Ongany v Ayieko (Civil Appeal 11 of 2019) [2023] KECA 683 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 683 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 11 OF 2019

PO KIAGE, M NGUGI & F TUIYOTT, JJA

JUNE 9, 2023

BETWEEN

WILLIAM ORARO ONGANY ..... APPELLANT

AND

LEONARD OBUNGO AYIEKO ..... RESPONDENT

(An appeal from the Ruling of the Environment and Land Court at Kisumu (Kibunja, J.) dated 4th September 2018 in ELC Case No. 117 of 2012)

JUDGMENT

JUDGMENT OF KIAGE, JA

1. By this appeal, the appellant challenges the ruling of the Environment and Land Court (Kibunja, J.) rendered on 4th September 2018, by which the learned Judge allowed a notice to show cause and dismissed the suit for want of prosecution under Order 17 Rule 2 of the *Civil Procedure Rules*.

2. Previously, in a ruling dated 23rd November 2016, the learned judge had directed that the *ex parte* judgment dated 7th October 2014 be set aside to allow the defendant file his defence. The defendant was also ordered to file and serve his defence, witness statements and list of documents within 21 days of the date of the ruling. Another order was made as part of the proceedings of the day to the effect that, 'by consent further mention before D/R to confirm compliance with Order 11 of *Civil Procedure Rules* on 14.3.2017'. On the said 14th of March 2017, however, there was no appearance by either party.

3. Subsequently on 24th July 2018, the court issued a notice to show cause why the suit should not be dismissed. On 14th August 2018, the appellant made a request for the court to enter judgment in his favour asserting that the respondent had failed to enter appearance and file his defence. On 4th September 2018, counsel for the parties appeared before the court to respond to the notice to show cause. Upon the learned judge hearing them he dismissed the suit for want of prosecution.

4. The appellant challenges the dismissal on 5 grounds, which, in summary are that the learned judge erred in law and fact by;Being unfair to the appellant who had complied with Order 11 of the *Civil Procedure Rules*.Not properly appreciating the right of access to justice.Misinterpreting the import of Order 17 of the *Civil Procedure Rules*.

5. When the appeal came up for hearing, learned counsel Ms. Machuka appeared for the appellant. There was no appearance for the respondent and neither were there any submissions filed on his behalf. The appellant's counsel on record, Mwamu & Company Advocates, had filed written submissions together with a bundle of authorities which counsel sought to rely on.

6. Ms. Machuka briefly highlighted the submissions contending that dismissal of the suit was not justified. She complained that the respondent had failed to enter appearance and file his defence, and while the appellant was waiting for him to do so, notice to show cause was issued. Counsel faulted the learned judge for failing to consider that the respondent had failed to comply with Order 11 of the *Civil Procedure Rules*. Moreover, an interlocutory judgment had previously been entered against him for the same reasons of non-compliance. The learned judge was criticised for disregarding the fact that on 14th March 2017, the date that was scheduled to confirm compliance with Order 11, both parties did not appear in court. It was further alleged that the learned judge overlooked the explanation of counsel on record.

7. Counsel argued that the suit was terminated prematurely, the appellant having applied for judgment, and despite his plea to be allowed to prosecute the case. She referred to the principles for dismissal of a suit for want of prosecution as highlighted by the High Court in *Argan Wekesa Okumu vs. Dima College Limited & 2 Others* [2015] eKLR;

> 'the applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and the defendant is likely to be prejudiced by such delay...the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously...'

8. Further, citing *Naftali Opondo Onyango vs.national Bank Of Kenya Ltd* [2005] eKLR it was urged 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 appellant was said to be eager to prosecute his case and he should therefore be allowed to do so. Answering questions from the Court, Ms. Machoka acknowledged that a year of non-action had gone by before the suit was dismissed and the request for judgment only came after service of the notice to show cause.

9. I have given due consideration to the record of appeal, the submissions, and the authorities cited by counsel. In this appeal, what is being challenged is the exercise of discretion by the learned Judge. As an appellate court, we are, as we must be, extremely slow to interfere with a first instance court's decision that lies in its discretion, and it matters not that had we been dealing with the matter ourselves, we might have arrived at a different decision. We, however, will not hesitate to interfere if we are satisfied that the learned judge misapprehended the facts; or misdirected himself on the law; or that he took into account matters of which he should not have; or failed to take into account considerations which he should have; or that his decision was plainly wrong. See *Mbogo vs. Shah* [1968] EA 93.

10. The appellant challenges the dismissal of the suit blaming the respondent for failing to enter appearance and file his defence. I observe that in dismissing the suit, the learned judge reasoned that the last application in the matter was made on 23rd November 2016 when the case was fixed for mention on 14th March 2017. On the said mention date, there was no appearance by either party and the matter was stood over generally. The learned judge noted that the notice to show cause dated 27th July 2018

was issued after a period of more than one year had passed without any step being taken to prosecute the case. Further, the request for judgment by the appellant through a letter dated 10th August 2018 and filed on 14thAugust 2018, was an attempt to evade the notice to show cause and it was therefore not sufficient cause or explanation for the delay.

11. In the result, the learned judge dismissed the suit for want of prosecution Order 17 rule 2 of the C*ivil Procedure Rules* provides;

> " 2. Notice to show cause why suit should not be dismissed [Order 17, rule 2.]
>
> 1. 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.
>
> 2. If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
>
> 3. Any party to the suit may apply for its dismissal as provided in sub-rule 1.
>
> 4. The court may dismiss the suit for non- compliance with any direction given under this Order". (Emphasis mine)

12. It is plain that in the event of inaction by any party in a suit for a period of one year, the court may issue a notice to show cause, and the cause has to be explained to the satisfaction of the court. In the full circumstance of this case as I have set them out herein, I find that the learned judge did no wrong in holding that no sufficient reason had been given for the delay in prosecuting the suit.

13. A perusal of the record reveals that the parties, though notified, did not appear before the Deputy Registrar on 14th March 2017 to confirm compliance with Order 11 as had been agreed upon and ordered by the court on 23rd November 2016. Order 11 titled 'Pre-trial directions and conferences' is evidently supposed to avail parties an opportunity to deal with preliminary issues in a matter and enable them prepare for trial. The parties herein failed to take any steps in litigating the matter for over one year. While I am cognizant of the appellant's protest that the respondent has constantly failed to lodge his defence, it is incontrovertible, as conceded by his learned counsel, that a year of inactivity had gone by in the suit and his request for judgment came after the notice to show cause was already issued and clearly if ingenuously, in response thereto.

14. Ultimately, I do not think that the learned judge committed any error of principle, misdirected himself or was otherwise plainly wrong so as to entitle this Court to interfere with his exercise of discretion.

15. In consequence, this appeal is devoid of merit and I would dismiss it, but with no order as to costs, given the respondent's history of defaults.

16. As Mumbi Ngugi and Tuiyott, JJ.A agrees, it is so ordered.

JUDGMENT OF MUMBI NGUGI JA

17. I have read in draft the judgment of my learned brother Kiage, JA. with which I am in full agreement and there would be no utility in my adding anything thereto.

JUDGMENT OF TUIYOTT, J.A

18. I have had the advantage of reading in draft the judgment of Kiage, JA, with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF JUNE 2023.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR