Karimoni v Embu Farmers Sacco & 2 others (Civil Appeal 13 of 2019) [2023] KECA 1051 (KLR) (24 August 2023) (Judgment)

Neutral citation: [2023] KECA 1051 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 13 OF 2019

W KARANJA, J MOHAMMED & AO MUCHELULE, JJA

AUGUST 24, 2023

BETWEEN

WILSON NJOGU KARIMONI .... APPELLANT

AND

EMBU FARMERS SACCO .... 1ST RESPONDENT

MWANGI AUCTIONEERS .... 2ND RESPONDENT

GITHUMBU NJERU .... 3RD RESPONDENT

(Being an appeal against the order and ruling of the Environment and Land Court at Embu (Y.M Angima, J.) dated 21st June 2018 in ELC No. 32 of 2017)

JUDGMENT

1. On June 21, 2018 the Environment and Land Court (ELC) (JM Angima, J) at Embu dismissed with costs an application filed by the appellant Wilson Njogu Karimoni seeking to review and set aside the orders that had been issued dismissing for want of prosecution his suit which he had filed against the 1st respondent Embu Farmers Sacco, the 2nd respondent Mwangi Auctioneers and the 3rd respondent Githumbu Njeru. This appeal was filed to challenge the dismissal of the review application. The applicant was aggrieved by the dismissal and raised the following grounds:-

“ 1) The learned Judge erred in law and in fact in failure to appreciate that the suit was fully defective as is breach of mandatory statutory notice section 74 of the *Registered Land Act* Cap 300 (now repealed) as respondent failed to give 90 days’ statutory notice to appellant before auctioning the suit land.

2. The learned Judge erred in law and in fact in failure to appreciate that the suit land was fraudulently auctioned when appellant owed no money at all to respondent.

3. That learned judge erred in law and in fact in failure to appreciate that respondent was paid twice as appellant paid the loan and then his land was auctioned by respondent.

4. The learned court with due respect treated me unfairly as he dismissed my case for want of prosecution when he was informed I was out of the country for urgent matter and court of appeal was kind and adjourned my advocate appeal when the court was informed my advocate was out of the country on urgent matter.

5. The learned Judge erred in law and in fact in failure to appreciate that while on several occasions the delay was caused by itself as the court file had on several times gone missing.

6. The learned Judge erred in law and in fact in failure to appreciate that the appellant had to reconstruct the court file when it went missing in court and it took for the court to allow the application to construct and hear the application.

7. The learned Judge erred in law and in fact in failure to appreciate that in auctioning the suit land on ground that appellant had not paid arrears of loan when indeed respondent confirmed to appellant in writing that appellant owed respondent no money at all.

8. The learned Judge erred in law and in fact in failure to appreciate that this case was dismissed for want of prosecution when indeed there was no want of prosecution as 1st respondent confirmed in writing to appellant that he had been paid in full so there was no injustice.

9. That the learned Judge erred in law and in fact in failure to appreciate that in allowing counsel for the 1st and 2nd respondents to swear vital affidavit on behalf of his client and was not cross-examined by plaintiff was acting irregularly and in breach of court process and defendant application should.

10 . The learned Judge erred in law and in fact in failure to appreciate that the swearing or giving evidence by the advocate for the 1st and 2nd respondents made the affidavit and evidence void as he was not cross-examined by appellant and the said affidavit was irregular and the application to strike out the suit should be struck out.

11. The learned Judge erred in law and in fact in failure to appreciate that when issue of trial court jurisdiction arises on preliminary objection the court on priority basis should determine the issue of court jurisdiction first on priority hearing any other matter.

12. The learned Judge erred in law and in fact in failure to appreciate that in accepting advocate for the 1st and 2nd respondents advocate that the suit land had been dormant for 4 years which was not correct as the delay was less than one year as the appellant had filed affidavit and invited appellant several times to take hearing date in vain.

13. The learned Judge erred in law and in fact in failure to appreciate that the appellant invited respondent to take date of hearing many times in vain as the court file could not be traced or the case number would be changed.

14. The learned Judge was very unfair for dismissing a land case without hearing and with no sound ground."

2. To contextualise this appeal, the suit before the Environment and Land Court was as follows. The appellant was the registered proprietor of LR Kagaari/Weru/1232. On April 2, 2002 he charged it in favour of the 1st respondent to secure a loan of Kshs 600,000. When he defaulted in repayment to the tune of Kshs 1,063,300, the 1st respondent instructed the 2nd respondent to sell the property to recover the outstanding loan. The 2nd respondent issued a 45 days' redemption notice, and, subsequently, a notification of sale, to the appellant. There was no repayment, the suit property was advertised for sale. On the due date, the auction was cancelled as the highest bidder was for Kshs 700,000. The sale was re-advertised, following which the suit property was sold to the 3rd respondent for Kshs 700,000.

3. The appellant filed originating summons dated December 21, 2011 seeking a declaration that the sale was invalid, null and void; that the sale and transfer to the 3rd respondent be set aside; and that there be an order re-transferring the land to him. In opposing the suit, the 1st and 2nd respondents filed a preliminary objection to challenge the jurisdiction of the court to hear and determine the case. The basis was that the suit was subject to the provisions of section 76 of the *Cooperative Societies Act*, and therefore the court did not have jurisdiction. The other response to the suit was that, the applicant had been in blatant default of repaying the loan whereupon the 1st respondent had elected to exercise the right of sale under sections 74 and 77 of the *Registered Land Act*, and that all statutory notices had been issued.

4. Subsequently, the 1st and 2nd respondents filed an application dated June 26, 2015 seeking the dismissal of the suit for want of prosecution. The appellant opposed the application. The application was heard, and on 2nd November 2015 a ruling was delivered dismissing the suit with costs for want of prosecution. The appellant filed an application to review the orders in the ruling. The application was dismissed with costs. The decision is the subject of this appeal.

5. The appellant was unrepresented during this appeal, but filed written submissions on which he elected to rely. Learned counsel, Ms. Ndorongo was present for the 3rd respondent and held brief for learned counsel, Mr Njeru Ithiga for the 1st and 2nd respondents. Counsel for the 1st and 2nd respondents had filed written submissions which the 3rd respondent's counsel chose to rely on to oppose the appeal.

6. In the appellant's submissions, before the pleadings had closed in the case before the ELC, the 1st and 2nd respondents filed a preliminary objection to jurisdiction; that the objection had not been determined to see whether the court had jurisdiction when, at the instance of the two respondents, the suit was dismissed for want of prosecution. He submitted that it was up to the respondents to prosecute the objection, which they did not do, and therefore the dismissal of the suit was erroneous. The appellant submitted that one of the reasons why there was delay in prosecuting the suit was the objection which had not been determined. The two other reasons why there was delay in the prosecution of the case were that the court file had gone missing, and because his advocate had travelled abroad for medical attention. Lastly, he submitted that his parcel of land had been irregularly sold because of there not having been issued the requisite statutory notices. His right to be heard, he concluded, had been compromised; and that substantive justice had not been done to the case.

7. According to the submissions by the respondents, the grounds in the appeal did not touch on the issues canvassed in the application subject of the appeal. The only relevant grounds were, according to the respondents, 5, 6, 8 and 13; and that, even then, the appellant had all along been indolent in the prosecution of the case. He, therefore, could not blame the court that dismissed his application for review.

8. We have anxiously considered the ruling subject of the appeal, the grounds of the appeal and the rival submissions. We are cognizant of the fact that the appellant did not appeal against the ruling that dismissed his suit for want of prosecution. In the grounds filed in the instant appeal, he raised issues that would have been relevant had he filed an appeal against the dismissal of his suit.

9. In the application that he filed for review, the grounds were that the suit was erroneously dismissed for want of prosecution; that the pleadings had not closed; that the respondents had blocked the hearing of his suit by filing a notice of preliminary objection; that his advocate was away for treatment, hence the delay in the prosecution of his case; and that the court file was missing for a long time and that was why he could not set down the suit for hearing. The ELC found that all these reasons had been raised, considered and a determination made thereon during the application filed to dismiss the suit for want of prosecution. The only new ground was in regard to the loss of the file. This ground was dealt with in the ruling under consideration in the following manner:-

> " 12. The only new matter which the plaintiff has raised now which was not raised in the application for dismissal was that the court file was missing for a long time in consequence whereof he was unable to prosecute the suit. In my view, this matter could, with due diligence, have been raised in the earlier application. The plaintiff must have been aware that the court file was missing hence his inability to prosecute the suit."

10. We entirely agree with the learned Judge. If the appellant went to the registry with the intention of listing the case for hearing and was informed that the court file was missing, and that this had continued for a long time, this was information within his knowledge. He ought to have raised it as a ground in opposing the application to dismiss his suit for want of prosecution. In the application the respondents were complaining that for four years the appellant had failed to prosecute his case. When he raised the issue of the loss of the file during his application for review, the court correctly pointed out that he was raising an issue that he was aware of at the time of the application to dismiss his suit, and therefore this could not form a ground for review as –

> " there is no discovery of new and important matter or evidence which could not be produced earlier."

11. The application before the ELC had been brought under Order 45 of the *Civil Procedure Rules* that provides as follows:-

> " (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 the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

12. This was an application that required the ELC to consider the circumstances in the matter and, bearing in mind the provisions above, exercise his discretion to allow or not to allow the same. The question that arises is whether we should interfere with the learned Judge's exercise of discretion. For us to do so, we must be satisfied that the learned Judge misdirected himself in law or misapprehended the facts or considered matters he ought not to have considered or failed to take into account a matter he ought to have taken into account and, as a result, arrived at a wrong decision. Madan JA. (as he then was) held as follows in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd*, Civil Appeal No 36 of 1983:-

> " 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 at first instance, would or might have given a 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 should not have taken into account; fourthly, that he failed to take account of considerations of which he should have taken account; or fifthly, that his decision, albeit a discretionary one, is plausibly wrong."

13. We have looked at the grounds of appeal. None of them alleged that, in regard to the ruling in the application for review, that the learned Judge misdirected himself on the law, or that he did not appreciate the facts, or failed to consider an important matter or considered a matter he ought not have considered or that he exercised his discretion and reached a decision that was plainly wrong.

14. We would like to reiterate that an erroneous interpretation of the law, an erroneous decision or an erroneous conclusion on the facts cannot be corrected by the remedy of review. They can only be corrected by an appeal. Similarly, a request that entails a re-appraisal of the evidence and re-analyzing a decision to establish whether or not a court was right or wrong are all beyond the scope of review (*National Bank of Kenya Ltd v Ndungu Njau*, Civil Appeal No 211 of 1996; *Paul Maniki v NHIF Board of Management* [2020] eKLR).

15. It is clear to us that the appellant was aggrieved by the dismissal of his suit for want of prosecution. He wanted to be allowed to call evidence to prove the complaint in his originating summons, which was that the sale of his land was invalid because he had not received statutory notices, among other documents. His grievance was that by the dismissal of his suit he had been removed from the seat of justice; and that his fundamental right to be heard on the merits of the originating summons had been compromised. His complaint was legitimate, and that is why he should have appealed against the ruling that dismissed the suit for want of prosecution. On the facts, however, the remedy of review was not

available to him, and, on this we agree with the learned Judge who properly exercised his discretion on the application subject of this appeal.

16. In conclusion, we find no merit in the appeal. We dismiss it with costs.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF AUGUST, 2023

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A.O. MUCHELULE

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR.