M'Nkondi v Muriungi & another (Civil Appeal 2 of 2019)
[2024] KECA 1556 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1556 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 2 OF 2019

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

OCTOBER 25, 2024

BETWEEN

NDATHO M'NKONDI ..... APPELLANT

AND

MISHECK MURIUNGI ..... 1ST RESPONDENT

JUDITH MAKENA NJOROGE ..... 2ND RESPONDENT

(Being an Appeal from the judgment of the Environment and Land Court of Kenya at Meru (L. Mbugua, J.) dated 28th November 2018 in ELC NO. 300 of 1989)

JUDGMENT

1. In the High Court at Meru in Civil Case No. 300 of 1989, the appellant, Ndatho M'Nkondi, stated that he owned land parcels L.R. No. Nkuene/Nkumari/615 and L.R. No. Nkuene/ Nkumari/475. He was living on L.R. No. Nkuene/Nkumari/ 475. He sold L.R. No. Nkuene/Nkumari/615 to Cypriano Meeme (the defendant). Somehow, the defendant got L.R. No. Nkuene/Nkumari/475 to be transferred to himself. The appellant claimed that the transfer and registration were fraudulent as he had no transaction with the defendant over the land. In the suit, the appellant sought that the Land Registrar rectifies the register to have the land re-transferred to himself.

   The defendant denied the claims, saying that he was the legitimate owner of the suit land.

2. The matter was subsequently taken over by the Environment and Land Court (ELC) at Meru.

3. On 27th March 2014 the suit was dismissed pursuant to a notice to show cause that the court had issued. Vide a notice of motion dated 27th April 2015 the appellant applied to have the suit reinstated. On 18th February 2016 the defendant died. In Nkubu SRM Succession Cause No. 44 of 2017 the respondents, Mishek Muriungi and Judith Makena Njoroge, obtained a limited grant to participate in the matter

on behalf of the deceased. On 20th February 2018 they instructed Alfred Kitheka & Co Advocates and also filed grounds of opposition to oppose the notice of motion.

4. The learned L. Mbugua, J. heard the application and, on 28th November 2018, dismissed it with costs. The court observed that the suit had been in court for a long time of 24 years with the appellant making little or no attempt to prosecute it; and that there were no sufficient reasons given to warrant reinstatement. It is this ruling that led to this appeal.

5. The appellant's grounds of appeal were as follows:-

> "1. That the learned judge erred in law and fact in dismissing the appellant's application dated 27/4/2015 when the application raised substantial issues of law as the previous counsel for the appellant did not inform the appellant any developments on the suit.
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> 2. That the learned judge erred in law and fact in finding that the appellant's application lacked merits.
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> 3. That the learned judge erred in law and fact in failing to properly consider and appreciate the issues raised by the appellant in his application when arriving at her decision to dismiss the appellant's application.
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> 4. That the learned judge erred in law and fact in failing to consider that the previous counsel for the appellant did not inform the appellant of the Notice to Show Cause to dismiss the appellant's suit and thus it was not the mistake of the appellant.
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> 5. That the learned judge erred in law and fact in failing to consider the claim of the fraud on appellant property on L.R No. Nkuene/Nkumari/475 by the respondents' deceased father one Chivaliano Meme Muthamia who illegally transferred the appellant's land under his name on where the appellant resides and indeed where he has extensively developed the same by building a dwelling house for his family and in an occupation where has lived on the same for over 75 years and by dismissing the application, the appellant who is of advanced age is likely to be displaced and evicted from his legally acquired family land.
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> 6. That the learned judge erred in law and fact in dismissing the appellant's application dated 27th April 2015 whereas the respondents' deceased father, one Chiviliano Meme Muthamia was dishonest, greedy, and used fraud to cause the transfer of the appellant's L.R No. Nkuene/Nkumari/475 to his name without the knowledge or consent of the appellant as required by the law or without considering that the appellant and his family are in occupation of the said land to date.
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> 7. That the learned judge erred in law and fact in failing to properly exercise her discretion in accordance with the law as required under article 159(2)(d) of *the Constitution*."

6. During the virtual hearing of this appeal on 26th June 2024, learned counsel Ms. Kithinji held brief for Mr. Mbaabu M'Inoti for the appellant. The firm of M/s. Okubasu Munene & Co. Advocates on record for the respondents were not present despite service of the hearing notice upon them. No submissions were filed for the respondents.

7. Ms. Kithinji sought to rely on the written submissions filed on behalf of the appellant. It was submitted that the learned Judge had failed to consider that the appellant's advocates then on record had been served with the notice to show cause but that they had not informed their client, and that was why the suit had been dismissed without his knowledge. The decision in Athman *Said -vs- Ibrahim Abdille Abdullah & Another, ELC Civil Suit No. 663 of 2009* was cited to us. In the case, the affected party's advocate had not been served with the notice to show cause. The court held that the party had been denied the right to be heard. It was the appellant's submission that, because he had not been informed by his advocate that a notice to show cause had been served, the dismissal of his suit had compromised his right to be heard. (See Richard Nchapi Leiyagu -vs- IEBC & 2 Others [2013]eKLR and Mbaki & Others -vs- Macharia & Another [2015]2 E.A. 206).

8. It was the submitted on behalf of the appellant that he was an old and illiterate man who relied on his sons to communicate with his advocates on the progress of the case, but that, following the dismissal of the case on 27th March 2014, it was not until January 2015 that he learned from h

9. is son that the suit had been dismissed. This was something, it was submitted, that the learned Judge had failed to consider. This was the reason it had taken up to 27th April 2015 before the notice of motion to reinstate the suit had been filed.

10. Lastly, it was submitted that it should be borne in mind that the appellant had been living in the suit land for 75 years, and that was seeking that he be given an opportunity to pursue his claim to the land.

11. We have considered the record of appeal, the submissions by learned counsel, the authorities and the law. We discern that the issue for determination in this appeal is whether the ELC was right in dismissing the appellant's motion which sought the reinstatement of his suit.

12. The decision to dismiss or not to dismiss the suit under Order 17 rule 2 of the Civil Procedure Rules, following a notice to show cause, entailed the exercise of discretion on the part of the trial court. This Court can only interfere with the trial court's discretion if the appellant is able to demonstrate that the court misdirected itself in some matter and as a result arrived at a wrong decision, or it is manifest that the learned Judge was clearly wrong as a result of which an injustice occurred. (See Mbogo & Another -vs- Shah [1968] EA 96).

13. In United India Insurance Co. Ltd -vs- East African Underwriters (Kenya) Ltd [1985]EA 898, this Court stated 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 as 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 would not have taken account; fourthly, that he failed to take account of consideration of which he should have taken account of; or fifthly, that his decision albeit a discretionary one is plainly wrong."

14. The appellant's application for the reinstatement of the suit relied on, among other provisions, section 1A of the *Civil Procedure Act* (Cap. 21). Section 1A(1) of the Act provides that –

> " The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act."

15. Under section 1A (2) and (3) of the Act the courts are required to give effect to this overriding objective, and any party to the suit is under the duty to assist the court to further the overriding objective and, to that effect, to participate in the processes of the court and to comply with any directives given. Then there is Article 159(2)(b) of *the Constitution* that commands the courts to make sure that justice is not delayed.

16. In refusing to reinstate the suit the court considered that this matter had been in court for 24 years during which the appellant had done very little to have it heard and determined. The appellant was represented by an advocate. His case was that he was an old man who relied on his sons to be communicating with the advocate. That may be so but the case was his. He sued the deceased who was the registered proprietor of the land, and sought that the registration be reversed so that he gets the land. His primary duty was to take steps to progress this case, having dragged the deceased to court. (See Utalii Transport Company Limited & 3 Others - vs- NIC Bank & Another [2014]eKLR). He did not demonstrate any single or tangible step that he took during the 24 years to progress his case.

17. It was clear from the record that it was the court itself that brought up the case, when it was realised that it had taken long without action, and served a notice on the advocates for cause to be shown why the suit should not be dismissed. The appellant stated that his son informed him about the dismissal of the case about one year later. That may be so, but when was the last time he had asked either his son or his advocates about the progress of the case?

18. Whichever way we look at the matter, the delay to prosecute this suit was too long and inexcusable. (See Ivita -vs- Kyumbu [1984] KLR 441). There was, given the circumstances of the case, a substantial risk to a fair trial and serious prejudice to the deceased's family. No wonder, many years after the suit had remained unresolved, the deceased died.

19. Given all these facts, we find that no sufficient basis has been shown to justify our interference with the discretion of the learned Judge who dismissed the application to reinstate the suit which had been dismissed after failure to show cause. The appeal is therefore dismissed with costs to the respondents.

DATED AND DELIVERED AT NYERI THIS 25TH DAY OF OCTOBER 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR