



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MURANG'A**

**ELCA NO.24 OF 2019**

**PHYLIS WANGARI MAINA.....APPELLANT**

**VS**

**TRUPHENA GATHONI MAGU.....RESPONDENT**

**RULING**

1. The instant appeal arose from the ruling by the Honourable Chief Magistrate M. Wachira on 12<sup>th</sup> September 2019 in Civil case No. 33 of 1992 as preferred by the Plaintiff /Appellant vide her memorandum of appeal dated 9<sup>th</sup> October 2019 and set forth the following grounds of appeal;

- a. That the learned Chief Magistrate erred in law and fact by dismissing the appellant's suit contrary to the tenets of access to justice and fair hearing as provided for in the Article 48 and 50 of the Constitution of Kenya 2010.
- b. That the learned Chief Magistrate erred in law and fact by disregarding the appellant's submissions and in giving undue weight to the submissions of the Respondent thereby arriving at a wrong finding.
- c. That the learned Chief Magistrate erred in law and fact by failing to exercise her discretion in a judicious manner contrary to the provisions of Article 159(2) (d) thereby driving the appellant from the seat of justice.
- d. That in all the circumstances of the case and in as far as the Appellant is concerned the learned magistrate failed to do complete justice before her.
- e. That the learned Chief Magistrate erred in law and fact by making orders that were not only unconscionable but also an affront to the provisions of Article 159(2)(d) of the Constitution of Kenya 2010 which underlines substantial justice a opposed to procedural technicalities.
- f. That the learned Chief Magistrate erred in law and in fact in failing to consider all the issues presented before her to enable her make an informed decision.
- g. That the learned magistrate erred in law and fact in dismissing the Appellants suit and allowing the Respondents' application thereby occasioning miscarriage of justice.

2. The appellant sought the following orders;

- a. This appeal be allowed.
- b. The Appellant suit be reinstated for hearing on its merits.
- c. The cost of this appeal and the proceedings in the Chief Magistrates Court be awarded to the Appellant.

3. The trial Court gave those orders on 11/09/2019 when the matter came up for directions and on the motion by the defendant's counsel that the Court was functus official, that the plaintiff did not only fail to fix the matter down for pretrial within the stated period but also filed their documents beyond the allowed time with the plaintiff's statement filed on 20/6/2019 and the list of witnesses and documents filed on 31/7/2019. Counsel for the plaintiff submitted that they had invited their counterparts to fix dates for pretrial but were informed the diary was full and were allocated the earliest available date, that the circumstances were beyond their control. The Court noted that there were orders

issued on the 25/4/2019 requiring the suit to be set down for pretrial conference within 21 days which expired on 16/5/2019 and also to set the case down for hearing within 60 days which expired on 24/6/2019.

4. Following the failure to comply with the two orders the trial magistrate ordered that the suit stood dismissed and on application by counsel for the defendant awarded costs to the defendant.

5. The appeal was canvassed through written submissions.

6. The appellant in a bid to show the efforts she put at prosecuting her claim discussed some history of the proceedings in the matter from the filing of the plaint in 1992, its amendment in 2003 to the loss and reconstruction of the file in 2016 then the application to further amend the plaint on 12/9/2017 which never proceeded and remains pending for determination. The matter would then be fixed for hearing on 25/4/2019 without pretrial directions being taken. It is on this day that the trial Court gave directions requiring the Plaintiff to set down the matter for pretrial and hearing within 21 days and 60 days respectively. That thereafter the Plaintiff did invite their counterparts to fix dates for pretrial on 06/5/2019 within the 21 days but they could not get dates at the registry as they were informed the diary was full and were allocated the earliest available date on 22/8/2019. That before the said date the plaintiff had fully complied with order 11 of the Civil Procedure Rules. The orders dismissing the suit were issued on 12/9/2019.

7. The Appellant submits that the orders of the trial Court pushed her away from the seat of justice in violation of her constitutional rights in respect to being afforded a fair hearing and access to justice under Article 50 and 48 of the Constitution. That the unavailability of dates at the registry as submitted by counsel was beyond the Appellant's control and therefore, she ought not be punished for it.

8. That the trial Court failed to heed the call and spirit of Article 159 of the Constitution in exercise of its jurisdiction in order to achieve the overriding objective of the Court and do justice to the parties. That it ought to have done justice to the parties despite the delays and conspiring that the Appellant had complied whilst the Respondent had not. That the Appellant's case relates to land which is a highly emotive issue in the African society. The appellant prays for the case to be reinstated for the same to be heard on merits.

9. The Respondent in her submissions on her part elaborately explained the chronology of events that led to the dismissal of the Appellant's case in addition to what is highlighted by the Appellant in her submissions to include the revival of the suit and substitution of the deceased Respondent sometimes in July 2016, followed by the application to amend the plaint which was granted on 17/7/2017 with orders to file the re-amended plaint in 21 days which orders the Appellant had not complied with despite the matter being before the Court on various dates by the 25/4/2019. In between the Appellant had changed advocates on 03/10/2017 but still failed to comply with the orders of 17/7/2017. Later the Appellant applied to consolidate the suit with a previously concluded Misc. application No. 8 of 2011 which was denied.

10. That as at the 25/4/2019 there being no amended plaint on record and no evidence of compliance with order 11 of the Civil Procedure Rules by parties, coupled with the age of the case having commenced 27 years ago, the trial Court gave the final orders requiring the Appellant to fix the matter for pretrial within 21 days and set the matter down for hearing within 60 days failure to which the suit would be dismissed. As expected, the Appellant failed to comply with those orders as the 21 days lapsed on 16/5/2019 without the Appellant fixing the matter for pretrial and before filing the compliance documents.

11. That on 13/5/2019 the Appellant invited the Respondents for fixing of a pretrial conference which was fixed for 22/8/2019. On that date the Respondent moved the Court to make a determination on whether the Appellant's suit was still subsisting as per the orders of 25/4/2019 to which both Counsels rendered their submissions and the honourable Court delivered its ruling on 12/9/2019 upholding its previous orders of the 25/4/2019.

12. The Respondent submits that the Appellant has through the years demonstrated willful disobedience of Court orders and mischief. That the invitation to fix a date for pretrial without filing the compliance documents as per Order 3 rule 2 of the Civil Procedure Rules was irregular. That the Appellant failed to utilize legal options available to her by either applying for extension and or review of the Court orders of the 25/4/2019, the Court could therefore not vacate its own orders on its own motion. The Appellant has indeed not sought to vary those orders in this appeal either. That indeed the Appellant failed to aid the Court to achieve its overriding objective by failing to comply with directions and Court orders.

13. That the failure of the Appellant to file and serve the substituted defendant/ Respondent with the amended summons and plaint the defendant/ Respondent is non-suited within the meaning of order 1 rule 10(4) of the Civil Procedure Rules. The Respondent could therefore not enter appearance or file a defence if she so wishes nor comply with order 11 of the Civil Procedure Rules.

14. That the Appellant has failed to demonstrate how her constitutional rights have been violated. In regard to her right to access to justice under Article 48, the Appellant failed to prosecute her case for the 27 years her suit had been before Court. In regard to her right to fair hearing under Article 50(1), the Appellant disobeyed the law that was applied by the Court, the proceedings were conducted in open Court and in presence of the Appellant's counsel at all times who chose not to move the Court for variation of the Court orders. And in respect to the principles anticipated to be applied by Court under Article 159, the Respondent understands the orders of 25/4/2019 to have been made to assist the Appellant to further progress her case expeditiously which cannot be termed as unfair.

15. That the grounds raised in the memorandum of appeal are devoid of merit as the Appellant failed to give evidence in support of ground 2, 6 and 7 and ground 4 suggests that complete justice would only be done if the Court had condoned the Appellant's impunity of disobedience of Court orders. The Respondent relied on the stated authorities and prays for the appeal to be dismissed with costs.

16. The suit giving rise to the appeal was filed on the 5/2/1992 by Francis Macharia Waikwa claiming a portion of 0.4 acres from LOC 14/KAMUNE/176 registered in the name of the MAGU GIKONYO, the defendant then. The defendant filed a defence and counterclaim on the 23/3/1992 and denied the Plaintiffs claim that he was a trespasser and sought vacant possession of the suit land claimed by the Plaintiff.

17. According to the record Francis Macharia Waikwa died on the 9/4/1993 and his wife Phylis Wangari Maina, the Appellant herein was appointed the legal representative of his estate vide limited letters of grant issued on the 4/3/1994. It would appear that the suit abated for lack of substitution and in 1994 on application the suit was revived and the said legal representative was substituted as the Plaintiff. Taking charge of the suit, on application she was granted leave to amend the Plaintiff on the 16/9/2003. She introduced a claim based on customary trust that is to say that the defendant held the land in trust for her and her family and sought the dissolution of the said trust and the transfer of 0.4 acres in her name.

18. On the 21/8/2003 the Appellant changed advocates to Messrs Kirubi Mwangi & Co advocates. On the 22/8/2005 the trial of the case started before the Principal Magistrate where some witnesses testified. The matter remained inactive until the advocates of the Respondent vide a letter dated the 9/12/2009 brought to the attention of the Appellants advocates on record that the Court file was damaged and required reconstruction and sought to know whether their client intends to apply for reconstruction. Awakened by the Respondent, the Appellant through its lawyers wrote to the Registry on the 12/5/11 and 14/7/2011 requesting that the file be traced and made available for reconstruction if need be.

19. In the meantime, and as fate would have it MAGU GIKONYO passed away on the 29/8/2011 and his wife Truphena Gathoni Magu was appointed his legal representative of his estate on the 23/7/15.

20. On the 21/3/2016 the Court ordered the reconstruction of the file. I have perused the old file in this case opened on the 5/2/92 which is mutilated beyond comprehension.

21. On the 11/7/16 the Appellant sought the revival of the suit which had hitherto abated when the then defendant died and substitution was not done within one year. The revival of the suit and the substitution of the late Magu Gikonyo with Truphena Gathoni Magu was allowed by consent of the parties on the 17/10/16. On the 12/9/2017 the Appellant sought orders to amend the Plaintiff to incorporate the administrator of the estate of Magu Gikonyo who had been substituted.

22. In the meantime, the Appellant changed advocates on the 3/10/17 by instructing the firm of Mbue Ndegwa & Company Advocates.

23. It would appear that the application dated the 12/9/17 was not prosecuted at all as the Appellant's lawyer kept insisting that the Plaintiff had been amended before. It therefore means that the plaintiff remains as amended on the 17/10/16.

24. On the 25/4/19 when the matter came up for hearing, the issue of whether or not the application of the 12/9/17 concerning the prayer for amendment of the plaintiff was raised but no orders were made. The Respondent requested for the time to comply with order 11 of the Civil procedure Rules in respect to pretrial directions. The Court made the following orders;

“This is an old case. This Court orders that the Plaintiff sets the suit for pretrial conference within 21 days and set the suit for hearing within 60 days thereafter failure to which suit shall stand or dismissed for want of prosecution.”

25. According to the record both counsels fixed the pretrial conference on the 13/5/19 and the date was set for the 22/8/19. Come the 22/8/19 when the matter came for pretrial the Appellant informed the Court that it had complied with order 11 and filed certain documents. The Respondents counsel sought directions as to whether the suit was still existing given the orders of the Court issued on the 25/4/19. He argued that the suit stood dismissed by the 17<sup>th</sup> or 18<sup>th</sup> May 2019 and the Court became functus officio. In response the Respondent argued that pursuant to the said orders they sought a date for pretrial in the Registry but could only get the 22/8/19 as the diary was full. He stated that these are circumstances that were outside their control and pleaded with the Court to see the effort that they had expended to set the matter for pretrial. That the Respondent would not be prejudiced.

26. On the 11/9/2019 the Court delivered its ruling on the matter as follows;

“I have read the record. On the 25/4/19 the Court ordered the suit be set down for Pretrial conference within 21 days which expired on the 16/5/19. The Court also ordered suit to be set down for hearing within 60 days and 60 days expired on the 24/6/2019. This suit stands dismissed.”

27. I have condensed the grounds of appeal to one question for determination which is whether the suit in the lower Court stood dismissed by the 22/8/19. My analysis of the Orders of the Court issued on the 25/4/19 is twofold; In the 1<sup>st</sup> limb the Appellant was ordered to set the suit for pretrial within 21 days. I agree with the Court that 21 days would end on the 16/5/19. It is on record that the parties both represented in the registry set the pretrial date for 22/8/19. The appellant has explained that this was the date available in the Registry. No evidence has been tabled before this Court to challenge this averment nor to show that indeed there were earlier dates available. The Respondent has not challenged this. Come the pretrial date the Advocate for the Respondent sought directions on whether the suit was still in existence. This question seems to have sent the Court on a detour ending in the suit being declared as dismissed. I say so because the 2<sup>nd</sup> limb of the Court orders ordered the Appellant to set the suit for hearing within 60 days thereafter failure to which suit shall stand dismissed for want of prosecution. My understanding of this order is that the hearing would only be fixed after the pretrial conference and the suit being certified ready for hearing and not before. The 60 days therefore should be counted from the 22/8/19 and not earlier. The reason is because the pretrial would not have taken place earlier than scheduled. It was fixed for 22/8/19.

28. I find that the suit was declared dismissed prematurely.

29. My perusal of the record shows that the Appellant filed the witness statement on the 20/6/19, the list of documents and the plaintiffs list of witnesses were filed on the 31/7/19. The Court orders are silent on when the pretrial documents were to be filed and served. The order only directed the Appellant to set the suit for pretrial. Was it expected that the pretrial documents had been filed or were to be filed within the pretrial period? It is not clear. In the absence of an explanation otherwise, the Court deems that the pretrial documents filed by the Appellant

were properly filed on record.

30. In respect to the issue whether or not the suit has abated, it is on record that the suit was revived and the Respondent was substituted in place of Gikonyo Magu on the 17/10/16. It is also not in dispute that the application dated the 12/9/19 seeking to amend the Plaint to include the current Respondent is yet to be determined. It is therefore my holding that this suit has not abated notwithstanding the pending amendment desired by the Plaintiff which are allowable in law at any stage of the proceedings.

31. I have been invited to address myself to the delay in prosecuting this case which I find unfortunate given that it has been in the corridors of justice for the last 28 years! I have in the preceding paras analyzed the entire life of this case as well as the actors and their conduct. One would be right to blame the Appellant for the general delay in prosecuting the case however looking at the terrain that the suit has traversed it is to be noted that some delay is attributed to the tracing and or damage of the file. I have perused the file and it is damaged beyond comprehension and perhaps that informed the reconstruction of the same. In addition, the original parties died necessitating the substitution of the new parties. That notwithstanding, the Court is not blind to the picture of lethargic litigants on both side of the contest, portrayed by the time taken to prosecute this case. I say so because the Respondent too bears responsibility to prosecute her suit by way of counterclaim. That is why the Learned Magistrate cannot be faulted by the orders which she rightly made which were in conformity with the overriding objectives of the Court of expeditious dispensation of justice except that she fell in error in the time sequencing and calculation of the days given.

32. That said and in the interest of justice, I allow the appeal and reinstate the suit so that it may be heard expeditiously on its merits. Let the parties have their day in court.

33. The costs of the Appeal shall abide the suit in the lower Court.

34. It is so ordered.

**DELIVERED, DATED AND SIGNED VIA EMAIL THIS 7<sup>TH</sup> DAY OF MAY 2020.**

**J G KEMEI**

**JUDGE**

**ORDERS**

In light of the declaration of measures restricting court operations due to the COVID - 19 pandemic and following the practice directions issued by his Lordship, the Chief Justice dated 20th March 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice No. 3137, this ruling has been delivered to the parties by electronic mail/video conferencing. In this case the parties have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court

**J.G. KEMEI**

**JUDGE**