra* there was no pending applications to withdraw from acting or express intention of lack of instructions before the consent to withdraw the suit was filed.

56. In my considered view, and looking at the circumstances of this matter what was coming up was an application for injunction and not the main hearing of the suit. Parties had been directed to file written submissions. There was no threat or order from the court that the suit must proceed one way or the other. There was no order for a last adjournment or the payment of adjournment fees or costs before any further action could be taken.

57. What precipitated the erstwhile advocate to compromise the suit and or withdraw it remains unclear. There was no reasons or ground(s) given to the trial court whether the instructions to withdraw the suit were in the interest of the appellants. As much as the appellants were to blame for the inordinate delay of the matter and also put their counsel then on record at risk of shouldering the blame of inordinate delay at the very least their rights as to fair hearing and for access to justice had to be safeguarded by the court in line with articles 50 and 159 of the *Constitution* as read together with sections 1A, 1B and 3A of the *Civil Procedure Act*.

58. My finding is that the interest of justice tilts in favour of allowing the appellants to have their day in court, otherwise they would be condemned unheard. The respondents in their replying affidavit and the written submissions have not said what prejudice will be occasioned to them if the suit were to be reinstated.

59. Nothing has been given to show that the dispute has been resolved, is overtaken by events or that the subject matter no longer exists. Similarly, nothing has been demonstrated to this court that the reasons given by the appellants do not amount to sufficient cause to enable the court to review, set aside and or vacate the order for the withdrawal of the suit.

60. In the premises, my finding is that the trial court erred in law and fact under the circumstances obtaining. The appeal is allowed. The appellants shall pay Kshs 65,000/= as throw away costs inclusive of the appeal costs and for the lower court to the respondents within 21 days from the date hereof.

    Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 5TH DAY OF OCTOBER, 2022

In presence of:

C/A: Kananu

Mwirigi holding brief for Ogoti for Appellant

HON. C.K. NZILI

ELC JUDGE