



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. 109 OF 2019**

**MWIRIA THIRINJA.....APPELLANT**

**VERSUS**

**M'IMATHIU M'ARITHI .....RESPONDENT**

**(Being an appeal from the ruling of Hon. G. Sogomo (P.M) delivered on 22/8/2019 in Tigania PM ELC No. 36 of 2018)**

**JUDGMENT**

1. The appellant herein was the plaintiff in the subordinate court, while the respondent was the defendant. The appellant instituted the suit vide a plaint dated 6/2/2018 where he sought the following orders;

- a. **“An order declaring that the suit land belongs to the plaintiff and an order barring the defendant from interfering with the said land in any way.**
- b. **An order of exhumation and removal of the remains of the defendants’ grandchild herein called the suit land.**
- c. **Cost and interest.**
- d. **Any other relief deemed just and fit”.**

2. The appellant also filed an application contemporaneously with the plaint seeking orders for exhumation of the remains of respondent’s grandchild from the suit land, which application was dismissed on 13.3.2018.

3. On 10.5.2019, the respondent filed an application seeking orders of dismissal of the appellant’s suit for want of prosecution and that the appellant be condemned to bear the costs of the suit. In a ruling delivered on 22.8.2019, the aforementioned application was allowed. The honorable magistrate was satisfied that no reasonable steps had been made by the appellant after the dismissal of his application on 13.3.2018.

4. Being aggrieved by the said ruling, the appellant lodged this appeal raising the following grounds;

- a. **That the learned trial magistrate erred in dismissing the suit on grounds that the appellants advocate failed to file the submissions despite having been present in court when directions to file the submissions were issued.**
- b. **That the learned magistrate erred in law by failing to check the record and find that the appellant had in fact filed his submissions way before the counsel filed his submissions on 25/7/2019 in fact a month before the judgement was delivered.**
- c. **That the learned trial magistrate erred in law and fact by failing to appreciate that failure to file submissions do not warrant the court to give an unfavorable judgement against he who defaults to do but is rather dependent on the merits of the application.**
- d. **That the trial magistrate erred in failing to consider the submissions of the appellant on record and instead “delving in indicating an otherwise innocent counsel for the appellant” ??**
- e. **The learned trial magistrate by failing to give a judgement founded on facts and merits of the case and instead based the judgement on what is immaterial to the case ??**

**f. That the learned trial magistrate failed to evaluate the grounds for dismissal/and/or for lack of it in arriving at his judgement and awarding the costs to the respondent.**

5. On 21/1/2020 this court gave directions for the appeal to be heard by way of written submissions. The appellant has submitted that the suit was dismissed on the basis that the appellant failed to file submissions yet their submissions were filed way back on 24.7.2019. It is also averred that the magistrate delivered two rulings of which one was back dated and inserted into these proceedings.

6. The respondent on the other hand maintained that the trial magistrate never mentioned a failure to file written submissions by the appellant anywhere in his ruling. The trial court fully analyzed the facts and arguments of both parties as well as the applicable law.

7. I have carefully perused the record in its entirety and the issue for determination is whether to set aside the ruling of 22.8.2019 where the appellant's case was dismissed. The appellant contends that the trial magistrate erred in dismissing plaintiff's suit due to failure to file submissions. The ruling of the trial court however does not capture this averment. The decision of the trial court was anchored on the provisions of **order 17 rules 2 and 3** as well as the facts of the case and not on failure to file submissions.

8. I however find it necessary to determine the issue as to whether the trial court erred in not considering the submissions of the appellant who apparently filed the same before the current respondent. The records of the court clearly indicate that the directions on the hearing of the application dated 9.5.2019 were given on 4.7.2019 in the presence of advocates for both parties. The parties were to file their respective submissions and the matter was given a mention date for 25.7.2019. Come the date of 25.7.2019 and there was no appearance for the appellant. Similarly, the trial magistrate could not trace any submissions in the file. I find that it was proper for the trial magistrate to proceed to give a date for ruling. The averment by the appellant that they had already filed their submissions on 24.7.2019 is not supported by the records as the court stamp on the said submissions bears the date of 25.7.2019.

**9. Section 1A (3) of the Civil Procedure Act provides** that;

**“A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court”.**

10. This is a case whereby the appellant failed to comply with the above mentioned provisions of law. The appellant's counsel also failed to turn up in court on 25.7.2019 and they failed to present their submissions by the time the matter was mentioned in court on that day of 25.7.2019. Further, it is crystal clear that after the ruling of 13.3.2018, the appellant went into slumber only to be awoken more than a year later by the respondent's application for the dismissal of the suit.

11. In the case of case of **Ivita Vs Kyumbu [1984] KLR 441**, Chesoni, J as he then was stated thus:

**“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite the delay. Justice is justice to both the plaintiff and the defendant; so both parties to a suit must be considered and the position of the judge too....”.**

12. In the instant suit, I find that the trial magistrate analyzed the facts of the case clearly, stating that the appellant did not put forth any cogent evidence to show why he failed to prosecute the suit. I therefore find that trial court arrived at a correct decision.

13. The appellant in his submissions has also raised the issue that there were two rulings emanating from the trial court. However, this issue has not been raised in the grounds of appeal. I have also not seen two rulings. The ruling in question was delivered on 22.8.2019 and the extracted order was issued on 27.8.2018.

14. In the final analysis, I find no merits in this appeal which is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT MERU THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2020**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 6.7.2020. 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 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to 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.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**