Abuor v Opiyo (Civil Appeal 87 of 2020) [2025] KECA 606 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KECA 606 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 87 OF 2020

MSA MAKHANDIA, P NYAMWEYA & LK KIMARU, JJA

MARCH 28, 2025

BETWEEN

AUMA ABUOR ..... APPELLANT

AND

JENNIFER ADHIAMBO OPIYO ..... RESPONDENT

(Being an appeal from the ruling of the Environment and Land Court at Kisumu (S.M. Kibunja, J.) dated 7th March 2018 in Kisumu ELC Case No 546 of 2015.)

JUDGMENT

1. On 7th March 2018, the Environment and Land Court ("the ELC") at Kisumu (S.M Kibunja J.), delivered a ruling declining an application dated 21st February 2017 filed by Auma Abuor, the appellant herein, that had sought to set aside an earlier ruling of the ELC dated 31st January 2017, by which the appellant's suit was dismissed for want of prosecution. The grounds for the appellant's application were that although the appellant was ready and eager to prosecute her case and her counsel attempted to fix it for hearing severally between 8th July 2015 and 31st July 2017, the counsel was informed by the registry that the Court's diary was full.

2. Further, that the suit was dismissed without giving the appellant sufficient notice, since the notice to show cause was served on her counsel's chambers on 30th January 2017 at around 11,.00 a.m., which was a few hours before the Court's sitting, and was not brought to the counsel's attention in time. The application was opposed by way of Grounds of Opposition filed by the advocates of Jennifer Adhiambo Opiyo, the respondent herein, for being incompetent and an abuse of the process of the law.

3. S.M.Kibunja J., after hearing the parties, found that no reasonable explaination had been given by the appellant for failing to take action to prosecute the case for the period of about eighteen (18) months since the last court appearance by the parties on the 7th April 2015. Being aggrieved, the appellant lodged the instant appeal and has raised five grounds in a Memorandum of Appeal dated 13th July 2020, which challenge the learned trial Judge's findings for failing to take into account the attempts made

by the appellant to set the suit down for hearing, and the prejudice that she was likely to suffer. The appellant therefore seeks orders that the impugned ruling be set aside, the dismissed suit be reinstated and each party bears their own costs of this appeal.

4. We heard the appeal on this Court's virtual platform on 20th November 2024, when learned counsel, Mr. Munuango, appeared for the appellant, while learned counsel, Mr. Onsongo appeared for the respondent. Mr. Munuango relied on his written submissions on record dated 11th November 2024, which he conceded were served on the respondent's advocates late. We accordingly granted Mr. Onsongo leave to respond orally. He opposed the appeal and urged us to dismiss it.

5. This being a first appeal, the duty of this Court as was set out in the decision of Selle & Another vs Associated Motor boats Co. Ltd & Others (1968) EA 123 which is to reconsider the evidence, evaluate it and draw our own conclusion of facts and law, and only depart from the findings by the trial Court if they were not based on evidence on record; where the said Court is shown to have acted on wrong principles of law as held in Jabane vs Olenja (1968) KLR 661 or where its discretion was exercised injudiciously as was held in Mbogo & Another vs Shah (1968) EA. 93.

6. The main issue in this appeal is whether the learned trial Judge exercised his discretion injudiciously in declining to set aside the ruling of 31st January 2017.The grounds upon which we can interfere with the exercise of the learned trial Judge's discretion were set out in United India Insurance Co. Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co. Ltd Vs East African Underwriters (Kenya) Ltd [1985] eKLR as follows:

> " The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.
>
> The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

7. Mr. Munuango in this respect submitted that while the ELC had discretion to dismiss a suit where no action has been taken for one year or on application by a party, this discretion was required to be exercised judiciously and cautiously. Counsel cited the decision by this Court in Alex Wainaina t/a John Commercial Agencies vs Janson Mwangi Wanjihia [2015] eKLR, to push the point that such discretion should be exercised on sound reason rather than whim, caprice or sympathy and with the sole aim of fulfilling the primary concern of the court, which is to do justice to the parties before it. Counsel further submitted that the trial Judge did not exercise his discretion judicially as he did not consider various factors, namely that the appellant was not responsible for the delay in fixing a hearing date, and was not given time to respond to the notice to show cause.

8. Lastly, while reiterating that the appellant has not lost interest in the suit in the ELC and citing the decision of this Court in *Githere vs Kimungu, Civil Appeal No. 56 of 1983*, counsel submitted that dismissal of a suit should be a last resort, and the interests of justice require that parties be afforded the opportunity to be heard.

9. Mr. Onsongo in opposition submitted that the learned trial Judge exercised his discretion judicially, examined the letters produced by the appellant and found that there was no evidence of trying to fix

the suit for hearing, nor did the appellant provide evidence that he was served with the notice to show cause on the day of the hearing.

10. We have considered the arguments made by the counsel for the appellant and respondent, and also perused the record of the trial Court. It is notable that the appellant's advocate deponed as follows in paragraph 6(f) of the affidavit he swore on 21st February 2017 in support of the application to set aside the orders dismissing the suit:

> " From the 8th day of July 2015 both the plaintiff ad(sic) defendant's counsels made several attempts to fix the matter for hearing but all the efforts bore no fruits as they were informed by the registry staff that there were no dates available the last attempt having been scheduled for 31st January 2017. Annexed and marked "MCO 2 (a) (b) (c) (d) (e) (f) (g) and (h) are copies of mention notices".

11. The learned trial Judge in turn found as follows with respect to the said notices:

> " 5 (b)...The counsel's deposition that the parties counsel made several visits to the registry between 8th July 2015 to 31st January 2017 to fix the matter for hearing without success is not verified as the letters annexed to the supporting affidavit dated 7th April 2014, 29th July 2015, 3rd November 201(sic), 14th April 2016, 13th October 2016 and 10th January 2017 do not have the court's receiving stamps"

12. We have examined the said letters seeking to fix the suit at the ELC for hearing and which were addressed to the Deputy Registrar of the Court, and note that that they all bore receiving stamps from the ELC at Kisumu, and also acknowledgments of receipt by the counsel for the opposing side. It is our view that this was adequate evidence that the appellant had taken steps to have the suit in the ELC heard. In addition, the deposition by the appellant's advocate that the notice to show cause was served in his office on the same day and a few hours before its hearing was not disputed by the respondent during the hearing in the ELC. We accordingly find that the holding by the learned Judge that the claim by the appellant's counsel that he was not given sufficient notice had no basis did not take into account this factor. All in all, there were reasonable explanations given by the appellant, which were not taken into account by the learned Judge.

13. We therefore find that there is sufficient reason to interfere with the exercise of the learned Judge's discretion, and we consequently allow this appeal. The result is that the appellant's application filed in the ELC dated 21st February 2017 is hereby allowed. The ruling and orders of the ELC of 31st January 2017 dismissing the appellant's suit for want of prosecution are accordingly set aside, and the said suit, being Kisumu ELC Civil Suit No. 546 of 2015 is hereby reinstated for hearing.

14. Given the circumstances leading to the appeal we make no order as to the costs of the appellant's application in the ELC dated 21st February 2017 and of this appeal.

15. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF MARCH, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR