



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 13 OF 2018

MERCELLINA KANYAA.....APPELLANT

VERSUS

FRANCIS MWANZIA KANYAA.....RESPONDENT

JUDGMENT

1. In the Memorandum of Appeal dated 16th August, 2012, the Appellant averred that the learned Magistrate erred when he failed to appreciate the circumstances that led to the suit to remain pending for the period it did; that the learned Magistrate failed to order the suit to be heard on its merits and that the trial court erred when it dismissed the Appellant's case for want of prosecution.
2. The Appeal proceeded by way of written submissions. The Appellant's advocate submitted that the Appellant gave reasons for her failure to take a hearing date of 3rd October, 2006; that the Appellant produced medical records which showed that she was undergoing treatment both as an in-patient and out-patient and that it was an error and a misdirection on the part of the trial court to find that the Appellant had failed to explain her failure to prosecute her case between June, 2007 and May, 2012.
3. The Appellant's advocate submitted that it was the Respondent's Application that remained pending for over five (5) years and that it is the Respondent's Application dated 4th May, 2007 that should have been dismissed.
4. The Respondent's advocate submitted that the Appeal herein was filed out of time; that the Appeal was filed sixty (60) days after the Ruling was delivered contrary to the provisions of Section 79G of the Civil Procedure Act and that no leave was ever sought and obtained to file the Appeal out of time.
5. The Respondent's counsel submitted that there was inordinate delay in setting down the suit for hearing; that under Order 17 Rule 2(3) of the Civil Procedure Rules, 2010, the court has the discretion to dismiss the suit if no action has been taken for one (1) year and that the last action that had been taken by the Appellant in the lower court was on 3rd October, 2016.
6. Counsel submitted that no reasons were given by the Appellant for failing to prosecute the suit and that the Appellant never offered evidence to show that she was sick between 1st May, 2007 –4th May, 2007.
7. The Ruling which is the subject of this Appeal was made by Hon. A.G. Kibiru in Kitui SPMCC No. 386 of 2005 on 17th July, 2012. In the said Ruling the court allowed the Respondent's Application filed on 30th August, 2007 to have the Appellant's suit dismissed for want of prosecution. In the said Ruling, the learned Magistrate held that the Appellant (*Plaintiff*) had not explained the failure to prosecute her case between June, 2007 and May, 2012, and dismissed the suit for the said delay.
8. The first issue for determination is whether the Appeal herein was filed within time.
9. The court records show that after the Ruling of the learned Magistrate on 17th July, 2012, the Appellant filed her Record of Appeal on 21st September, 2012. However, for reasons that are not clear to this court, the Memorandum of Appeal dated 16th August, 2012 does not have a court stamp showing the date it was filed. That notwithstanding, the fact that the Memorandum of Appeal was signed on 16th August, 2012 shows that the same was either filed on the said date or on 21st September, 2012 together with the Record of Appeal. In the absence of a court stamp or a receipt to show that the Memorandum of Appearance was filed on 16th August, 2012 or earlier, the only assumption that the court can make is that the Memorandum of Appearance was filed together with the Record of Appeal on 21st September, 2012.
10. Section 79G of the Civil Procedure Act provides that every Appeal from a Subordinate Court to the High Court (ELC) shall be filed within a period of thirty (30) days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the decree or order.

11. The Appeal in this matter was filed after the expiry of sixty (60) days, that is on 21st September, 2012. In an attempt to comply with the provisions of Section 79G of the Civil Procedure Act, the Appellant has included in the Supplementary Record of Appeal a Certificate of Delay. According to the Certificate of Delay dated 17th September, 2012, a certified copy of the Ruling was made available for collection on 7th September, 2012. The said Certificate of Delay further provides that *“the period between 24th July, 2012 and 7th September, 2012 is hereby certified as requisite for the preparation and delivery to the Plaintiff’s advocates of the Ruling.”*

12. In my view, to the extent that the Certificate of Delay shows that the Appellant was only able to get a certified copy of the Ruling on 7th September, 2012, the period between 24th July, 2012, when the Ruling was delivered, and 7th September, 2012, when the certified copy of the Ruling was ready for collection, should be excluded from computation of time. Having filed the Appeal on 21st September, 2012, I find that the said Appeal was filed within the requisite period of thirty (30) days.

13. The lower court record shows that the Appellant/Applicant filed the Plaintiff in Kitui SPMCC No. 386 of 2005 on 12th October, 2005. The Respondent filed his Defence on 7th November, 2005. Together with the Plaintiff, the Plaintiff/Appellant filed an Application dated 12th October, 2005 in which he sought for an order of injunction. That Application was dismissed by the court on 21st February, 2006.

14. After the Ruling of 21st February, 2006, the record shows that the matter came up for hearing on 23rd May, 2006, and 3rd October, 2006. On the said two occasions, the matter was adjourned at the behest of the Plaintiff/Appellant.

15. After 3rd October, 2006, the matter remained in abeyance until 30th August, 2007 when the Defendant filed an Application dated 2nd May, 2007 seeking for the dismissal of the suit for want of prosecution. Indeed, in the said Application, the Defendant/Respondent averred that *“since 3rd October, 2006 when the case was adjourned generally, the Plaintiff has not taken any steps to set the suit down for hearing.”* The Application was not heard until 15th May, 2012, and the Ruling delivered on 17th July, 2012.

16. In his Ruling, the learned Magistrate held as follows:

“In the present case, the Plaintiff/Respondent did not explain the failure to prosecute her case between June, 2007 and May, 2012 a period of five (5) years. Five (5) years is an inordinate delay.”

17. That holding by the learned Magistrate, with respect, is erroneous. The delay in prosecuting the suit can only be upto and until the date the Application for dismissal of the suit was filed. Having filed the Application for dismissal of the suit on 30th August, 2007, the Plaintiff/Appellant could not have prosecuted the suit until the Application is heard.

18. Indeed, the period of the purported delay in prosecuting the suit that the trial court should have considered was from the time when the matter was last in court, that is on 3rd October, 2006, and when the Application for dismissal of the suit was filed, that is on 30th August, 2007. That period was slightly over ten (10) months. Consequently, it was an error on the part of the learned Magistrate to find that the Appellant did not explain the failure to prosecute her case between June, 2007 and May, 2012.

19. In her Affidavit in response to the Application dated 2nd May, 2007 and filed on 30th August, 2007, the Plaintiff produced medical records to show that she had been unwell, thus the delay in prosecuting the matter. In my view, it was not even necessary for the Plaintiff/Appellant to belabour the issue of her sickness. I say so because between the time when the matter was last in court, and when the Application for dismissal of the suit was filed, a period of one (1) year had not lapsed.

20. Order 17 Rules (2) and (3) of the Civil Procedure Rules provides that the court, on its own Motion or on Application, may dismiss a suit which has not been set down for hearing for one (1) year. A period of one (1) year had not lapsed from the period when the matter was last in court and when the Defendant filed the Application for dismissal of the suit for want of prosecution. Indeed, a delay of ten (10) months for fixing a matter for hearing cannot be said to be inordinate. The learned Magistrate therefore erred by dismissing the Appellant’s suit for want of prosecution.

21. For the reasons I have given above, I allow the Appellant’s Appeal in the following terms:

a. The lower court’s decision dated 17th July, 2012 in Kitui SPMCC No. 386 of 2005 be and is hereby set aside.

b. The Respondent’s Application dated 2nd May, 2007 and filed on 30th August, 2007 in Kitui SPMCC No. 386 of 2005 be and is hereby dismissed with no order as to costs.

c. Each party to bear his/her own costs in respect to the Appeal.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF MAY, 2019.

O.A. ANGOTE

JUDGE