



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

CIVIL APPEAL NO. 25 OF 2009

RUKARIA M'NGUTHARI.....APPELLANT

VERSUS

KIRERA MUGAMBI.....RESPONDENT

(An appeal from the ruling of Hon. S.N Andriessen SRM delivered on 18th March 2009 in CMCC no. 524/2003 Meru)

JUDGMENT

INTRODUCTION

1. This is an appeal arising from the ruling of the learned magistrate Hon. S.N Andriessen (SRM) delivered on 18th March 2009 in CMCC no. 524/2003 (Meru). That ruling had been prompted by a notice of motion application brought by the respondent/defendant to have the suit dismissed under order xvi rule 5 (a) (now order xvii civil procedure rules) for want of prosecution. In the interlocutory application which gave rise to the impugned decision dated 29th January 2009 the defendant/respondent in his supporting affidavit sworn the same date had stated how the plaintiff/appellant had failed to prosecute the suit on several occasions when the same had been set down for hearing. The defendant referred to 29/05/2008 when the case had come up for hearing but the same was adjourned at the instance of the parties with a view to explore an out of court settlement. After they left the court house they agreed to meet again on 13/6/2008 for purposes of reconciliation but the plaintiff/appellant and his advocate did not come to the agreed venue.
2. The matter was then fixed for hearing on 25/09/2008 but the case was adjourned at the instance of the plaintiff who was ordered to pay court adjournment fees and the defendant's costs assessed at Kshs.400/= and 1700 respectively which was to be paid before the next court action.
3. On 29.1.2009 almost three months later, the defendant filed the interlocutory application to have this suit dismissed for want of prosecution.
4. In his replying affidavit sworn on 25th February, 2009 the plaintiff/appellant opposed the application stating that it was brought in bad faith.
5. The plaintiff also stated that the trial magistrate of court 4 went on transfer from 25.9.2008 and a new magistrate reported in December 2008 and immediately went on leave until January 2009. The plaintiff also stated that the court diary according to his advocate were closed in October, 2009 to await the 2009 diaries. In view of those reasons it was not possible to fix the case for hearing.
6. From the analysis of the evidence by the trial court in her ruling delivered on 18th March 2009 the learned magistrate noted that the plaintiff ought to have taken a hearing date before any other court and not necessarily court no. 4. The case was still fresh and could have been fixed before any other court with competent jurisdiction to hear and determine the matter. The learned magistrate in her analysis of the evidence was surprised how the case had been fixed severally but the same could not proceed for reasons attributed to the plaintiff. The learned magistrate finally noted that that suit was over six years since it was filed and that there was no intention by the plaintiff/appellant to prosecute the same.
7. I have evaluated the affidavit evidence by the parties in the interlocutory application and the analysis of the learned magistrate in her ruling delivered on 18th March 2009.
8. When parties bring their dispute to our courts for resolution the courts should always provide a conducive environment to determine their disputes in an expeditious and fair manner.
9. An application for dismissal of a suit for want of prosecution is a discretionary power donated to a court of Justice to be exercised in exceptional circumstances where the court is satisfied that either the plaintiff or his advocate have failed to take reasonable steps to prosecute

the matter as a result of which has caused inordinate delay such as to give substantial risk that a fair trial of the issues in litigation will not be possible at the earliest date if it were allowed to continue. The court must also be satisfied that before such a discretion is exercised, the plaintiff has been given an opportunity of remedying his default.

10. In the instant case the proceedings shows that the matter had been fixed for hearing several times and the trial court adjourned the case severally after being satisfied of the reasons given. It is my view that though the matter had been fixed for hearing before the lower court several times, the hearing could not proceed after the trial magistrate was satisfied that there were good reasons for the adjournment. The plaintiff or his advocate cannot therefore be faulted for adjournments which were beyond his control. The delay in prosecuting the lower court case in my view was not attributed to the plaintiff and his advocate alone.

11. In the upshot, I find the appeal merited and the same is allowed in the following terms:

- (i) The lower court's orders of 18/03/2009 dismissing civil case no. 524 of 2009 (Meru) be and is hereby set aside.
- (ii) The said CMCC case no. 524/2009 (Meru) be and is hereby reinstated.
- (iii) The plaintiff is given 14 days to fix the same for hearing on priority basis failing which the suit shall be dismissed for want of prosecution.
- (iv) Each party shall bear his own costs of this appeal and the application before the lower court.

Read, delivered and signed in the open court this 14th day of June, 2018

MR. E. CHERONO

ELC JUDGE

In the presence of:

CC: Galgalo

Ms. Nyaga holding brief for Kioga for appellant present

N/A for respondent