



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 39 OF 2018

PAMELA MUKOMUNENE NDEGWA APPELLANT

VERSUS

HARUN NDUBI RIMBERIA RESPONDENT

(Being an appeal from the Ruling of Hon. S. Abuya (S.P.M.) delivered on 29th August, 2018, in Meru CMCC No. 271 of 2013)

JUDGMENT

1. The appellant by memorandum of appeal dated **24.9.2018** appeals against orders in **Meru CMCC No.271 of 2013** made on **29.8.2018** on the following six grounds:

a) That the learned magistrate erred in law and fact in dismissing the application on technicalities contrary to provisions of Article 10 (2), (b), 159 (2) (a) (b) (d) of the Constitution and the provisions of section 1A, 1B and 3A of Civil Procedure Act Cap. 21.

b) The learned magistrate erred in dismissing the application without taking into account that it was purely on the inadvertence of the appellant advocate.

c) That the learned magistrate erred in law by failing to give respondent an opportunity to prosecute his case on merits against the rules of natural justice.

d) The learned magistrate erred in law and fact by not recognizing the fact that the appellant delay in prosecuting the matter was not inordinate and the respondent did not suffer any prejudice.

e) The learned magistrate erred in law and fact by failing to take into consideration that the matter was part-heard.

f) The learned magistrate erred in law and fact for failing to recognize that the dismissal of the suit would amount to great prejudice as the plaintiff/appellant and drive him out of the seat of justice.

2. This being a first appeal this court is expected to look into the pleadings, evidence and facts in the lower court and come up with its own conclusion and establish whether the lower court was right in law and fact in line with **Section 78** of the **Civil Procedure Act**.

BACKGROUND

3. The appellant as the plaintiff filed a plaint on **10.9.2013** claiming for **Kshs. 935,000/=** paid to the respondent on account of two agreements for sale of **L.R Nthimbiri/Abonyai/391** The respondent was to transfer the suit land to the appellant once the title deed was discharged by the lenders, after the loan facilities were cleared.

4. The appellant sought for the refund of the amount after the respondent refused to transfer the land. The respondent filed a defence on **18.9.2015** in which he admitted owing the appellant **Kshs. 920,000**, claimed he was willing to transfer the land upon receipt of the balance. He also admitted giving vacant possession to the appellant in good faith.

5. The record shows prior to filing defence, an interlocutory judgment was entered on **17.10.2013** and the case proceeded for formal proof on **8.4.2014**. The said default judgment was vacated by consent on **29.4.2014**. On **25.4.2016** the case was indefinitely postponed on account of the Malindi High Court ruling over magistrates jurisdiction to handle environment and land disputes.

6. On **30.8.2017** the suit was dismissed for non-prosecution following which an application dated **10.5.2018** was filed, heard and dismissed on **10.5.2018** triggering this appeal.

7. The parties herein agreed to dispose of the appeal through submissions dated **7.6.2021** and **6.10.2021** respectively.

8. The appellant on ground 1 of the appeal relies on **Article 10 (2) (b) and Article 159 (2) (a) (b) of the Constitution, Section 1A, 1B and 3A of the Civil Procedure Rules** on the proposition that justice shall be administered without undue regard to technicalities particularly on substantive justice doctrine which the lower court did not consider.

9. Regarding ground No. 2, the appellant relies on ***Belinda Murai & Others –vs- Amoi Wainaina [1978]*** on the proposition by Madan J, that doors of justice should not be closed due to mistake on one's counsel.

10. As regards ground 3 & 4 of the appeal the appellant urges the court to grant him an opportunity to be heard as delay was not intentional and relies on the holding in ***Philip Chemwolo & Another –vs- Augustine Kubede 91982-88] KAR 103.***

11. Concerning ground 5 the appellant submits the case was part-heard at the time it was dismissed and hence there was willingness to prosecute it. Under ground No. 6, it is submitted the dismissal drove the appellant out of the seat of justice and urges the court to be guided by ***John Nahashon Mwangi –vs- Kenya Finance Bank Limited (in liquidation) [2015] eKLR.***

12. On the other hand the respondent takes the view the trial court rightly dismissed the suit and relies on ***George Gatere Kibata –vs- Kuria Mwaura & Another [2017] eKLR*** on the proposition that there was a delay of one year with no sufficient cause shown. The respondent relies on ***Fran Investments Ltd. –vs- G4S Security Services Ltd [2015] eKLR*** on the proposition that justice is for all parties, and ***Mukavi Ways Co. Ltd –s- Family Bank Ltd. [2020] eKLR*** on the proposition that the delay herein was not explained at all by the appellant.

ANALYSIS AND FINDINGS

13. Having looked at the entire file the issues for determination are:

- a) **Whether there was inordinate delay in prosecuting the matter at the lower court,**
- b) **If the delay was solely caused by the appellant,**
- c) **If the delay was inordinate and lastly**
- d) **If the trial court applied the applicable law under the circumstances.**

14. Firstly it is not in dispute the respondent partly admitted the claim through his pleadings. Secondly, the suit proceeded with two witnesses on 8.1.2014. Parties however set aside the interlocutory judgment on 29.4.2014 with an order to recall PW1 and PW2 for cross examination. Thirdly, on 25.4.2016 the matter was taken out for the court's jurisdiction was in dispute due to the Malindi High Court matter. This was not out of the appellant's fault until there was stay in December 2016 and eventual Court of Appeal clarification on the magistrates jurisdiction on 19.10.2017.

15. A notice to show cause under **Order 17 Rule 2 Civil Procedure Rules** was issued for 30.8.2017 to M/S P.M. Majau & Co. Advocates and Charles Kariuki Kiome Advocates The same was served by Julius Onderi upon Kimanthi the clerk on 16th August, 2017. Whereas there is a stamp for service upon the respondent's advocates and which is acknowledged on 16.8.2017, the one for M/S Charles Kariuki Kiome Advocates lacks a stamp.

16. As a matter of fact it was common knowledge that there was delay of land matters between 2015 – 2016 at magistracy level countrywide. This cannot be attributed to any of the parties and none ought to benefit out of that delay. Therefore the delay between 2015 when this matter was taken out of the cause list and December 2017 cannot wholly be levelled against the appellant.

17. As regards the dismissal on 30.8.2017, since the Court of Appeal matter was determined in December 2016, it apparent the suit was dismissed during the time there was uncertainty over the issue of jurisdiction of magistrate's court jurisdiction over land matters.

18. On the issue that the case was part-heard and dismissal was prejudicial to the appellant, it is not in dispute PW1 and PW2 had already testified. The respondent had also partly admitted the claim in his pleadings. On that account, the dismissal of the claim was an injustice to the appellant by making him suffer thrice – losing his money, losing the transfer and losing the case out of no fault of his own.

19. In my view the sword of justice cuts both ways. The respondent has not alleged change of status of the suit land. The respondent has not stated there will be any prejudice if the suit is reinstated.

20. Given the foregoing reasons I find the appeal with merits and is hereby allowed. The cross appeal dated 29.1.2020 is struck as is filed out of time with costs to the appellant.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 3RD DAY OF NOVEMBER, 2021

In presence of:

Miss Gikunda holding brief for Kiome for appellant

Mutegi Mugambi advocates absent

Court Clerk: Kananu

HON. C.K. NZILI

ELC JUDGE