



Kitrap v Chemencha & 3 others (Environment and Land Appeal 6 of 2022) [2024] KEELC 315 (KLR) (18 January 2024) (Judgment)

Neutral citation: [2024] KEELC 315 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL 6 OF 2022**

**EM WASHE, J
JANUARY 18, 2024**

BETWEEN

JOHN OLE KITRAP APPELLANT

AND

LEKUTA CHEMENCHA 1ST RESPONDENT

**THE DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER,
TRANSMARA WEST/EAST 2ND RESPONDENT**

**THE CHAIRPERSON, NKARARO LAND ADJUDICATION COMMITTEE,
TRANSMARA 3RD RESPONDENT**

THE HON.ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. The Appellant herein being dissatisfied by the Ruling of Hon.R.M.Oanda, Senior Principal Magistrate (hereinafter referred to as “the Trial Court”) pronounced on the 21.07.2022 (hereinafter referred to as the “the Trial Court Ruling”) filed a Memorandum of Appeal dated 04.08.2022 on the following grounds;-
 - a. The Learned Trial Magistrate erred in law and fact by dismissing an application to reinstate the Plaintiff’s suit based on erroneous facts.
 - b. That the Learned Trial Magistrate erred in law and fact by failing separate mistakes of Counsel which have been admitted by Counsel in an Affidavit from the rights of the Plaintiff to be heard and the matter determined on merit by a Court of law.
 - c. That the Learned Trial Magistrate erred in law and fact by failing to issue a notice to show cause before dismissing the entire suit.



- d. That the Learned Trial Magistrate erred in law and fact by misinterpreting the law as it relates to setting aside of dismissal orders and reinstatement of suits.
 - e. That the decision of the Learned Trial Magistrate is unbalanced, perfunctory, passionate and substantially irregular and legally untenable. Consequently, the decision herein is wrong and fraught with errors of facts and law.
2. The Appellants prayers therefore based on the above grounds in the Memorandum of Appeal were as follows; -
 - a. The Appellant’s appeal be allowed with costs to the Appellant.
 - b. The Honourable Magistrate’s Ruling delivered on the 21st July 2022 and Orders issued therein be set-aside with costs to the Appellant.
 3. The Record of Appeal was indeed served on the Respondents and listed for substantive hearing thereof by way of written submissions.
 4. The Appellant filed his submissions 22.08.2023 in support of the Appeal while the 1st Respondent filed his submissions on the 21.09.2023 in opposition of the Appeal.
 1. It is important to point out that this Honourable Court is sitting as an Appellate Court and should be guided with certain principles which were expressed in the case of *Selle & Another v Associated Motor Boat Co.ltd & Others*[1968] EA 123 where the Court observed as follows; -

“ A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”
 5. The Honourable Court has indeed gone through the Record of Appeal and the submissions by the Appellant and the 1st Respondent and the issues for determination can be summarised as follows; -

Issue No.1- What Was The Reason as to the issuance of the order of Dismissal Issued On The 11.02.2021?

Issue No.2- Were there any sufficient grounds adduced by the appellant to warrant The Setting -aside of the order of dismissal issued on the 21.07.2022?

Issue No. 3- Is the appellant entitled to the prayers sought for in this appeal?

Issue No. 4- Who bears the costs of this appeal?
 6. This Honourable Court having identified the above issues for determination, the same will now be discussed as hereinbelow.

Issue No.1- What was the reason as to the issuance of the order of Dismissal Issued on the 21.07.2022?

7. The facts that led to the Appellant filing the Notice of Motion dated 19.02.2021 whose Ruling was pronounced on the 21.07.2022 and is under Appeal was the dismissal of their case on the 11.02.2021



8. According to the proceedings contained on Page 51 of the Record of Appeal, the Trial Court on the 11.02.2021 pronounced itself as follows; -

“Today’s date was taken by the Plaintiff’s Counsel. Mr. Kerosi Ondieki was in Court but has since left. They seem not to be interested on pursuing this matter.

The Plaintiff is also not in Court. I order that the matter be dismissed with costs for lack of prosecution.”

9. It is this determination by the Trial Court on the 11.02.2021 that resulted to the Appellant filing the Notice of Motion dated 19.02.2021 seeking to set-aside the said Trial Court Ruling and reinstate the suit thereof.

Issue No.2- Were there any Sufficient grounds adduced by the appellant to Warrant The Setting - aside of the Order Of Dismissal issued on the 21.07.2022?

10. Upon the Trial Court making its determination on the 11.02.2021, the Appellant herein prepared a Notice of Motion Application dated 19.02.2021 and filed on the 19.09.2021 seeking to set-aside the said determination made on the 11.02.2021 and reinstatement of the suit.

11. The grounds which were advanced by the Appellant in support of the prayers on the Notice of Motion Application dated 19.02.2021 were as follows; -

- a. The Appellant indeed admitted that a hearing notice was prepared by his advocate’s office and served upon the Respondent’s Counsel.
- b. However, due to the negligence of the Appellant’s Counsel on record, the said hearing date was not entered in their diary.
- c. Consequently therefore, both the Appellant and/or his advocate were not aware of the hearing date on the 11.02.2021 and failed to appear.
- d. The Appellant submitted that the none appearance by himself and/or his advocate was not deliberate and therefore for the interest of justice, the orders issued on the 11.02.2021 should be set-aside and the suit reinstated therein.
- e. The Appellant further stated that the suit which was dismissed raised weighty issues of facts and law and should be ventilated at a full hearing.

12. On the other hand, the 1st Respondent opposed the Notice of Motion application dated 19.02.2021 by filing a Replying Affidavit sworn on the 12.03.2021.

13. The 1st Respondent in his Replying Affidavit sworn on the 12.03.2021 advanced the following grounds in opposition of the Appellant’s Notice of Motion application dated 19.02.2021; -

- a. The Appellant and his Counsel were very much aware of the hearing date fixed on the 11.02.2021.
- b. Secondly, the 1st Respondent stated that on the material day of 11.02.2021, the Appellant’s Counsel was present before the Trial Court but left before the matter was called out without any valid reason.
- c. Further to that, the 1st Respondent lamented that the Appellant and/or his Counsel had not complied with the Trial Court’s directions to pay a sum of KShs 5,000/- to the 1st Respondent which had not been done.



- d. The 1st Respondent in Paragraph 9 submitted that in the event the Appellant was still interested to pursue the suit, then he should be compelled to pay the sum of KShs 5,000/- to the 1st Respondent and further deposit half of the total costs in a joint interest earning account so that the Trial Court can now revive the case.
14. The Appellant and the 1st Respondents both filed their submission dated 12.07.2021 and 29.07.2021 respectively.
 15. The Trial Court Ruling was then pronounced on the 21.07.2022.
 16. The Honourable Court has indeed perused the Trial Court Ruling in detail and appreciates the manner in which it was written and the substantive ground for declining to set-aside its determination of 11.02.2021.
 17. First and foremost, the Trial Court outlined the number of times the Appellant's Counsel had obtained hearing dates but failed to either serve the Respondents or simply was not ready to proceed.
 18. According to the Trial Court, the suit has been fixed for hearing on the 06.02.2020,02.04.2020,21.05.2020,06.082020,22.10.2020,27.10.2020 and finally 22.10.2020.
 19. During all these hearings, the Appellant and/or his Counsel were never present to proceed regardless of the file being a 2014 matter.
 20. It is on this basis that the Trial Court came to the considered opinion that the Appellant was not serious with the proceedings and therefore the same should be dismissed in an effort for litigation to end.
 21. The Trial Court further relied on the case of Shah v Mbogo(1967) EA 116.
 22. Looking at the circumstances and facts of how the Appellant has conducted himself from the Lower Court proceedings, it is clear that there has been an inordinate delay in the hearing and determination of the Lower Court file.
 23. Initially, the Lower Court file had begun as Kisii ELC Case No.407 of 2014 before being transferred to the Narok ELC in the year 2017.
 24. Throughout this period between 2014 and 2017 when the file was at the KISII ELC, the file was never fixed for hearing save for pre-trial on the 06.02.2017 when the Appellant's Counsel was absent and the same stood over generally.
 25. Thereafter, the file was transferred to NarokELC and after numerous mentions before the Deputy Registrar, the file was certified ready for hearing on the 27.09.2017.
 26. On the 13.11.2017, the Court proceeded to fix a hearing date for the 24.01.2018.
 27. On the 24.01.2018, the Appellant's Counsel applied for an adjournment on the grounds that some of the documents they intended to rely upon were missing.
 28. The Honourable Court therefore adjourned the matter and instead transferred the same to the Kilgoris SPM Courtfor hearing and determination on the 01.03.2018.
 29. Upon arrival at the Kilgoris SPM Court,the file was fixed for hearing on the 12.06.2018.
 30. On the 12.06.2018, Counsel for the Appellant was not present and the file was given a mention date of 07.08.2018 to fix a hearing date.
 31. On the 07.08.2018, the Counsel for the Appellant fixed the matter for hearing on 02.10.2018.



32. On the 02.10.2018, the Court was not able to proceed with the hearing and rescheduled the hearing to 18.12.2018.
33. On the 18.12.2018, the Appellant's Counsel was not present and the matter was adjourned with directions that a new hearing date be fixed from the registry.
34. The Registry then fixed the matter for hearing on the 19.02.2019 but on this day, the same did not proceed as an interlocutory application had been filed.
35. The interlocutory application was dispensed off on the 26.09.2019 and the matter again fixed for hearing on the 05.02.2019.
36. On the 05.02.2019, Counsel for the Plaintiff applied for an adjournment on the grounds that he was travelling to Nairobi and the matter was adjourned to 06.02.2019.
37. On the 06.02.2019, the Appellant's Counsel did not appear in Court and the matter was then adjourned to 02.04.2020.
38. Before the hearing of 02.04.2020 materialised, the Appellant's Counsel sought for an alteration of the hearing date to the 21.05.2020.
39. It seems that on the 21.05.2020 the Trial Court was not sitting and the file was then fixed for hearing on the 06.08.2020.
40. On the 06.08.2020, the hearing was adjourned by consent of all parties to the 22.10.2020 with the same being marked as a last adjourned on the part of the Appellant.
41. On the 22.10.2020, the Trial Court was not sitting and the file was mentioned on the 27.10.2020 whereby a new hearing date of 11.02.2021 was fixed with the consent of the Appellant's Counsel who was present.
42. On the 22.02.2021, the Appellant's Counsel failed to appear although the Respondent's Counsel seems to have seen him within the Court's premises.
43. Reflecting on the manner in which the Appellant and his Counsel have handled this file, this Honourable Court takes judicial notice that there is no effort by the Appellant to prosecute this file.
44. Since the year 2014 when the Trial Court file commenced, there is no day the Appellant has availed any witnesses and/or indicated that he is ready to proceed with the hearing.
45. This form of inaction runs contrary with the expectation of any diligent litigant who is seeking for justice in a Court of Law.
46. In the case of *Esther Wamaitha v Safaricom*, the Learned Judge made the following observations; -

“...The discretion is free and the main concern of the courts is to do justice to the parties before it (See *Patel v EA Cargo Handling Services Ltd*) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (See *shah v Mbogo*). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of



a court. (See *Sebei District Administration v Gasyali*). It also goes without saying that the reason for failure to attend should be considered”. (Emphasis mine)

47. In another case of *Ivita v Kyumbu* [1984] KLR 441, where the court 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 it 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.”

48. In the case of *Jim Rodgers Gitonga Njeru v Al-husnain Motors Limited & 2 Others* [2018] eKLR, the Judge observed as follows; -

“it is my view that such would be valid considerations in an application for dismissal of suit for want of prosecution, which in this case has already been done; and it is manifest from the record that the reason why the suit was dismissed in the first place was that the Court was satisfied there was inordinate delay of 3 years for which there was no explanation.”

49. Lastly, in the case of *Mobile Kitale Service Station v Mobil Oil Kenyan Limited*[2004] eKLR, the Court made the following finding; -

“I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders.”

50. In essence therefore, the delay by the Appellant to prosecute the Trial Court file since the year 2014 up to the year 2021 when the same was dismissed is inexcusable and unjustified.

51. Further to that, the reason advanced by the Appellant that the previous advocate failed to diarise the hearing date of 11.02.2021 is not convincing at all because this date was settled by the same advocate before being record by the Trial Court in open Court.

52. What happened to the diary that the Appellant’s Counsel used to fix the hearing date of 11.02.2021 on the 27.10.2020?

53. The date of 11.02.2021 is not one that was fixed Ex-parte by the Trial Court and then a hearing Notice served on the Appellant’s Counsel.



Issue No. 3- Is The Appellant Entitled To The Prayers Sought For In This Appeal?

54. Based on the determination of the Issue No.2 hereinabove, this Honourable Court is of the considered view that the prayers sought in the Memorandum of Appeal dated 04.08.2022 are not merited and cannot be granted.

Issue No. 4- Who Bears The Costs Of This Appeal?

55. The recognised rule about costs is that they follow the event.

56. In this instance, the Appeal is not merited and therefore the costs thereof will be borne by the Appellant.

Conclusion.

57. In conclusion therefore, this Honourable Court hereby makes the following Orders in determination of the Memorandum of Appeal dated 04.08.2022; -

- a. The Memorandum of Appeal Dated 04.08.2022 be and is Hereby Dismissed.
- b. The Costs of The Appeal will be borne by the Appellant.

DATED, SIGNED & DELIVERED Virtually in KILGORIS ELC Court on 18TH JANUARY 2024.

EMMANUEL.M.WASHE

JUDGE

In The Presence Of:

Court Assistant: Mr. Ngeno

Advocate For The Appellant: Mr. Shira

Advocate For The Respondent: Mr. Ochwangi for 1st
Respondent

Mr. Ranah for 2nd – 4th Respondent**

