



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELCA CASE NO. 17 OF 2020

PAUL MIYOYO OTIENO.....APPELLANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION

AND SETTLEMENT.....2ND RESPONDENT

THE CHIEF LAND REGISTRAR.....3RD RESPONDENT

THE DISTRICT COMMISSIONER SIAYA.....4TH RESPONDENT

OTIENO ALIS.....5TH RESPONDENT

JOSEPH ONYANGO ONDAGO.....6TH RESPONDENT

FRANCIS OMONDI OWUOR.....7TH RESPONDENT

MICHAEL ODHIAMBO OWUOR.....8TH RESPONDENT

DICKSON ODUOR OLOO.....9TH RESPONDENT

DOK OBIERO OWUOR.....10TH RESPONDENT

PAUL OLILO OLOO.....11TH RESPONDENT

OGAJA WERE.....12TH RESPONDENT

OWUOR ANDAGO.....13TH RESPONDENT

JOSEPH ONDAGO AMUOGA.....14TH RESPONDENT

ALOICE APONDI OBER.....15TH RESPONDENT

JANES OPONDO OTIENO.....16TH RESPONDENT

JOHN ONDAGO.....17TH RESPONDENT

CHARLES OMONDI OBER.....18TH RESPONDENT

FRANCIS ONDAGO OPIYO.....19TH RESPONDENT

(Being an appeal from the Ruling of the Hon. J. Ong'ondo,

Principal Magistrate delivered on 20/02/2020 at Siaya in the suit of

MCL & R No. 109 of 2018 formerly Kisumu HCCC No. 46 of 2004)

JUDGEMENT

The 5th to 20th respondents who were the defendants in the lower court filed a Notice of Motion in the said court dated 12/7/2019 seeking orders that the suit therein be dismissed for want of prosecution. The application was based on grounds that the Plaintiff had refused neglected and/or otherwise failed to take any steps to prosecute the matter for a period of over fifteen (15) years since filing of the suit on the 1st day of April 2004. The suit therein was at the time of filing even filed against deceased persons. That amongst the listed Defendants, it was only the 5th Defendant who was still alive. The suit abated against the 6th to 20th Defendants. The suit was therefore an abuse of the process of the Honourable Court. The Defendants/Applicants representatives continued to suffer unnecessary anxiety due to the delay in the prosecution of the suit that kept on hanging over their heads. The Plaintiff had depicted by his indolence, a lack of willingness to prosecute the suit herein. No prejudice whatsoever or at all was to be occasioned on the Plaintiff upon dismissal of the suit.

In the supporting affidavit of Gabriel Omondi who is not a party, it is stated that he is a son and legal representative of the 6th Defendant. He did not annex any document to demonstrate that he is a legal representative of the estate of the 6th Defendant. He states that on 12th October 2004 the Defendants entered appearance and filed a Defence their behalf. That the Plaintiff did file a reply to the Defence dated 5th November 2004 and filed in Court on 8th November 2004. That no action had been taken since then until the Kisumu ELC Court on its own motion transferred the file to Siaya Law Courts in 2018.

The Plaintiff had refused neglected and/or otherwise failed to set down the suit for hearing and/or take any steps to prosecute the same for a period of then over fifteen (15) years contrary to the law.

That the suit therein at the time of filing was even filed against deceased persons. That amongst the listed Defendants, it was only the 5th Defendant who was still alive.

That he had been advised by his Advocates on record, which information he verily believed to be true, that the case against the deceased persons who passed on after filing of suit had abated twelve (12) months from the dates of their respective demise.

That he was further advised by his Advocate on record, which information he verily believed to be true, that even the cases that were filed against the deceased persons are null and void ab initio and therefore an abuse of the Court process and that the neglect and failure to set down the suit for hearing amounted to an abuse of the process of the Honourable Court. That for reasons aforesaid, it was just and expedient that the case be dismissed with costs for want of prosecution.

The appellant replied with grounds of opposition that the application was frivolous vexatious and bad in law. He stated that and I **quote**:

- 1. "The record reflects the previous counsel on record for the defendants having made an application in courts to substitute the deceased defendants in terms of order 24 rule 4 has failed to do so and therefore this cannot be blamed on the plaintiff.**
- 2. That the cause of action being a land matter survives the deceased and therefore the need for the instructing defendants or their beneficiaries to take up letters of administration and defend the claim.**
- 3. That the Applicant had no locus standi to bring any proceedings on behalf of the 6th Defendant as he was neither a party to the suit nor an administrator of that estate.**
- 4. That the 5th Defendant was confirmed as still alive and therefore the suit could not be dismissed for want of prosecution where there is a defendant that is still alive as founded in order 24 rule 2.**
- 5. That the Order to dismiss the suit for wants of prosecution was sought in haste and prematurely, and was meant to prejudice the Plaintiff/Respondent and deny him his day in court."**

In the replying affidavit of Vitalis Oduor Otieno, he stated that the 5th, 7th, 8th, 14th, 15th, 16th, 17th, 18th Defendants were alive and that his sincere attempts to set the suit for hearing was thwarted by the Defendants who indicated to him vide their letter dated 10.12.04 they had not yet complied with the Provisions of order 10 Rule 11A of the Civil Procedure Rules and so the matter could not be set down for hearing and that Compliance with provisions of Order X Rule 11A of the Civil Procedure Rule was not only a duty of the Plaintiff but also of the Defendants. That to the date of the hearing of the application, the Defendants had also not complied with the said provisions.

According to the appellant, there has never been any delay on his part to prosecute the suit but all his attempts had been thwarted by the Defendants.

That a fair trial on the matter could still be attained as the Defendants had not tendered any evidence that they had lost or misplaced any

document relevant to the suit since the close of the pleadings and all parties were still at the same position.

The Respondents basically argued that the appellant failed to prosecute their case and the last activity was in the year 2004 and that the respondents had died hence the suit had abated. The appellants argued that the suit was not ripe for dismissal for want of prosecution as the suit was actively consistently and persistently prosecuted since it was filed. The appellant also argued that the applicant had no locus standi to prosecute the suit. After hearing the parties, the trial court made a decision on the following issues as framed by the said court: -

Whether the suit against the deceased defendants is a nullity.

The trial court found that in this case the suit was filed against 6th, 9th -13th defendants and 18th and 19th defendants who had already died before the matter was filed in 2004. The annexed death certificates indicated that the defendant died well before 2004. It was therefore unclear why the plaintiff committed such glaring and unforgivable error and sustained it for 15 years.

The plaintiff had not rebutted the defendant's allegations as the Replying Affidavit sworn by one Vitalis Oduor Otieno who was not the plaintiff and had not disclosed his relationship with the plaintiff. or whether he has the plaintiff's permission to do so had no evidential value.

The trial Magistrate was guided by the case of ELC no. 45 of 2015, Taracira M. Njuki vs Anthony Gachuki & 4 others, where Justice Olao J. delivered himself thusly on this issue:-

“The issue of trust....was only mentioned in affidavit of Jane Wambui, a stranger in these proceedings and whose Replying Affidavit is therefore of no evidential value.”

The trial magistrate found that in the case before him, the Replying affidavit filed by Vitalis Oduor was of no evidential value and could not be taken to revert anything deposed by Gabriel Omondi in the supporting affidavit. In conclusion, the found that the suit against the deceased defendants was a nullity and an abuse of court process and should not continue.

On whether the suit had abated against the defendants who had died during subsistence of the proceedings, the court found that the suit against them namely; the 9th, 18th and 19th Defendants who had not been substituted within one year as required by law had since abated.

On whether the suit should be dismissed for want of prosecution the court found that having ruled that the Replying affidavit by one Vitalis, Oduor Otieno is of no probative value as the same was sworn by a stranger, there was no explanation for the delay in prosecuting the matter since filing in 2004 and that the plaintiff was guilty of laches for failing to prosecute the suit even when it came for hearing before the honourable court on 14.2.2019 and had never set the suit down for hearing since.

The court found that on 14.2.2019, the counsel for the plaintiff adjourned the matter on very strange reasons that he was seeking consent of the defendants' Advocate to file witness statements in 2019 when the matter was filed in 2004. It had been 12 months since the adjournment and the plaintiff was not willing to take a hearing date until the application for dismissal was brought.

The learned Magistrate considered case no. 285 of 2010, PREMCHAND MUIJI SHAH T/A KETAN EMPORIUM VS M.D POAT & ANOTHER, where Justice Aburili J. stated:

“In the premises and as the plaintiff failed to explain the delay, failure to grant the orders in the application by the defendant.....would in essence be a lavish exercise of discretion which this court is not prepared to engage in.”

The learned magistrate proceeded to dismiss the suit against defendants for want of prosecution with costs of the application and suit to the defendants.

The appellant appealed to this court on grounds that the Learned Trial Magistrate erred in law and fact by dismissing the suit for want of prosecution yet the suit had previously been set down for hearing on the 14th February 2019 and the application for dismissal for want of prosecution was made on the 12th July 2019; this was before the lapse of the period set down in the law of one year.

That the learned trial magistrate erred in law and fact by disregarding the appellant's replying affidavit whereas the rules of court allow evidence to be produced by affidavit and that the learned trial magistrate erred in law and fact by allowing the respondents supporting affidavit whereas disregarding the appellant's affidavit where the supposedly were suffering from the same defect in law as concluded by him.

That the Learned Trial Magistrate erred in failing to find any merit in the Appellant's credible reasons for the delay in setting down the matter for hearing and/failing to consider the reasons advanced at all.

That the Learned Trial Magistrate erred in not taking the court proceedings and documents filed into consideration before exercising his discretion.

That the Learned Trial Magistrate erred in fact and law in finding that the plaintiff's submissions do not suffice as much as a sworn statement would.

The Learned Trial Magistrate erred in fact and law in dismissing the suit notwithstanding the fact that the defendant did not show any prejudice which it had suffered and the suit was ready for hearing and could be set for hearing and determined on the merit. The Learned

Trial Magistrate erred in fact and law in denying the Appellant an opportunity to advance his case.

The appellant prayed for orders that that the Appeal be allowed and that the Lower Court ruling/order/decisions of 20th February, 2020 be set aside and the Lower Court ELC No. 109 of 2018 be reinstated and be placed before a different court. That the Appellant be paid the costs of this Appeal.

I have carefully considered the matter and do find that the last action taken by the appellant before the dismissal of the suit was on 13/06/2019 when all parties present fixed the matter for mention on 08/08/2019. **Strangely, the application for dismissal for want of prosecution was filed on the 23rd day of July, 2019 and served on the 24th July 2019** before the date scheduled for mention.

Order 17 (2) (3) provides for a **Notice to show cause why suit should not be dismissed. Thus:-**

2. (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1. (4) The court may dismiss the suit for non-compliance with any direction given under this Order.

[Order 17, rule 3.] Procedure if parties fail to appear on day fixed. 3. Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 12, or make such other order as it thinks fit."

I do agree with the appellant that the Learned Magistrate erred in finding that there was a delay in the prosecution of the matter as the application was filed to pre-empt a mention date. Moreover, I do find that there was no justification in the Learned Magistrate's finding that the suit as a nullity based on the fact that parties had died. This is because the issues of the death of parties had not been canvassed or raised by any party and therefore the learned magistrate determined an issue that was not raised in the application and that was not before him. I do find the appeal merited and do allow the same thus the Lower Court ruling/order/decisions of 20th February, 2020 be and is hereby set aside and the Lower Court ELC No. 109 of 201 be and is hereby reinstated and to proceed in accordance with the law. That the Appellant be paid the costs of this Appeal.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF JULY, 2021

ANTONY OMBWAYO

JUDGE

This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE