Muigai v Lisaranja (Civil Appeal 20 of 2019)
[2023] KEHC 22492 (KLR) (21 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22492 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL 20 OF 2019

FR OLEL, J

SEPTEMBER 21, 2023

BETWEEN

SIMON NGUGI MUIGAI ..... APPELLANT

AND

WANGARI SUSWE LISARANJA ..... RESPONDENT

(Being an appeal from ruling & order of the Principal Magistrates Court at Naivasha delivered by Hon.Kimilu (P.M) on 2nd April 2019 in CMCC No. 231 of 2011)

RULING

1. This appeal arises from the ruling of Hon Kimilu (P.M) dated 2nd April 2019, wherein the trial court did dismiss the appellant's Notice of motion application dated 2nd April 2019 seeking to reinstate the suit which had earlier been dismissed on 6th December 2016. The Appellant/Applicant being aggrieved and dissatisfied with said Ruling filed a memorandum of appeal against the ruling on grounds that;

    a. The Honourable Learned Magistrate erred in Law and in fact by failing to consider the fact that the period of one year had not lapsed without any steps being taken by the plaintiff to prosecute the case as required under Order 17 Rule 2 of the *Civil Procedure Rules 2010*.

    b. The Honourable Learned Magistrate erred in Law and in fact by failing to consider the fact that notice was given by the Honorable Court prior to the dismissal of the suit as required under Order 17 Rule 2 of the *Civil Procedure Rules 2010*.

    c. The Honourable Learned Magistrate erred in law by failing to consider that by disallowing the appellant's application dated 6th February 2019, his constitutional rights to access justice and fair hearing as enumerated under articles 48,50(1) and 159 of *the constitution* of Kenya 2010 would be breached.

d. The Honourable Learned Magistrate erred in fact by failing to appreciate and consider that when the matter came up for dismissal for want of prosecution on 6th December 2016, there was no representation of either the parties as there was no notice issued to either of them.

e. The Honourable Learned Magistrate erred in law and in fact by holding that the supporting affidavit to the application was not signed.

f. The Honourable Learned Magistrate erred in law by holding that the supporting affidavit to the application ought to have been sworn by the plaintiff and not his advocate.

g. The Honourable Learned Magistrate erred in facts and law by basing her ruling on matters not pleaded nor argued at the hearing of the appellant's disallowed application dated 6th February 2019.

Brief Facts

2. The appellant did file a suit seeking in June 2011 seeking refund of Ksh.1,320,000/= plus interest being the deposit of the purchase price paid by the appellant to the Respondent for purchase of various properties mention in the said plaint. The primary suit came up for mention/hearing on several dates between 2014 and 2016 but the same was never heard. On 21st October 2016 the matter came up for mention and the court was not sitting. On 6th December 2016 the suit was dismissed for want of prosecution under Order 17 Rule 2 of the *civil procedure Rules*.

3. The appellant seemed to be unaware of the dismissal and only woke up from his slumber in February 2019, when he filed an application to reinstate the suit. The appellant deponed that the dismissal was not proper as the parties had actively been pursuing the matter prior to the dismissal and a period of one year had not lapsed without any step being taken by the parties as required by law. Further there was no notice to show cause served upon counsel prior to the dismissal as mandatorily required under order 17 rule 2 of the *Civil Procedure Rule.* The appellant had thus been denied justice and needed to be given the opportunity to be heard and prosecute his matter.

4. The Application was opposed by the Respondent. She averred that the application was misplaced and an abuse of the court process, being that it was brought after two and half years after the dismissal of the suit. The dismissal was on an account of want of prosecution and by coming to court coming to court after over two years, confirmed that the applicant had lost interest in the matter. It was further deponed that the applicant was not able to justify the long inaction hence found it easier to hide under his advocate to swear an affidavit for reinstatement on his behalf.

5. The respondent further stated that her lawyer was served with the notice to show cause and contrary to the allegations made, the applicant was fully aware of the dismissal. The applicant took a hearing date five years after filing the case which demonstrated a laid back and lackluster attitude taken by him in bid to misuse the litigation process. The respondent averred that the court could not be held at ransom by a party who was not keen on litigating his matter and therefore prayed that the suit be dismissed

Appellant's submissions

6. The Appellant raised two (2) issues for determination in the submissions filed;

    a. Whether a period of one year had lapsed without any action being taken by the plaintiff before the matter was dismissed for want of prosecution on 6th December 2016.

b. Whether it was proper for the advocate to swear the affidavit in support of the application dated 6th February 2019.

7. On the issue of whether a period of one year had lapsed without any action being taken by the plaintiff before the matter was dismissed for want of prosecution on 6th December 2016, it was submitted that dismissal of a suit is anchored under Order 17 Rule 2 of the *Civil Procedure Rules 2010*, and based on that provision the Court was invited to consider the fact whether or not a period of one year had lapsed without any steps being taken by the plaintiff to prosecute his suit. It was submitted that a hearing date for the case was fixed for 21st October 2016 exparte by the plaintiff's advocate, and a copy of the hearing notice was served upon the respondent's advocates on 16th August 2016. The court did not sit on 21st October 2016 thus the hearing did not proceed.

8. The appellant submitted that the matter came up for dismissal for want of prosecution thereafter on 6th December 2016, barely two months after it was slated for hearing and about four months after a date for hearing had been fixed by the plaintiff's advocate at the registry. Prior to that the suit came up for pretrial on 9th October 2015 by which date the defendant/Respondent was yet to comply with provisions of Order 11 of the *Civil Procedure Rule 2010.*

9. It was submitted that the trial Court did acknowledge the fact that the appellant had fixed the suit for hearing on 21st October 2016 but the trial court did not sit on that date. Prior to the dismissal, the appellant was not served with a notice to show cause by the court and it could be presumed that that the same was never served on the respondent's either and that explained why none of the parties was represented in court when the matter came up and was dismissed for want of prosecution.

10. The court therefore failed to appreciate that the period of one year had not lapsed without any steps being taken to prosecute the matter by either of the parties prior to the dismissal of the suit and thus the dismissal was unprocedural as it did not meet the threshold under Order 17 Rule 2 of the *Civil Procedure Rules* 2010.

11. Further the trial court failed to appreciate the submission by the appellant that the notice to show cause dated 24th November 2016 was never served upon them and that the non-appearance by either of the party on 6th December 2016, when the matter came up for dismissal for want of prosecution further cast doubt as to whether the court registry served either of the parties with the notice to show cause. Reliance was placed on the case of *David Kemei v Energy Regulatory Commission & 2 Others[2017]* eKLR .

12. The appellant acknowledged that there was a delay in discovering that the matter had been dismissed for want of prosecution and that the application for reinstatement was brought long after the dismissal, the same was not deliberate but purely an oversight on the part of the appellant's advocate and that an advocate's mistake should not be visited upon an innocent client. The court was urged to exercise its discretion by reinstating the suit and grant the appellant an opportunity to seek justice by prosecuting his suit. Reliance was placed by the case of *Ivita v Kyumbu [1975]* eKLR .

13. On whether it was proper for the advocate to swear the affidavit in support of the application dated 6th February 2019 it was submitted that Order 19 Rule 3(1) of the *Civil Procedure Rules* 2010 provided that the deponent of an affidavit must depone the facts within his or her knowledge. The matters deponed to by the advocate in the supporting affidavit to the application dated 6th February 2019 related to the proceedings in respect to the case and which were facts within his knowledge having been in conduct of the matter on behalf of the plaintiff. He was at a better standing to depone as opposed to the plaintiff.

14. It was finally submitted that the dismissal of the suit for want of prosecution was premature and the court was urged to set aside the orders of the trial court dismissing the appellant's application and subsequently reinstate the suit for determination on its merit.

15. The Respondent did not file any written submissions.

Determination

16. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See Santosh Hazari Purushottam Tiwari (Deceased) by L.Rs [2001] 3 SCC 179.

17. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See Kurian Chacko v Varkey Joseph AIR 1969 Keral 316

18. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties.

19. The only issue for determination in this appeal is whether the court did exercise its discretion judiciously in refusing to set aside the order dated 16th December 2016, which order dismissed the primary suit for want of prosecution.

20. The jurisdiction of the court to review and set aside its decisions is wide and unfettered. In Shah v Mbogo and Another [1967] EA 116 the Court of Appeal of East Africa held that:

> " This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice." (emphasis added)

21. The legal threshold to consider before exercising the said discretion is whether the applicant has demonstrated a sufficient cause warranting setting aside of the ex-parte decision or proceedings. In *Wachira Karani v Bildad Wachira [2016]* eKLR Mativo J held that:

> " Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause..."

22. The Supreme Court of India in Civil Appeal 1467 of 2011 *Parimal v Veena Bharti* [2011] observed that:

> " Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been 'not acting diligently ..."

23. The courts are also guided by the provisions of Article 159(2)(d) of *the Constitution* and Section 1A and 1B of the *Civil Procedure Act* in administering justice. The focus being on substantive justice, rather than procedural technicalities, and the just, efficient and expeditious disposal of cases.

24. Dismissal of a suit for want of prosecution is anchored under the provisions of order 17 rule 2 of the *civil procedure rules 2010*. The said provision of law provides that;

> " In any suit 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 should not be dismissed and if cause is not shown to tis satisfaction, may dismiss the suit."

25. The proceedings show that on 3rd August 2016 the appellant's representative appeared in the registry and fixed the matter for mention on 21st October 2016. On the said date no proceedings were undertaken, and the averment by the appellant that the court did not sit on the said date was not controverted by the Respondent and accepted as factual. The proceedings further show that on 6th December 2016 no party appeared before the court and the suit was dismissed for want of prosecution under order 17 Rule 2 of the c*ivil procedure Rules.* The appellant averred that they were not served with any notice before the said dismissal as is mandatory required in law, while the Respondent on the other hand alleged that her counsel was served.

26. It is pretty obvious that from the foregoing analysis of the proceedings that the trial court failed to appreciate that the period of one year had not lapsed, which period should have been one of inactivity by the parties and prematurely proceeded to dismiss the suit, yet there were proceedings which had taken place during the year. This was a clear error in law.

27. Secondly on the issue of service, the applicant alleged that they were not served with any Notice to show cause which is a pre requisite before an order of dismissal can be made. The court record shows that the court did issue the notice to show cause dated 28th November 2011. But there is no evidence of serve upon the parties either directly or by email. In absence of the said evidence I am inclined to believe the appellant that they were not served with the said notice to show cause.

28. As held in *David Kemei Vs Energy Regulatory commission & 2 others [2017]*Eklr Judge S.N Rechi held that;

> " In this application, there is no evidence on record that the applicant was served with the notice to show cause. I am not prepared to find that publication in the website and causelist alone was sufficient notice particularly where the applicant contends that no such service was served on them."

29. In the case of Sangram Singh v Election Tribunal Kotch (AIR 1955 SC 664) the Court remarked:

> " There must be ever present to the mind; the fact that our Laws of Procedure are guided on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their

lives and property should not continue in their absence and that not be precluded from participating on them."

30. The appellant was thus condemned unheard and the court ought to have exercise its discretion in his favour. The said order clearly was in breach of the rules of natural justice and attracts ex debito justitiae the right to have it set aside.

31. The final issue that arises for determination is that the appellant filed his application over two years late and was thus underserving in equity. Given the circumstances herein the order of dismissal was made prematurely and was a nullity abinitio. As stated in Macfoy v United Africa Company [1961] 3 All ER 1169:

> " If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to setting aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so."

32. Since the order for dismissal was void abinitio, there is not need to consider the long time frame taken by the applicant to apply to set aside the dismissal order.

Disposition

33. Taking all relevant factors into consideration I do find that this appeal is wholly merited and the order dismissing Naivasha CMCC 231 of 2011 dated 2nd April 2019 is hereby set aside.

34. Having considered the entire proceedings of the trial court I do not find that the appellant has also been guilty of laches in prosecuting this matter and therefore is not entitled to costs of this appeal

35. It is so ordered.

Ruling written, dated and signed at Machakos this 21st day of September, 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 21st day of September, 2023.

In the presence of: -

.....Appellant

.....Respondent

.....Court Assistant