Otwere v Koteha (Civil Appeal E198 of 2021)
[2024] KECA 1110 (KLR) (30 August 2024) (Judgment)

Neutral citation: [2024] KECA 1110 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL E198 OF 2021

HA OMONDI, HM OKWENGU & JM NGUGI, JJA

AUGUST 30, 2024

BETWEEN

BERTHA NALIAKA OTWERE ..... APPELLANT

AND

RAMESH KOTECHA ..... RESPONDENT

(Being an appeal from the ruling of the Environment & Land Court at Kakamega (N. A. Matheka, J.) dated 21st June 2017 in Case No. 274 of 2015)

JUDGMENT

1. The ruling subject of appeal before this Court relates to the application dated 3rd September 2015 seeking orders of dismissal of the appellant's suit for reason of inaction on the part of the appellant as there has been no action/step taken in the case for over 6 years.

2. The genesis of this matter stems from the suit Kakamega Environment & Land Court (ELC) No. 274 of 2015 filed by the late Justus Sabal Otwere t/a Otwere Miti Shamba Company Ltd (Justo), against the respondent, and Kakamega County Council. Upon his demise on 23rd September 2004, he was substituted by his widow Bertha Naliaka Otwere, who obtained a limited grant for purposes of pursuing the suit. The substitution was allowed on 23rd July 2009.

3. The suit had commenced via a plaint dated 19th December 2001 which was later amended vide an amended plaint dated 29th August 2003. The claim was that the respondents had colluded to defraud the late Justo of a parcel of land situated in Kakamega Town Block 1/180 where Justo had lived and conducted business for over 35 years, hence predisposing him to be first in priority in the event of change of ownership of the land either by being disposed or allocated. He, thus, sought to be declared the rightful owner of the said parcel; and an order be made compelling Kakamega County Council to cancel or revoke the 1st respondent's registration in respect of that parcel, compensation for loss, by way of general damages and special damages.

4. On 3rd September 2015, the respondent filed a notice of motion, seeking that the suit be dismissed for want of prosecution citing the fact that for a period of 6 years, from 23rd July 2009 to the date of making the application, no steps had been taken in prosecuting and concluding the matter. Vide his supporting affidavit dated 3rd September 2015, the respondent argued that after the order was made allowing the appellant to substitute the original plaintiff, the appellant lost interest in the case and that the rights and interests of the respondent as the sole owner of the subject matter were adversely affected by the pendency of the matter, especially because the appellant had caused an inhibition on the title, yet she had no beneficial interest as an owner or purchaser.

5. In contesting the application for dismissal, the appellant filed grounds of opposition in which she stated that:

    a. The application remained incompetent as the firm of Fwaya Advocates who filed it had no locus standi in the matter.

    b. The applicant acted in bad faith in that after filing the application on 9th September 2015, he served it on the eve of the last weekend to the hearing being 2nd October 2015, thereby denying the appellant sufficient opportunity to respond through appropriate affidavits to explain the delay in taking a hearing date.

    c. The delay was substantially caused by the non- availability of Environment and land court which was seized of the appropriate jurisdiction in the matter.

    d. The orders sought were not in the best interest of justice as the appellant was ready and willing to move the court for the hearing of the suit.

    e. The application amounted to an abuse the court'sprocess.

6. The appellant also filed a replying affidavit in which she explained that her inability to fix the matter for hearing was due to the fact that there was no judge to handle land matters; and that Justice Mwita, who took charge for some time, was found by this Court as having acted without the requisite jurisdiction, so for that reason the hearing failed to take off for a long period.

7. Vide a ruling dated 21st June 2017, the trial court found that the issues raised in the statement of grounds dated 5th October 2015 were irrelevant, that there were no attempts to explain the delay and that the allegation that the High Court did not have jurisdiction was not correct as the ELC court came into being in 2010 and as such no issues of jurisdiction could have arisen in 2009. The court went on to note that after 2010 there were judges in Kakamega and land matters were handled accordingly. The court then went on to find that the application had merit and allowed the same as prayed.

8. This being a first appeal and has been reiterated in several decisions of this Court, it is this Court's primary duty to evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as per rule 31(1)(a) of the Court of Appeal Rules. This duty has been reiterated in Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Company Advocates [2013] eKLR.

9. The appellant raises 5 grounds of appeal bringing out two main issues, namely:

    i. Whether the court erred in allowing the respondent's application despite the same being served by a firm not properly on record.

        The crux of the appellant's case under this ground is that there is no notice of change and/or appointment of advocates filed and served by the firm of Gabriel Fwaya Advocates who filed

the application dated 3rd September 2015 which resulted into the impugned ruling and as such the application was a nullity ab initio.

ii. Whether the court erred in failing to recognize that the matter in question had not been determined on merit.

On this issue, the appellant submits that Article 159 of *the Constitution* requires courts, while administering justice, not to put undue regard to procedural technicalities, and that all matters should be determined on merit and that dismissal of matters should only be exercised as a last resort where the matter is demonstrated to be hopeless or disclosing no reasonable cause of action. The appellant argues that the subject matter being land, the same needed to have been determined on merit.

10. The respondent on the other hand submits that on the issue of the filing of the notice of appointment by Fwaya Advocates, the same was filed on 3rd September 2015 and was duly served. The respondent submits that the issue of representation was never raised by the appellant in the superior court and that a perusal of the grounds and submissions are silent on the issue.

11. The respondent further submits that the application in the trial court was not to make a determination on merit over the subject matter but rather to determine whether or not the appellant had failed to prosecute the suit for a period of over one year, and if so, whether there were any good reasons for such failure.

12. The respondent is correct regarding the first issue: the appellant did not raise the issue of whether the respondent's advocates' firm was correctly on record as an issue before the trial court. As such, the appellant did not preserve the issue for determination on appeal and cannot, therefore, raise it in this Court for the first time. Consequently, we hold the view that the sole issue for determination in this application is whether the appellant's suit warranted dismissal for want of prosecution. We will now look at that issue.

13. Order 17 Rule 2(1) of the Civil Procedure Rules, which governs dismissal of suits for want of prosecution in the lower courts, provides as follows:

> In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
>
> In addition, Order 17 Rule 2(3) of the Civil Procedure Rules, states thus:
>
> Any party to the suit may apply for its dismissal as provided in sub-rule 1.

14. Clearly, the statutory threshold set out under Order 17 Rule 2 of the Civil Procedure Rules is that a suit qualifies to be dismissed for want of prosecution: if no application has been made or no step has been taken in the suit by either party for at least one year preceding the presentation of the application seeking dismissal of the suit.

15. In Civil Appeal Salkas Contractors Ltd vs. Kenya Petroleum Refineries Ltd, [2004] eKLR, this Court (Omolo, Okubasu, Onyango Otieno, JJA) acknowledging that in dealing with an application of this nature, the court is called upon to exercise its discretion; and the guiding principle to consider is whether discretion was exercised based on a wrong in principle or that the court acted perversely on facts and was clearly wrong in its decision. Drawing from the case of Allen vs. Sir Alfred McAlpine & Sons Limited [1968] 1 ALL ER 543, which enumerated the principles to be applied in a case seeking dismissal for want of prosecution either because of the plaintiff's failure to comply with the Rules of

the superior court or under the court's inherent jurisdiction; for such an application to succeed, the party applying for dismissal must show: (i) that there has been inordinate delay; the inordinate delay is inexcusable; and (iii) the defendants are likely to be seriously prejudiced by the delay.

16. In Argan Wekesa Okumu vs. Dima College Limited & 2 Others [2015] eKLR, which is of persuasive status, the High Court considered the principles for dismissal of a suit for want of prosecution and stated as follows:

> " The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the defendant is likely to be prejudiced by such delay. As such the 3rd defendant in this case must meet the burden of proof in seeking the dismissal of the plaintiff's case for want of prosecution see the case of Ivita vs. Kyumbu (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same."

17. Whether to exercise the power of dismissal for want of prosecution under Order 17 is, however, a matter that is within the discretion of the court. In its decision in Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium vs. M.D. Popat and Others & Another [2016] eKLR, the High Court stated as follows:

> "Nonetheless, Article 159 of *the Constitution* and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of Ivita vs. Kyumba [1984] KLR 441 espoused that: "The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court."(bold and underlined for emphasis)

18. In Naftali Opondo Onyango vs. National Bank of Kenya Ltd [2005] eKLR, the court noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated as follows:

> " However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff."

19. Indeed, when the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away, but

substantive justice must be considered and weighed judiciously so as to balance the scales. In this regard, the case of *Mwangi S. Kimenyi vs. Attorney General and Another, Misc. Civil Suit No. 720 of 2009*, the court restated the test as follows:

i. "whether the delay has been intentional and contumelious;

ii. whether the delay or the conduct of the plaintiff amounts to an abuse of the court;

iii. whether the delay is inordinate and inexcusable;

iv. whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant; and

v. what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties."

20. From the record the plaint is dated 19th December 2001 and filed the next day. There is a reply to defence and counterclaim dated 7th November 2002 and filed on the same day. This Court also notes that there have been several interlocutory applications by both parties and rulings thereto from 2002 up to around the year 2017. The present application the subject matter of this appeal was fixed for hearing on several occasions 17/3/16, 15/6/16, 21/7/16, 7/11/16, (on these dates the application did not proceed) and on 4/5/16 parties decided to proceed by way of written submissions with a mention reserved for 29/5/17 for highlighting, and thereafter ruling was reserved for 21/6/17 when the same was delivered.

21. It is clear to this Court from the record that the several applications did indeed stop the main hearing of the matter. This Court also notes that after 2010 only Judges appointed to the Environment and Land Court could hear and determine land matters. We are of the considered view, and concur with the appellant that this matter, like all other matters, need to be determined on merit. Having noted all the interlocutory applications, which certainly hindered the hearing of the main suit and also noting that the respondent too, had the mandate under Order 17 Rule 2(1) to take steps to set the matter down for hearing which it did not do, we are persuaded that the dismissal was not warranted.

22. In conclusion, the appeal succeeds, and the trial court's decision is hereby set aside. In allowing the appeal the appellant is ordered to take appropriate steps towards having the suit fixed for hearing within 30 days hereof. Should the appellant fail to comply with said order the appeal shall stand dismissed. Each party shall bear its own costs of this appeal.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF AUGUST, 2024.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR