



REPUBLIC OF KENYA



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**Bakuli v Maino & another (Civil Appeal 79 of 2019)
[2023] KEHC 20422 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20422 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 79 OF 2019
WM MUSYOKA, J
JULY 21, 2023**

BETWEEN

GODFREY MOSES SITUMA BAKULI APPELLANT

AND

DANIEL ABINIZAR MAINO 1ST RESPONDENT

**FRIENDS OF ORPHANAGE & VULNERABLE PERSONS (FOVUP)
(FORMERLY FAVO NGO) 2ND RESPONDENT**

*(Appeal from ruling and order of Hon. E. Malesi, Senior Resident Magistrate,
SRM, in Kakamega SRMCCC No. 147 of 2012, of 23rd July 2019)*

JUDGMENT

1. The appellant had sued the respondents, at the primary court, for compensation, for refund of a sum of Kshs. 1, 280, 000. 00, allegedly advanced to them by him. The respondents filed a defence, admitting the indebtedness, but pleading partial payment of Kshs. 600, 000.00, and raising a claim for set-off of the balance of Kshs. 680, 000 against Kshs. 1, 885, 000.00, allegedly owed to them by the appellant, and counterclaiming Kshs. 1, 170, 000, 000.00, being the balance after the set-off. An ex parte judgment was entered against the appellant, on 23rd May 2012, in default of defence to the counterclaim, but was set aside, vide orders made on November 14, 2012, and the appellant was granted leave to file a reply to the defence and a defence to the counterclaim.
2. The suit was dismissed for want of prosecution, on July 11, 2017, by Hon. Malesi, SRM. Previous to that the matter was last in open court on January 7, 2015, and the date for July 11, 2017 had been fixed by the court. An application was made, dated July 17, 2017, to have the suit reinstated, and the same was allowed, on 15th August 2017, by Hon. Malesi, and the parties were urged to prosecute the suit.



3. Thereafter, the suit was mentioned on 12th September 2017, when the court was informed of an intention to consolidate the matter with another, and a mention date was requested for, and the matter was allocated a mention for 31st October 2017. On 31st October 2017, the court was informed that there was a related matter at the High Court, coming up on 5th December 2017, and a request was made for a mention after that date, which request was granted, and the matter was fixed for mention on 13th February 2018. On 13th February 2018, the parties were absent, and the suit was dismissed. An application, dated either 30th January 2019 or 25th May 2019, for reinstatement of the suit, was filed, argued, and dismissed on 23rd July 2019, on grounds that the suit had been dismissed more than once, and parties could not keep pleading mistakes.
4. The appeal herein arises from that ruling of 23rd July 2019, and the orders made in it. The principal arguments are that the dismissal was on technicalities of the law, and a distinction ought to have been made between the mistakes of an Advocate and those of a party.
5. Directions were given on 4th February 2020, for canvassing of the appeal, by way of written submissions. I have seen, on the record, the written submissions by the appellant, but not those by the respondents. The appellant cites *Belinda Murai & others vs. Amos Wainaina* [1978] KLR 278 (Madan, JA) and *Philip Chemwolo & another vs. Augustine Kubeto* [1982-1988] KLR (Apaloo, J), with regard to mistakes by parties, or their Advocates, and the point made that a party should not suffer the penalty of their case not being heard on merits on account of mistakes. *DT Dobie & Company (K) Limited vs. Joseph Macharia Muchina* CA 37 of 1978, is also cited, for the point that a suit ought not be dismissed summarily, unless it is so hopeless, for not plainly or obviously disclosing a cause of action.
6. The record before me, part of which I have recited in paragraphs 1, 2 and 3 of this judgment, paints the picture of a suit which the appellant and the respondents had no appetite to prosecute. It started with the appellant being served with a defence and counterclaim, to which he did not respond, and an ex parte judgment was entered, which the court exercised discretion to set aside, and allow the appellant to defend. It was on 14th November 2012 that the ex parte judgment was set aside, to allow the appellant file a defence to the counterclaim. After 14th November 2012, not much else happened in the matter, in terms of the parties getting the matter heard and disposed of, until the suit was dismissed on 11th July 2017, for want of prosecution. That awakened the appellant, who then promptly applied to have the suit reinstated, and the trial court exercised discretion and reinstated the suit. After that the appellant did not display any effort to prosecute the suit. He had it mentioned several times, on grounds that he wanted it consolidated with another suit, and that there was another suit at the High Court, and eventually he did not attend court, on a scheduled date, allocated in open court, at his own request, and the trial court, being tired of the time-wasting by the parties, dismissed the suit.
7. Did the court go wrong in making the dismissal order? I do not think so. The suit was initiated in 2012, and by 2018, when it was dismissed for a second time, the appellant had taken no step to have it prosecuted. Suits are not filed for the sake of it. They must be progressed by being heard and determined. The appellant had not taken steps to prosecute his suit. When given a second chance by the trial court, he squandered it, by needlessly having the matter mentioned, instead of fixing it for hearing, and did not even attend court on a date that he had himself requested from the court. The court is not a parking lot for cases filed by parties who have no intention of prosecuting them. Given that background, the trial court did not go wrong in dismissing the suit. A suit cannot be kept alive by the court forever, where the parties are not keen on prosecuting it, merely on grounds that the parties are entitled to be heard. The trial court, in this matter, allowed the parties time to be heard, but the parties did not take the chance given. I appreciate the positions stated in *Belinda Murai & others vs. Amos Wainaina* [1978] KLR 278 (Madan, JA) and *Philip Chemwolo & another vs. Augustine Kubende*



[1982-1988] KLR (Apaloo, JA), but these decisions are of no relevance where there is blatant lethargy on the part of the parties, or their legal advisers, to progress cases in court.

8. On whether it should matter that the mistakes that led to the dismissal were made by the Advocate for the appellant, and not the appellant himself, and that a court ought to take that into account, to avoid punishing an innocent party for mistakes of an Advocate, as articulated in *Pithon Waweru Maina vs. Thuka Mugiria* [1983] eKLR (Potter, Kneller JJA & Chesoni Ag JA), the answer should be that the Advocate is an agent of the party. The suit belongs to the party, and the party ought to demonstrate that he himself took steps to have his Advocate advance the matter to hearing. He has a role in ensuring that his suit is disposed of speedily. He should not instruct an Advocate, and then go to sleep, by way of not following up on the progress of the case. In any case, going by *Omwoyo vs. African Highlands & Produce Co. Ltd* [2002] 1 KLR (Ringera, J), the party has a remedy, in suing the Advocate for professional negligence, where cases are lost on the sheer negligence of the Advocate.
9. *DT Dobie & Co. Ltd vs. Muchina* [1980] eKLR (Madan JA) is of no application to the facts of the instant matter, as it turned on a summary dismissal of a matter. The suit herein was not dismissed through the summary procedure, but on account of non-attendance and want of prosecution, to which *DT Dobie & Co. Ltd vs. Muchina* [1980] eKLR (Madan JA) does not apply.
10. I find no merit in the appeal herein, and I dismiss the same. The respondents did not participate in the appeal, consequently I shall make no order on costs..

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 21ST DAY OF JULY 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Mr. Khayumbi, instructed by JI Khayumbi & Company, Advocates for the appellant.

