Ng'endo v Sorathia Investment Limited & 4 others (Civil Appeal E181 of 2019) [2024] KECA 583 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KECA 583 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL E181 OF 2019

F SICHALE, LA ACHODE & WK KORIR, JJA

MAY 24, 2024

BETWEEN

ESTHER NG'ENDO ..... APPELLANT

AND

SORATHIA INVESTMENT LIMITED ..... 1ST RESPONDENT

ASEGRALI ABDUL HUSSEIN MAMUJEE ..... 2ND RESPONDENT

FAKHRUDIN MOHAMMED ALI ..... 3RD RESPONDENT

ADAMALI MOHSIN ALI MOHAMMED ESSAJI ..... 4TH RESPONDENT

MUHSINALI MOHAMMED ALI ..... 5TH RESPONDENT

(Being an Appeal setting aside dismissal order in Environment & Land Court (Ombwayo J.) delivered on 31st day of March 2017 in ELC No. 461 of 2012)

JUDGMENT

1. Esther Ng'endo (the appellant), is unhappy with the ruling dated 31st March 2017, delivered in ELC No. 461 of 2012 at Eldoret by Ombwayo J hence this appeal. Sorathia Investment Limited, Asegrali Abdul Hussein Mamujee, Fakhrudin Mohammed Ali, Muhsinali Mohammed Ali and Adamali Mohsin Ali Mohammed Essaji are the 1st to 5th respondents respectively.

2. The backdrop of this appeal is that the appellant filed an Originating Summons dated 2nd July 2008, against the respondents, claiming rights over land parcel No Eldoret/ Municipality/Block 7/107 through adverse possession. The application was opposed by the respondents vide a replying affidavit dated 4th March 2009, sworn by Mansoor Sorathia (1st respondent's director). The respondents, through an application dated 15th March 2011, sought to strike out the Originating Summons for lack

of prosecution. The appellant did not file any opposition to the application, and the suit was struck out vide orders dated 26th February 2013.

3. Aggrieved by that decision, the appellant filed an appeal to this Court. However, she did not file the record of appeal on time. She made an application for extension of time, which was dismissed.

4. As a result, she went back to the Superior Court and filed an application dated 23rd September 2015, seeking that the orders dated 26th February 2013 be reviewed, varied, or vacated; that the suit be reinstated for hearing; and that the matter be consolidated with Eldoret E & L Case No. 2 of 2015, Esther Ngendo vs Sorathia Investments and 4 Others.

5. The application was based on the grounds that at the time of the hearing of the application for striking out the Originating Summons, the appellant had not filed her replying affidavit. As such, the necessary documents were not placed before the judge for consideration. It was further deposed that the appellant only learnt of the absence of the replying affidavit upon the perusal of the file after the ruling. She attributed the failure of including the documents to her former advocate.

6. In rebuttal, the respondents filed a replying affidavit sworn by Mansoorali Sorathia and deposed that the applicant had filed an appeal at the Court of Appeal in Civil Application No. 25 of 2013, therefore, review was not available. Further, that the application had been filed with unreasonable delay of more than two years from the date of the ruling.

7. The Judge, upon considering the application before him, declined to exercise his discretion in favour of the appellant and dismissed the application with costs.

8. Still aggrieved, the appellant returned to the Court of Appeal with this appeal on the grounds that the learned judge erred in fact and in law

a) ...in failing to allow the appellant to ventilate her case using all the material in her possession at a full hearing by striking out the appellant's suit.

b. ... by not demonstrating candour in deciding this case and instead taking a short cut to arrive at his ruling of striking out the plaintiff's suit relying on wrong premises.

c. ... in failing to appreciate the fact that though there were earlier suits involving the said property Eldoret Municipality

> /Block 7/107 the cause of action was not similar to the appellant's as the appellant's cause of action was purely for adverse possession, she having (sic) paid the rate to the municipality between 1979 to 1987.

b. ... in failing to appreciate the fact that in the earlier suits the courts therein did not have jurisdiction to determine the issue of adverse possession and as such the present case Eldoret Environment & Land case No. 461 of 2012 (OS) was not res judicata."

1. This appeal was disposed of by way of written submissions. The firm of M/S Angu Kitigin & Co. Advocates filed written submissions dated 27th July 2023 on behalf of the appellant, and the firm of M/S Manani, Lilian, Mwetichi & Co. Advocates filed written submissions dated 11th July 2023 on behalf of the respondents.

2. The appellant urged that the issues before this Court are yet to be determined by a court of law. Also, that the case was struck out prematurely as all the cases mentioned, do not have similar issues in question as those in this matter. As such, the matter is not res judicata.

3. On the question of delay in filing the application to reinstate the suit, it was urged that the delay was not only pegged upon the misfortune and unpreventable circumstances of the appellant but also on a bonafide mistake on the part of her counsel whose action was inadvertent. To buttress this position, she relied on the decision of Muchina vs Muchina Nairobi Civil Application No. 178/03 where it was held that in matters involving weighty issues, litigants should not suffer due to the negligence and slovenliness of their advocates.

4. In rebuttal, the respondent urged that this appeal has not in any way demonstrated how the judge erred by striking out the suit, and how the judge applied the wrong principles. Further, the grounds enumerated in the Memorandum of Appeal do not touch on the superior court's ruling of 31st March 2017, but mainly on the main suit and precisely, the decision of the court of 26th February 2013 which issue is res judicata.

5. It was asserted that for the orders sought by the appellant to be granted, her circumstance must be within those provided in Order 45 of the *Civil Procedure Rules*. The respondent went ahead and elaborated that the power of review is available where there is an error apparent on the face of the record which in this instance was not demonstrated by the appellant.

6. Also, the impugned ruling stated that the court's finding that the suit was res-judicata, was a ground for appeal and not review. It was affirmed that the appeal has not demonstrated how the court's ruling of 31st March 2017 is lacking both in fact and law, for this Court to set aside and or vary the orders arising from it.

7. Ultimately, the respondent urged that the superior court exercised its discretion judiciously while dismissing the appellant's application for review. This is because the review was on the grounds that Munyao J was wrong in finding that the suit was res judicata, which ground is one for appeal and not for review under Order 45 of the *Civil Procedure Rules*.

8. We have considered the record and grounds of appeal, the written submissions, and the law. This being the first appeal, the duty of this Court is as stated in Rule 31 (1)(a) of the *Court of Appeal Rules*, 2022 as follows:

> "On appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power to re-appraise the evidence and to draw inferences of fact"

17. Also, this Court in the decision of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, held that:

> "[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

18. Having stated that, in our view the only issue for consideration is whether the learned judge was within the law when he dismissed the application to review, vary or vacate the orders made on 26th February 2013, and reinstate the matter for hearing.

19. Section 80 of the *Civil Procedure Act* which provides for review of a decree or order states as follows:

> " Any person who considers himself aggrieved-
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> a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

20. Further, Order 45 Rule 1(1) of the *Civil Procedure Rules* provides that:

> a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.

21. The appellant urged that the matter was not res judicata and that it was struck out prematurely. In opposition, the respondent argued that the res judicata argument was on the struck-out application. Further, that in the impugned ruling it was correctly held that it was a subject of appeal and that the appellant did not challenge the view of the learned judge in this appeal.

22. In the impugned ruling the learned judge pronounced himself thus:

> "On grounds for review, the applicant appears to be applying to review the decision of Hon. Justice Munyao on the basis that the Honourable Judge was wrong on finding that the suit was res-judicata. I do hold that the applicant ought to go on appeal on this ground but not to apply for review under Order 45 of the *Civil Procedure Rules* 2010."

23. We agree with the judge that on the issues of res judicata the appellant ought to have preferred an appeal as opposed to a review under Order 45 of the *Civil Procedure Rules*. The Order is clear on the circumstances under which a review of the order or decree can be brought before the court, and this is not one of them. Additionally, the appellant has not challenged this decision of the impugned ruling. Therefore, we will not belabor the point.

24. The appellant urged that the delay in filing the application to reinstate the suit should be excused as it was because of the bona fide and inadvertent mistake on the part of her counsel. While the respondent asserted that it had been established that the appellant was aware of the decision of 26th February 2013 by the court, which she chose to appeal against. Only when the appeal failed did she try to seek a review after a delay of two months. Hence, the delay was unreasonable.

25. The judge had this to say on the time taken to file the application to reinstate the suit:

> "I have considered the application for review and do find that after the ruling by Justice Munyao on 26.2.2013, the applicant preferred an appeal in the Court of Appeal vide notice of appeal filed on 1/3/2013 and subsequently sought to obtain certified copies of

> proceedings from the deputy registrar though there was a delay in filing the record of appeal and therefore she filed an application for extension of time being civil application no Nai of 2013 (UR 187 of 2013). The application for extension of time was dismissed and therefore closing the avenue of appeal due to delay. The application was dismissed on the 26th day of May 2015 by Hon. Justice A.K. Murgor judge of appeal. This application was brought to this court on the 23rd September 2015 almost three months after the avenue in the Court of Appeal being closed. This fact illustrates that the applicant was aware that the decision had been made but was undecided as to whether to appeal or to go for review. I do hold that the delay of more than two months from the date of dismissal of the application for extension of time to file the record of appeal out of time to date of filing this application was unreasonable."

26. We are alive to the fact that the judge had the discretion to decide whether the delay was inordinate or not. We bear in mind the principles espoused in the established decision of *Mbogo & Another vs Shah*, (1968) EA, p.15 where it was held that:

> "An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice."

We are of the view that the judge exercised his discretion correctly in this case.

27. We also observed that the appellant's grounds of appeal substantively faulted the ruling that struck out her suit, as opposed to the one that dismissed her application to reinstate the suit. Ultimately, this appeal is found to have no merit and is dismissed with cost to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MAY, 2024.

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR