



## **REPUBLIC OF KENYA**

### **IN THE ENVIRONMENT AND LAND COURT**

#### **AT NYERI**

#### **ELCA NO. 17 OF 2016**

**JAMES NDONYU NJOGU.....APPELLANT**

**-VERSUS-**

**MURIUKI MACHARIA.....RESPONDENT**

*(Being an appeal from the ruling of Hon. F.W Macharia PM delivered*

*on 19th October, 2016 in Karatina PMCC No.109 of 2004).*

#### **JUDGMENT**

1. By a plaint dated 22nd June, 2004 the appellant herein instituted a suit in the lower court to wit Karatina SRMCC No.109 of 2004 seeking judgment against the respondent for cancellation of the title held by the respondent over the parcel of land known as IRIANI/GATUNDU/899 on the ground that the transfer of the suit property to the respondent was procured using forged documents.

2. Following an application by the respondent, brought under the provisions of **Order 17 Rule 2 (1)** and **(3)** of the Civil Procedures Rules, dated 24th July 2015, the appellants suit was dismissed for want of prosecution.

3. In dismissing the suit, the Trial Magistrate blamed the appellant for having delayed in fixing the suit for hearing, which delay was not explained. The Trial Magistrate acknowledged that the parties were engaged in negotiations for settlement of the suit out of court but blamed the appellant for having failed to follow the matter after the negotiations failed to yield any fruits. Being of the view that the appellant was not keen in prosecuting his claim, the Trial Magistrate allowed the application for dismissal of the suit and awarded the costs of the application for dismissal of the suit and those of the suit to the respondent.

4. Aggrieved by the decision of the Trial Magistrate, the respondent appealed to this court on seven (7) grounds which can be summarized as follows; That the learned Trial Magistrate erred by:-

(i) holding that magistrates' courts had jurisdiction to hear and determine disputes concerning environment and land matters when there existed an order of the High Court affecting that jurisdiction;

(ii) holding that he had not taken any step since 14th March, 2014 yet the parties were engaged in negotiations which affected his right to fix the suit for hearing;

(iii) by disregarding his uncontroverted evidence giving cogent reasons for the delay in setting down the suit for hearing;

(iv) dismissing the suit without any justification;

(v) dismissing the suit when he was still willing to be heard thus limiting his constitutional right to a fair hearing.

(vi) allowing the respondent to benefit from the pleaded illegality in the transfer of the suit property to him; and

(vii) awarding the respondent the costs of the application for dismissal and those of the suit.

5. Pursuant to directions issued on 1st November, 2017, the appeal was disposed of by way of written submissions.

### Appellants submissions

6. On behalf of the appellant, reference is made to the orders issued in Malindi High Court Constitutional Petition No.3 of 2016- **Malindi Law Society v. Attorney General & 4 others** staying the jurisdiction of Magistrates' courts to hear and determine environment and land disputes and submitted that the Trial Magistrate had no power to hear and determine the dispute preferred before her at the material time.

7. Pointing out that the Trial Magistrate was aware of the order of the superior court staying the jurisdiction of Magistrates' courts to hear and determine environment and land disputes, the appellant maintains that the Trial Magistrate erred by entertaining the dispute preferred before her when her power to entertain the same had been stayed by the superior court at the material time. In support of that argument the appellant relied on the cases of **Republic v. Senior Resident Magistrate Court Malindi ex parte Joshua Ngome Immanuel & 2 others (2017) e KLR** and **Kibwana Ali Karisa & Another v. Said Hamisi Mohamed & 3 Others (2015)e KLR**.

8. On whether there was inordinate delay in prosecuting the suit, it is reiterated that parties were engaged in negotiations to settle the matter out of court and explained that the respondent filed the application for dismissal of the suit immediately after the negotiations collapsed.

9. Maintaining that the appellant offered cogent reasons for the delay in prosecution of the suit which reasons the respondent did not controvert, the appellant faults the Trial Magistrate for having disregarded the reasons offered for the delay in prosecution of the suit and for having dismissed the suit when the appellant was still interested in having the dispute heard and determined on its merits. For the foregoing reasons the appellant urges this court to allow the appeal.

### Respondent's submissions

10. On behalf of the respondent, reference is made to the ruling of this court delivered on 14th March, 2014 in this matter concerning the appellant's contention that the Trial Magistrate had no jurisdiction to hear and determine the dispute preferred before her at the material time and submitted that the issue as to whether the Trial Magistrate had power to hear and determine the dispute preferred before her at the material time is *res judicata* that ruling.

11. Concerning the delay in fixing the suit for hearing, contrary to the appellant's claim that the respondent filed the application for dismissal of the suit immediately after negotiations for out of court settlement collapsed, it is pointed out that the application for dismissal of the suit was filed more than a year from the time the matter was last in court.

12. Contrary to the appellant's contention that he offered cogent reasons for the delay in fixing the suit for hearing, the respondent submits that there was inordinate unexplained delay in fixing the suit for hearing. In that regard, it is pointed out that prior to filing of the application for dismissal of the suit, the appellant had been issued with notices to show cause why the suit should not be dismissed for want of prosecution.

13. On the issue of costs, it submitted that the Trial Magistrate was justified in awarding the respondent the costs of the application and the suit because ordinarily cost follow the event; The respondent was the successful party both in the application and the suit.

14. The respondent points out that the appeal herein emanates from an order in respect of which no appeal lies without leave of the court. Because the appeal was filed without leave of court as by law required, it is submitted that the appeal is fatally defective. The process of hearing of the appeal is also faulted on the ground that the appeal was not admitted into hearing as by law required.

### Analysis and determination

15. From the memorandum of appeal filed in this suit and the submissions by the parties to the appeal, the issues for the court's determinations are found to be:-

**(i) Whether the Trial Magistrate had jurisdiction to hear and determine the dispute hereto at the material time?**

**(ii) Whether the appeal herein is defective?**

**(iii) Subject to the outcome of (ii) above, whether the defect in the appeal rendered it fatally defective?**

**(iv) Subject to the outcome of (iii) above whether the Trial Magistrate was justified in dismissing the plaintiff's suit for want of prosecution?**

**(v) What orders should the court make?**

16. On whether the Trial Magistrate had jurisdiction to hear and determine the dispute hereto at the material time, I agree with the submissions by the respondent's counsel that this court conclusively dealt with that matter through the ruling delivered on 14th March, 2017 where it held:-

**“Regarding the ground that there is stay order issued in Malindi case (supra), my view is that the outcome of the Malindi decision will not affect any land matter filed before 2012 when the Environment and Land Court (ELC) Act came into operation removing jurisdiction from the lower courts in regard to land matters. The matter before Karatina court was filed, long before the ELC Act came into operation. Therefore, whatever the outcome of Malindi case, the Magistrates' courts will still have jurisdiction to deal with land matters filed before the ELC Act came into operation so long as those cases were filed**

**in accordance with the relevant statutes in force at that time.”**

17. If the applicant was dissatisfied with the above determination, he ought to have appealed against it or applied for review. This not being an application for review of that determination, I agree with the respondent's submission that the issue is *res judicata* the above cited determination.

18. On whether the appeal herein is defective for want of the court's leave to appeal and for having being heard without first being admitted to hearing; whilst it is true that there are a number of procedural flaws in the institution and prosecution of the appeal, there being no prejudice suffered by any of the parties owing to those procedural flaws, I find and hold that those procedural flaws did not render the appeal fatally or incurably defective.

19. As to whether the Trial Magistrate was justified in dismissing the appellant's suit for want of prosecution; having reviewed the court proceedings which contrary to the appellant's contention that the application for dismissal of the suit was filed immediately after negotiations for settlement of the suit out of court collapsed indicate that the application was filed more than a year after the matter was last in court, I am of the considered view that without any plausible explanation by the appellant as to why he had not taken any step to list the matter for hearing for a whole year, and given the conduct of the appellant even when it came to defending the application for dismissal of the suit (he filed his response after the time given by the court for filing the response had long expired and without the leave of the court); the trial court was justified in exercising the discretion vested in it against the appellant.

20. Did the appellant offer any plausible explanation for the delay of more than one year in listing his suit for hearing?

Concerning the above question, it is important to review the explanation offered by the respondent which as follows:-

- (i) Parties had sought time to try and settle the case out of court;
- (ii) Immediately the talks collapsed, the respondent filed the application for dismissal of the suit;
- (iii) The suit could not be fixed for hearing before the application for dismissal of the suit was disposed off;
- (iv) That the Trial court lacked jurisdiction to determine the suit and the application.

21. Since at the time the application was filed the order for stay which informed the contention that the Trial court had no jurisdiction to hear and determine the suit had not been made, I am of the considered view that the appellant cannot reasonably be expected to flank that explanation as part of the reason as to why he had not fulfilled his obligation of taking measures to ensure that his suit was heard and determined expeditiously as required of him under **Section 1A** of the Civil Procedure Act. If indeed he could not fix the matter for hearing for want of jurisdiction, he should at least have moved the court for appropriate directions on the matter and not to leave the matter unattended.

22. By dint of the provisions of **Order 17 Rule 2(1) and (3)** of the Civil Procedure Rules, the respondent was within his right to move the court for dismissal after one (1) year lapsed without the appellant taking any step in the matter.

23. The court record shows that more than one year had lapsed between the time when the matter was last in court and when the application for dismissal was filed.

24. The proceedings in the lower court indicate that on 12th July 2013, the court gave the parties 30 days to settle the matter failing which the matter be fixed for hearing.

25. The court record shows that no consent was reached within the time ordered by the court. As a result, the matter was on two occasions listed for hearing on 14th March, 2014 and on 13th June, 2014. There is no indication whether the hearing notice was served on the respondent or what become of the hearing slated for 13th June, 2014.

26. The court record shows that the respondent's application was filed on 3rd August, 2015 which is slightly more than a year from 13th June, 2014 when the suit ought to have proceeded for hearing.

27. As pointed out above, the appellant fixed the suit for hearing on two occasions after the negotiations for out of court settlement broke down. For undisclosed reasons, the matter did not proceed to hearing until the respondent applied for its dismissal.

28. Having reviewed the record before me, I find as a fact that more than one year lapsed without the appellant taking any step to prosecute his suit. contrary to the explanation offered that he could not fix the suit because parties were engaged in out of court settlement, the court record shows that negotiations had long collapsed and the matter fixed for hearing on two occasions. There is no explanation offered as to why the matter did not proceed on those two occasions or for failure to take steps to fix the matter for hearing within the period of time in question that is from 13th June, 2014 to 3rd August, 2015 which period of time entitled the respondent to move the court for dismissal of the suit.

29. In the case of **Jimmy Wafula Simiyu v Fidelity Commercial Bank Limited [2014] eKLR** it was stated:-

**“No doubt the court has discretion to excuse a delay as long as it has been explained to the satisfaction of the Court. The satisfaction will come from the explanation given and the fact that the delay causes no substantial prejudice to fair trial or**

one of the parties or other or both. Therefore, the fact of delay per se does not seal the fate of the case. Other factors should be considered by the Court such as; whether the delay 1) is inordinate and inexcusable; and 2) will cause substantial prejudice to the fair trial of the case. The latter involves a delicate balancing act of the prejudice the dismissal of the case would cause on the plaintiff on the one hand, and real hardships to the Defendant on the other. The Court will be interested in the nature and importance of the case, the right of the Plaintiff to be heard and the fact that summary dismissal of a suit drives away the Plaintiff from the seat of judgment; an arbitrary and draconian act comparable only to the proverbial "sword of the Damocles". And, for the Defendant, in order to complete the balancing, the Court will seek to be told of the actual hardships, loss and prejudice the defendant has suffered and will suffer by the delay; here it will be incumbent upon the Defendant to show the prejudice is substantial and results to, impediment of fair trial, aggravated costs, or specific hardships. There must be some additional prejudice that has worsened the position of the Defendant. These factors answer to a higher constitutional principle of justice to serve substantive justice and Articles 48, 50 and 159 of the Constitution are the relevant guide here. Ultimately, as Chesoni J (as he then was) stated in the case of *Ivita Vs Kyumbu*, the Court should ask itself, whether, despite the delay, it is still possible to do justice for all the parties."

30. The decision whether a suit should be re-instated for trial is a matter of justice and it depends on the facts of the case. In this regard see the case of *Ivita v Kyumbu* [1984] KLR 441, where Chesoni, J. (as he then was) stated:

"The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

31. In the circumstances of this case, the court record paints the appellant as a litigant who had little regard for the timelines given by the court for the purposes of fasttracking the hearing and determination of the suit. For instance, despite having been given seven days to file his reply to the application for dismissal of the suit, the appellant took nearly two years to file that reply. When he ultimately filed the reply, he did so without the leave of the court.

32. Noting that the court had on previous occasions issued the appellant with notices to show cause why the suit should not be dismissed for want of prosecution, it is my considered view that the appellant should have taken keen interest in getting the matter heard and concluded without unreasonable delay which he failed to do. The Trial court was, as a result, justified in dismissing the suit for want of prosecution.

33. The upshot of the foregoing is that the appeal herein has no merit and is dismissed with costs to the respondent.

**Dated, Signed and Delivered in open court at Nyeri this 21st day of May, 2018.**

**L N WAITHAKA**

**JUDGE**

Coram:

Mr. Wagiita h/b for mr. Kiboi for the appellant

Muriuki Macharia – respondent

Advocate for respondent – absent

Court assistant – Esther