Onyancha v Housing Finance Company Limited & another (Civil Appeal 200 of 2018) [2023] KECA 1176 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1176 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 200 OF 2018

DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA

OCTOBER 6, 2023

BETWEEN

THOMAS ONYANCHA ..... APPELLANT

AND

HOUSING FINANCE COMPANY LIMITED ..... 1ST RESPONDENT

JOSEPHAT MUTUNGA MUIAH ..... 2ND RESPONDENT

(Being an Appeal against the Ruling and Order of the High Court at Nairobi (C. K. Kariuki, J.) dated 5th February 2016 in HCCC NO. 265 of 2002)

JUDGMENT

1. What brings the appellant before this Court is a long string of events in the High Court. The appellant filed a plaint dated 1st March 2002, contending that the 1st respondent advanced to him ksh 413,800 to purchase a parcel of land known as NAIROBI Block 111/1272 Komarock Estate and the developments erected thereon (the suit property) at an interest rate of 18% per annum repayable over a period of 18 years at monthly instalments of ksh 6,812/=. The repayment was secured by a charge over the said property. The 1st respondent, allegedly in breach of the terms of offer, unilaterally varied and increased the rate of interest without notice to him and, as a result, his account fell into arrears. He also contended that the 1st respondent never served him with the mandatory statutory notice of its intention to sell the suit property by public auction. Consequently, on 28th February 2002, the 2nd respondent tried to evict him from the suit property on account that he had bought it at a public auction held on 7th February 2002 for ksh 1,300,000. He sought a permanent injunction restraining the 1st respondent from transferring the suit property to the 2nd respondent; a declaration that the purported sale was illegal, null and void; an order setting aside the purported sale and transfer; general damages for fraud and negligence; an order compelling the 1st respondent to render a proper and just account; costs; and interest.

2. He simultaneously filed an application seeking an interlocutory injunction restraining the respondents from selling, disposing of, transferring or otherwise alienating the suit property, and the 2nd respondent from evicting him, taking possession of, or interfering with his possession pending the hearing and determination of the suit. By a ruling dated 30th September 2002, Mwera, J. allowed the application.

3. The 1st respondent then filed an application dated 16th September 2008, seeking dismissal of the suit for want of prosecution on account that the appellant had taken no steps since 12th June 2006 to prosecute the suit, and had been sitting on an injunction since 30th November 2002.

4. The appellant opposed the application, averring that the parties had been negotiating amicable settlement.

5. The trial court, in its ruling dated 5th December 2008 (Lesiit, J.) (as she then was), held that the appellant had given credible explanation for the delay which was excusable. It dismissed the application and ordered the appellant to pay the 1st respondent ksh 20,000 as throw-away costs within 30 days, and that the appellant do set the suit down for hearing within 30 days and, in default, the suit would stand dismissed.

6. The 1st respondent filed another application dated 26th July 2010 seeking dismissal of the suit for want of prosecution. However, this application was never heard, as the appellant set the suit down for hearing on 6th December 2011, which again did not proceed, resulting with the court issuing directions that the appellant and the respondents do file their respective bundle of documents and serve them within 14 days. Parties were also ordered to file their agreed issues within 30 days, and that the suit be set down for hearing within 120 days.

7. Sometime later, the 1st respondent filed another application dated 18th October 2012 seeking to have the suit struck out on the ground that the appellant had failed to comply with the orders of 6th December 2011. The appellant opposed the application stating that the mistake was on his previous counsel, and which mistake should not be visited on him.

8. The trial court, in a ruling dated 12th November 2014 (F. Gikonyo, J.), held that the 1st respondent was seeking dismissal of the suit; and that the appellant was well aware of his counsel's illness, and that he ought to have been vigilant to inquire about the position of his case. However, in the interest of justice, the court ordered that the suit be set down for hearing within 45 days, and in default, the suit would stand dismissed, without the need for a formal application for its dismissal. It also extended the injunction orders for a further 45 days.

9. It appears from the record as put to us that the directions issued by Gikonyo, J. on 12th November 2014 were not complied with and, accordingly, the suit stood dismissed. The appellant then filed an application dated 29th June 2015 seeking reinstatement of the suit and extension of time for fixing a hearing date plus costs of the application. His advocate, one Mr. Leo Masore Nyang'au, submitted that the suit could not be set down for hearing as the court diary was closed and that, despite several attempts, the court registry declined to allocate him a hearing date.

10. The 1st respondent opposed the application vide a replying affidavit sworn on 22nd September 2015 together with grounds of opposition of even date. According to the 1st respondent, the appellant had not given sufficient reasons, and was guilty of latches.

11. In a ruling dated 5th February 2016, the trial court (C. Kariuki, J.) held that the matter had been pending for 14 years and had never been heard; that there was no effort/enthusiasm by the appellant to have the case, which was lodged in 2002, disposed of; and that the appellant had not demonstrated that he had

taken any steps to have the matter fixed for hearing. It found no justification to disturb the orders of 12th November 2014 and proceeded to dismiss the application, with each party bearing its own costs.

12. Aggrieved, the appellant preferred the instant appeal to this Court. He raised eight grounds of appeal in a Memorandum of Appeal dated 18th June 2018 which we have collapsed as follows, namely that:

    a. the learned judge erred in law and fact by failing to give effect to the overriding objective in sections 1A and 1B of the *Civil Procedure Act* and Article 159 of the *Constitution*, which enjoins the court to administer justice without undue regard to procedural technicalities;

    b. the learned judge erred in law and fact by failing to have regard to the appellant's right to be heard substantively pursuant to Article 50(1) of the *Constitution*, thus denying him the opportunity of a just determination;

    c. the learned judge erred in law and fact in ignoring relevant precedents, applying irrelevant considerations, giving undue weight and considerations, and by to factors that were not in issue; and

    d. that the learned judge erred in law and fact by holding that the appellant made no effort to move the court to give a date despite the fact that he sought to fix a date at the registry on several occasions and, when the same was not successful, the appellant applied to extend the time within which to fix the suit for hearing.

    He prayed that the appeal be allowed with costs; that the ruling of the High Court dated 5th February 2016 be set aside; and that the Notice of Motion dated 29th June 2015 be allowed.

13. When the appeal came up for hearing before us, on the GoTo Meeting virtual platform, learned Counsel Mr. Nyang'au appeared for the appellant while learned Senior Counsel (SC) Ms. JanMohammed appeared for the 1st respondent, and Ms. Muluvi held brief for Mr. Mutua appeared for the 2nd respondent.

14. Mr. Nyang'au relied on his filed submissions dated 16th May 2022. Highlighting the submissions, counsel contended that the learned Judge failed to give regard to Order 50 rule 4 of the *Civil Procedure Rules*. He qualified this by submitting that the learned Judge erred, by arriving at the conclusion that the appellant failed to have the suit set down for hearing within 45 days; that days that ought to have been excluded in computing this period were included; and that, consequently, the Judge erroneously concluded that the appellant had not taken steps to prosecute the suit within the 45 days.

15. Counsel contended that fixing hearing dates in a defended case is a tripartite exercise which involves the plaintiff, the defendant and the court. Therefore, when the learned Judge gave an order for setting the suit down for hearing within 45 days, he ought to have taken into account the circumstances the court finds itself in. On this, he submitted, it was conceded by the 2nd respondent that at some point the court file went missing and, in another instance, the court's diary was closed and, when opened for the following year, the court file could not be traced. Counsel submitted that, when the court file was found, the time within which the suit would have been set down for hearing had lapsed.

16. On the question of their failure to write letters to the Registrar, counsel submitted that letters had been written and placed on the court file which had gone missing. Furthermore, it is the Registrar who issues directions that a court file is missing, and this being the position as at then, the most prudent thing to do was to have the court file reconstructed. According to counsel, these were reasonable grounds on which the application ought to have been allowed. He submitted that it was an error on the part of the learned Judge to dismiss the application. He urged us to find that the appeal has merit and allow it

accordingly, and that, in any case, no prejudice would be suffered by the 1st respondent if the suit were reinstated and set down for hearing.

17. Ms. JanMohammed SC, highlighted the 1st respondent's submissions dated 25th July 2022. She submitted that the ruling dismissing the suit was delivered on 12th November 2014, and that the application seeking reinstatement was filed too late in the day on 22nd July 2015; that the learned Judge exercised his discretion judiciously; that as was held in *Mbogo v Shah* (1968) EA 93 that this Court should be slow to interfere with such discretion, unless it was manifestly evident that the learned Judge wrongly exercised his discretion; that the appellant proffered no explanation as to why he filed the application seven months after the ruling; that, in any case, the suit property had already been sold, which action the appellant had acceded to; that equity aids the vigilant and not the indolent; that the Notice of Appeal was filed on 15th February 2016 and served upon the 1st respondent on 10th March 2016; and that the circumstances of this case demanded that justice be done to all parties, which tilted towards dismissal of the appeal.

18. On her part, Ms. Muluvi associated herself with the position taken by Ms. JanMohammed SC, and on her submissions filed on 9th May 2022, urging that the appeal be dismissed with costs.

19. In a brief rebuttal, Mr. Nyang'au submitted that the appellant had always been looking for the court file and that the subject application was made when the file was availed. He urged us to focus at doing substantive justice, which, according to him, inclined towards granting the appellant the opportunity to have the suit heard on merit.

20. We have considered the record, the submissions by the parties and the law. The only one issue for determination is whether the High Court Judge wrongly exercised his discretion in dismissing the appellant's application dated 29th June 2015.

21. As was espoused by Madan, JA (as he then was), in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] EA:

> " 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 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 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 plainly wrong."

22. The circumstances that led to the dismissal of the suit filed by the appellant are that he filed a plaint dated 1st March 2002 together with an application seeking temporary injunctive orders. On 30th September 2002, the court allowed the application restraining the respondents from selling, transferring, alienating or evicting the appellant until the suit was heard and determined. From then on, nothing took place until six years later when the 1st respondent filed the application dated 16th September 2008 seeking dismissal of the suit for want of prosecution, which application was dismissed on 5th December 2008, with an order mandating the appellant to set down the suit for hearing within 30 days next following. Two years later, the 1st respondent filed a similar application dated 29th July 2010 but, before it could be heard, the appellant set down the suit for hearing on 6th December 2011. When the matter came up for hearing, it was adjourned at the instance of the appellant on account that he had yet to serve the 1st respondent with his bundle of documents. The court issued directions that

each party do file and serve their respective documents within 14 days, and that the matter be set down for hearing within 120 days. Almost one year later, the 1st respondent filed a similar application dated 18th October 2012 which was dismissed and the appellant was ordered to set the suit down for hearing within 45 days failing which the suit would stand dismissed. The appellant then filed his application dated 29th June 2015, seeking reinstatement of the suit, which application was dismissed. He comes to us on appeal against this order.

23. The appellant argues that the court file went missing and that the court diary was closed, and therefore, he was unable to have the matter set down for hearing. In such circumstances, the court's duty was to exercise its discretion guided by the tenets of fairness of process and its sense of justice as between the parties. Section 1B of the *Civil Procedure Act*, provides that there should be just, effective and timely disposal of proceedings, and effective use of judicial time and resources. In effect, a court should not permit a situation where matters are filed and, once a party or parties obtains interim orders, fail to take further appropriate action towards prosecution of the suit or become indolent in so doing. From the chronology of the events preceding the dismissal of the suit, it is evident that the appellant failed to aid the court in achieving its overriding objective of executing just, effective and timely determination of cases. He ought to have explained sufficiently to the court why his application was merited, given the long period the suit had remained unprosecuted. We agree with the learned Judge that the reasons advanced by the appellant were not sufficient to warrant the court to exercise its discretion in his favour. To our mind, he was indolent and undeserving of the court's discretion.

24. The appellant also contended that the 45 days given within which the suit ought to have been set down for hearing fell within days that ought not to be computed as provided for in Order 50 rule 4 of the *Civil Procedure Rules*. The same reads as follows:

> [Order 50, rule 4.] When time does not run.
>
> 4. Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act: Provided that this rule shall not apply to any application in respect of a temporary injunction.

25. If we were to accept the said argument, it would require that we freeze the time from 21st December to 13th January the following year. This is a period of twenty-three days. The ruling requiring the appellant to set the suit down for hearing was issued on 12th November 2014. If we exclude the twenty-three days which account for the period from 21st December 2014 to 13th January 2015, our tabulation of 45 days takes us to 20th January 2015. By this date, the appellant was yet to set down the suit for hearing; he was yet to comply with the court orders. This cannot be the cross upon which the appellant choses to die on. His indolence was clearly inexcusable.

26. Despite the above scenario, we also reject the appellant's contention and hold that despite the court being on vacation, the court registries do not close, but remain open during this season. The appellant was required to have the matter set down for hearing. We do accordingly agree with the learned Judge that the appellant failed to produce evidence by way of letters or demonstrate in any other form his efforts to try and have the matter set down for hearing, or of his efforts to have the file traced or reconstructed upon allegedly learning that it had gone missing.

27. We do note with concern that this was not the first time that the appellant was indulged. The trial court had graciously exercised its discretion in his favour on a number of occasions. For instance, in 2008, it gave him 30 days to have the matter set down for hearing. In again in 2011, the court gave him 120 days and, in 2014 it gave him 45 days. To our mind, he either failed to take advantage of the court's generosity or chose to abuse it altogether. It is trite law that a court of law does not give orders in vain. If for any reason a party has difficulty in complying with court orders, the right thing to do is to go back to the court and explain the difficulties faced in complying with the order. The appellant did not do so.

28. We cannot but conclude that the appellant was never interested in prosecuting the suit and was satisfied with the injunction orders issued on 30th September 2002. He took refuge in those orders at the respondents' prejudice. On this account, he is guilty of indolence and his conduct speaks volumes. Article 159 of the *Constitution* enjoins this Court to administer substantive justice while sections 3A and 3B of the *Appellate Jurisdiction Act* mandate this Court to act justly and fairly. The parties herein are all entitled to fair and expeditious hearing through the overriding objective principle. The overriding objective principle is not aimed at according justice to one party at the expense of another. Justice must be balanced. It is a two-edged sword that the Court wields to deter parties from taking undue advantage of interim injunctive reliefs pending hearing and determination of the substantive suit, among other woes which include undue delay in taking steps to act with expedition, and in obedience to court orders.

29. In conclusion, this appeal is bereft of merit, and we hereby dismiss it with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER 2023.

D. K. MUSINGA

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JUDGE OF APPEAL DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR