Ekesa v Mbayaki & another (Civil Appeal 108 of 2018) [2023] KECA 392 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KECA 392 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 108 OF 2018

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

MARCH 31, 2023

BETWEEN

FRANCIS EKESA .... APPELLANT

AND

ANDREW MBAYAKI .... 1ST RESPONDENT

NAMULANDA SIGANGA .... 2ND RESPONDENT

(Being an appeal from the ruling of the Environment and Land Court at Kakamega (Matheka, J.) dated 27th June, 2018 in ELC No. 51 of 2012)

JUDGMENT

JUDGMENT OF TUIYOTT, JA

1. The action by Francis Ekesa (Ekesa), the appellant, against Andrew Mbayaki and Namulanda Siganga, the respondents, involving an alleged trespass over land parcel known and described as Budonga/Bundonga/1799 was not heard on merit. It was dismissed for want of prosecution by the Environment and Land Court (ELC) at Kakamega on July 8, 2015.

2. Unhappy with the dismissal, Mr. Ekesa through his then advocates Ndegwa Waweru & Co. Advocate, moved the ELC for review of the dismissal order through a notice of motion dated September 27, 2016. The motion was unsuccessful and, in disallowing it on November 15, 2017, Matheka, J held as follows:-

> “The decision on whether the suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. This matter was filed way back in 2012 and according to the applicant the file went missing for three years until the matter was dismissed for want of prosecution. I find that the applicant was not keen on prosecuting this matter as he would have applied for reconstruction of the file. Indeed one wonders why he would invite the

other advocate to fix a hearing date yet the file was "lost". From copies of the hearing notices on record I am satisfied that the applicant was notified of the hearing date on the notice to dismiss for want of prosecution. In Ivita v Kyumbu (1984) KLR 441, Chesoni J as he then was, stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Justice is justice for both the plaintiff and the defendant. I find that the delay was prolonged and inexcusable on the part of the applicant. I find this application has no merit and I dismiss it with costs."

3. On March 21, 2018, Ekesa filed a notice of intention to act in person and simultaneously filed a notice of motion seeking in the main, that the orders of November 15, 2017be reviewed and the suit be reinstated for hearing. In support of that application Ekesa stated that: on several occasions he visited the office of his advocates with the purpose of having his case prosecuted and was surprised to learn that the suit had been dismissed for want of prosecution; he was never served with a notice for dismissal; his advocates gave him the impression that the suit was still pending and; that mistake of his advocate should not be visited on him, a poor litigant.

4. The ELC was unimpressed by those reasons and in a ruling dated June 27, 2018, Matheka J stated:

" This court has perused the court file and indeed a similar application dated September 27, 2016was heard on merit and ruling delivered on 15th November 2017 dismissing the same for want of prosecution. No new evidence has been provided in the instant application and the applicant has now become a vexatious litigant. This application is an abuse of the courts system and a waste of time. I wish to reiterate the reasons given in that application on September 27, 2016 and I find this application has no merit and is dismissed with costs."

5. Ekesa is undeterred and is before us on appeal against this latter decision and seeks to persuade us that the learned Judge erred in law by:

   i. not considering that the appellant's application dated March 21, 2018was not opposed by the 1st and 2nd respondents,

   ii. not considering that the dispute between the parties was a land matter and the same had to be heard and determined on merit.

   iii. dismissing the application dated March 21, 2018by not allowing the appellant argue his application.

   Ekesa prays that we allow his appeal with costs and the impugned ruling be set aside.

6. At the hearing of the appeal only Mr. Ekesa appeared notwithstanding that the respondents had been duly served. Ekesa elected to rely on his written submissions dated September 28, 2022without making any highlights. In those submissions, the appeal regurgitates the grounds set out in support of the application for review dated March 21, 2018and adds that as a matter of law, when a party appoints an advocate, the advocate advises the client on all the legal matters respecting the case and that in this instance, he relied on his advocate's advice. Further that disputes touching on land have created historical injustices and should be handled with a lot of sensitivity, and dismissing them for want of prosecution blocked parties from ventilating the real issues in question.

7. The decision sought to be impeached arises from an application for review of the ELC's earlier decision. The substantive provision for review in the *Civil Procedure Act* is section 80- which reads:

" Any person who considers himself aggrieved –

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 is allowed 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."

8. Order 45 rule 1 of the *Civil Procedure Rules*,2010 (then applicable) fleshes out the circumstances under which review could (and still can) be sought and granted:

"(1) Any person considering himself aggrieved –

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 a review of judgment to the court which passed or made the order without unreasonable delay."

9. Implicit from these provisions is that the parameters are narrow. Of these parameters this court has spoken time and again. For example, in Julius *Ochieng Oloo & another –v- Lilian Wanjiku Gitonga* (2019) eKLR,the Court held:

"... The grounds for review as envisaged under the said order are limited to;

a. Discovery of new and important matters or evidence which was not within the knowledge of the applicant or which could not be produced by him at the time when the decree or order was made;

b. a mistake or error on the face of the record;

c. some other sufficient reason.

Supplemental to the above is that the application

must be brought without unreasonable delay."

10. On the meaning to be assigned to "for any other sufficient reason" in the context of a review application, thiscourt in *Pancras T. Swai vs Kenya Breweries Limited* [2014] eKLR had this to say about the position that now holds sway;

"29. As repeatedly pointed out in various decisions of this Court, the words, "for any sufficient reason" must be viewed in the context firstly of Section 80 of the *Civil Procedure Act*, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order. In Sarder Mohamed –v- Charan Singh Nand Sing and Another (1959) EA 793, the High

Court correctly held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate. In Shanzu Investments Limited –v- Commissioner for Lands (Civil Appeal No. 100 of 1993) this Court with respect, correctly invoked and applied its earlier decision in Wangechi Kimata & another vs. Charan Singh (C.A. No. 80 of 1985) (unreported) wherein this Court held that

> "any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the *Civil Procedure Act*; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous."

11. In that same decision thecourt made this important observation;

> " 30. The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of order 44 (noworder 45 in 2010 *Civil Procedure Rules*) relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the court is deemed to be alive to."

12. The application by Ekesa, it bears repeating, was premised on the following reasons: that he was keen on prosecuting his suit but was surprised to learn of its dismissal for want of prosecution; he was never served with any notice of dismissal; his advocates informed him that the matter was pending in court and he was surprised that the advocates never attended court as promised; mistake of his advocates should not be visited on him, a poor litigant; the grant of the application would not prejudice the respondents and; the relief sought would meet the ends of justice. Quite clearly none of these reasons or grounds amounts to discovery of a new and important matter or evidence or a mistake or error apparent on the face of the record or "any other sufficient reason" as delineated by our jurisprudence. To try and fit the grounds put forward by Ekesa to the strictures of a review application is to attempt to fit a round peg in a square hole, an intractable task, indeed impossible. The learned Judge cannot be faulted for rejecting that attempt. If Ekesa is of the conviction that his dilemma resulted from the negligence of advocates, then he would and should know that his remedy lies elsewhere.

13. I would propose that the appeal be dismissed but as the respondents neither filed submissions nor attended the hearing then there should be no order on costs.

JUDGMENT OF KIAGE, JA

14. I have had the benefit of reading in draft the judgment of Tuiyott, JA. I entirely agree with his reasoning and conclusions, and have nothing useful to add.

15. As Joel Ngugi, JA is also in agreement, the final orders in the appeal are as proposed by Tuiyott, JA.

JUDGMENT OF JOEL NGUGI, JA

16. I have had the advantage of reading in draft the judgment of Tuiyott, JA. I entirely agree with his reasoning and conclusions, and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF MARCH,2023.

F. TUIYOTT

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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

SIGNED

DEPUTY REGISTRAR.