



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 66 OF 2018

FRANCIS MUKUNJA

(Suing as the legal representative of the estate of MIRITI KABURI alias

M'MIRITI KIABURE Alias STEPHEN MIRITI – (Deceased).....APPELLANT

VERSUS

M'RUNGENTO MBOGORI.....1ST RESPONDENT

JOSEPH KITHINJI KAUGI.....2ND RESPONDENT

(Being an appeal from the Ruling of Hon. S. Abuya (S.P.M.)

delivered on 20th December, 2018 in Meru CMCC 49 of2013)

JUDGMENT

1. The appellant appeals against the ruling made on **28.12.2018** to review of orders made on **30.8.2018** dismissing the suit for non-prosecution on the basis that: mistakes of counsel should not be visited upon an innocent party; the court acted contrary to Constitutional and Statutory provisions on fair hearing and substantive justice especially since there were triable issues; condemned the appellant to pay costs, leading the appellant to face eviction and deprivation of his inheritance and contrary to **Section 39 Civil Procedure Act**.

2. This being an appeal, the court is expected to re-hear, re-hearse and re-assess the lower court file and come up with its own conclusion and findings in law see ***Selle V Associated Motor Boat Company Ltd., [1968] EA 123.***

A. PLEADINGS

3. The appellant as the legal representative of the estate of **Miriti Kiaburu alias M'Miriti Kiabure alias Stephen Miriti** had sued the respondents for fraudulent subdivision of the deceased **Parcel No's. Abothuguchi Gaitu/69 & Abothuguchi/Ruiga/1012**. (In the **No's 1908, 1909 and 1910 and thereafter Parcel No. 1909 into Parcel No. 2389 and 2390** amounting to disinheritance of the beneficiaries. He sought for the cancellation and reversion to the names of the deceased.

4. Together with the suit the applicant filed an interlocutory application for both inhibition and temporary injunction orders which the respondents opposed on the basis that the registration was not procured through fraud but succession proceedings since the appellant's late father held the property in trust for his late father and brothers to the appellant's late father John Mbogori.

5. The respondents insisted the succession proceedings had been brought by the appellants' mother and whose outcome was the property be shared equally between **Chabari Mbogori** and **M'Munge Mbogori** as per the decree. The court dismissed the application on **11.3.2016**.

6. After the ruling, the appellant did not take action until a notice to show cause under **Order 17 rule 2 of Civil Procedure Rules** was taken for **30.8.2017**. The notice was duly served on 10.8.2017 on both parties.

B. ANALYSIS AND FINDING

7. One of the grounds for the appeal is that the court did not consider issues of substantive justice. As indicated above there was an application for injunction and once the same was dismissed the appellant took no steps for over an year to prosecute his suit. Similarly the 1st

respondent had raised issues that there was a decree of the High Court determining the issue substantively and judgment entered to that effect regarding the suit properties. The affidavit in support to the notice of motion dated 12.10.2018 states the appellant had a good case with high chances of success.

8. The respondents had raised issues of res judicata and an abuse of court process. The appellant did not deny these facts that the time they were made the resultant title deeds were out of a decree issued by the High Court, which had not been appealed against and or set aside. The said decree was binding on the trial court, hence the lower court was right in finding the appellant had no good chances of success even if the suit were to be reinstated.

9. Secondly, the appellant submits he had not been served with a notice to show cause and alleged he did not know the process server. There was no request to cross-examine the process server made, in the lower court and hence the ground is not merited.

10. Thirdly, concerning the issue of a legal representative role under **Section 39** of the **Civil Procedure Act**, the lower court record indicates it is the appellant who initiated the suit. He cannot therefore turn around and claim otherwise. He was a proper party and hence liable to pay costs.

11. The appellant did not attend court hence the defendants sought for the dismissal for non-prosecution which the court granted with costs. The respondents sought for the assessment of costs on 30.8.2016. They were assessed and a certificate of costs issued on 25.5.2018 and a decree thereof. A notice to show cause dated 13.7.2018 was served upon the appellant. Following non-appearance a warrant of arrest was issued on 11.10.2018 prompting the firm of Kiogora Mugambi & Co. Advocates to apply for stay under a certificate of urgency application dated 12.10.2018.

12. In **Nilesh Premchand Mulji Shah & Premchand Mulji Shah t/a Ketan Emporium –vs- M.D. Popat and others & Dayalal Bhanji & Sons Ltd. [2016] eKLR**, the court held **Article 159** of the **Constitution** and **Order 17 rule 2 (3)** gives the court discretion to dismiss a suit where no action has been taken for a year in which justice has been delayed without explanation.

13. The case of **Ivita –vs- Kyumbu [1984] KLR 441** laid the test to be applied as to whether the delay is prolonged and inexcusable and if justice can still be done despite the delay.

14. In **George Gatere Kibata –vs- George Kuria Mwaura & another [2017] eKLR** the court held: under **Order 17 rule 2** there is discretion to act **suo moto** and dismiss a suit where delay is inordinate, in excusable, amounts to an abuse of court process, is unreasonable and was prejudicial to the opposite party and whether a fair trial is possible as a result of the delay.

15. In **Jimmy Mutuku Kiamba –vs- Nation Media Group Limited & 2 others [2020] eKLR** one cannot hide under that umbrella to escape the consequences of the dismissal of the suit.

16. Further, costs follow the event under **Section 27 & 28** of the **Civil Procedure Act** unless there are valid reasons to the contrary. There is no law which says relatives and or friend should not be condemned to pay costs to the successful relative or friend to a case. Law is presumed value neutral.

17. Fifth, the supporting affidavit was silent on the dismissal of the suit for non-prosecution. The service of the notice upon the appellant for the notice to show cause under **Order 17 rule 3** was not been denied. Similarly there was no explanation why the appellant did not take action to prosecute the suit since dismissal of his application for inhibition and temporary injunction. The appellant did not say what actions he took to get in touch with his advocates to know the progress of his case.

18. Sixthly, his then lawyer on record did not swear any affidavit to explain the delay in taking measures to dispose of the matter one way or the other. The supporting affidavit did not state the mistake was upon counsel as submitted by the appellant.

19. Again, the inordinate delay was not explained at all even if there was mistake of counsel. The trial court was therefore right in finding the application lacking merits and hence cannot be blamed for visiting a mistake of counsel upon the appellant as per the **Bushani Development** case the court held a reason as to non-prosecution has to be *given and proved*.

20. In **Nzoia Sugar Co. Ltd –vs- West Kenya Sugar Ltd. [2020] eKLR** the court held thus:

“Parties should file suits in court with a view to prosecute them. It should never be the case that suits are filed for the sake of it. They should not remain parked in the court registry, filing space and creating a false sense of backlog of cases. A suit should be prosecuted failing which it should meet the fate of dismissal for want of prosecution.”

21. Guided by the above reasoning and for the reasons given, the appeal lacks merit. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 24TH DAY OF NOVEMBER, 2021

In presence of:

Gitonga for the 1st respondent

Kiogora for appellant

2nd respondent in person

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE