



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA CASE NO. 22 OF 2014

JOHN IKHUTA MULALU..... APPELLANT

VERSUS

KASSIM MULALU.....RESPONDENT

JUDGEMENT

The appellant, being dissatisfied with the ruling of Honourable S. Atambo, Senior Resident Magistrate at Mumias, delivered in the defendant's chamber summons dated 21st April, 2010 dismissing this case for want of prosecution, appeals against the said ruling on the following grounds;

1. That the learned magistrate erred in law and in fact in allowing the defendant's application dated 21st April, 2010 and thus dismissing the plaintiff's case.
2. That the learned magistrate erred in law and in fact in allowing the defendant's application dated 21st April, 2010 and thus dismissing the plaintiff's case without giving the plaintiff the chance to be heard.
3. That the learned magistrate erred in law and in fact in failing to consider that the court schedule fails to accommodate the 3 months provision in the Civil Procedure Rules Order XVI Rule 5 (d).
4. That the learned magistrate erred in law and in fact in failing to consider that there is another case pending at the District Tribunal Matungu.
5. That the learned magistrate erred in law and in fact in failing to exercise his inherent powers to stay this suit awaiting the decision of the tribunal or vis versa.

The appellant prays for orders that;

1. That this appeal be allowed.
2. That the ruling of the Senior Resident Magistrate at Mumias be set aside.
3. That SRMCC NO. 999 OF 2006 be set down for hearing on its merits
4. That the costs of this appeal be borne by the respondent.

The appellant submitted that the ruling of the lower court denied the appellant a chance to be heard. The appellant's case was dismissed at a preliminary stage without the suit being heard. The court should have issued a notice to show cause before dismissing the same. The parties are aware that during that period there was another matter pending at the tribunal.

This court has considered the appeal and the submissions herein. I have perused the trial file records and the ruling to be set aside. The trial magistrate held that;

“According to the Civil Procedure Rules Order XVI Rule 5 (d) ; if within three months after the adjournment of the suit generally, plaintiff or the court of its own motion on notice to the parties, does not set down the suit for hearing, the defence may either set down the suit for hearing or apply for the dismissal.”

The trial court further goes on to observe that;

“The last time the suit was in court was on 28/3/2008 when the same was adjourned at the instance of the plaintiff who since then hasn’t taken any step to have this suit heard and determined. This is well over 2 years ago yet the civil procedure rules refer to a period of 3 months.”

I concur with the ruling by the trial court. There was inordinate delay in setting this suit down for hearing which was not excusable. In the case of Utalii Transport Company Ltd & 3 Others vs NIC Bank & Another (2014) eKLR, the court held that it is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court. The decision on whether the suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. In Ivita v Kyumbu (1984) KLR 441, Chesoni J as he then was, stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Justice is justice for both the plaintiff and the defendant. I find that the learned Trial Magistrate did not err in law or fact in his ruling.

In Mwanasokoni v Kenya Bus Service (1982 - 88) 1 KAR 870, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision was judiciously arrived at and will not interfere with the same. The court finds no basis to interfere with the ruling as it was based on cogent evidence. This appeal is dismissed for lack of merit. The appellant is to meet the costs of the appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 8TH DAY OF MAY 2019.

N.A. MATHEKA

JUDGE