



Njeru v Kinanda (Civil Appeal 136 of 2017) [2022] KECA 946 (KLR) (22 July 2022) (Judgment)

Neutral citation: [2022] KECA 946 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 136 OF 2017
W KARANJA, J MOHAMMED & KI LAIBUTA, JJA
JULY 22, 2022

BETWEEN

JACOB NYAGA NJERU APPELLANT

AND

NJERU KINANDA RESPONDENT

(Being an appeal against the Ruling and Order of the Environment and Land Court of Kenya at Embu (Y. M. Angima, J.) delivered on 18th July 2017 in Environment and Land Court Case No. 18 of 2017 Formerly Kerugoya E.L.C No. 164 of 2013)

JUDGMENT

1. Article 159(2) (d) of the Constitution requires courts and tribunals, in exercise of judicial authority, to administer justice without undue regard to procedural technicalities. This constitutional edict was not intended to suspend or undermine the application of the rules of civil procedure in so far as such rules regulate the institution and prosecution of civil suits within such timelines as would guarantee expedition and cost-effectiveness in accordance with the overriding objectives set out in sections 1A and 1B of the Civil Procedure Act, Revised 2020 [1985] (hereafter the Act), and sections 3A and 3B of the Appellate Jurisdiction Act. The former applies to proceedings before the High Court while the latter applies to proceedings before this Court. These objectives impact just and expedient determination of competing claims.
2. Sections 1A and 1B of the Act do not by any means impute tolerance to indolence when they require facilitation of the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act (see section 1A (1)).
3. Section 1A (2) mandates courts, in exercise of their powers under the Act, to give effect to the overriding objective specified in sub-section (1). To this end, section 1A (3) imposes a statutory duty on a party to civil proceedings or an advocate for such a party to assist the court to further the overriding objective of the Act and, to that effect, to participate in the processes of the court, and to comply with the



- directions and orders of the court. Indeed, adherence to the foregoing constitutional precepts and the regulatory provisions set out in the [Civil Procedure Act](#) and the [Rules](#) made thereunder and the [Appellate Jurisdiction Act](#) and the [Rules](#) made thereunder go a long way in ensuring the just and expedient determination of civil disputes and appeals that may arise from those disputes.
4. The appellant (Jacob Nyaga Njeru) sued the respondent (Njeru Kinanda) in the High Court of Kenya at Embu Civil Case No. 141 of 201 seeking: injunctive relief to restrain the respondent from invading, trespassing, encroaching, entering upon, remaining on, wasting, damaging or in any other manner interfering with parcel No. Kagaari/Weru/559 (the suit property) within Embu county; a declaration that the appellant has obtained proprietary rights over the suit property by adverse possession; an order requiring the respondent to obtain consent of the Land Control Board and transfer the property to the appellant and, in default, the Deputy Register of the court to do so; and costs of the suit and interest. His case was that he had bought the suit property from the respondent in 1973 and completed payment of the purchase price in 1978.
 5. The respondent filed a defence on 24th November 2011 denying the appellant’s claim. He denied having sold the suit property to the appellant.
 6. It would appear that the appellant took no steps to prosecute his suit and, by a notice of motion dated 18th June 2013, the respondent applied for orders, inter alia, that the appellant’s suit be dismissed for want of prosecution, and that he be awarded the costs of the suit. In his supporting affidavit sworn on 18th June 2013, the respondent deponed that the appellant had failed to prosecute his suit for more than one-and-half years; and that he (the appellant) had lost interest in the matter.
 7. By a ruling delivered on 22nd October 2013, the court dismissed the respondent’s Motion with costs to the respondent. In addition, the court ordered the appellant to complete all pretrial procedures, pursuant to order 11 of the [Civil Procedure Rules](#), within 30 days from the date of the ruling and have the suit listed for hearing and, in default, the suit shall stand dismissed with costs to the respondent.
 8. The appellant having failed to comply with the aforementioned orders of the court, his suit was dismissed with costs to the respondent. Three years later, the appellant filed a notice of motion dated 22nd November 2016 seeking, *inter alia*, stay of execution of the ruling aforementioned; extension of time to comply with the orders given in the ruling delivered on 22nd October 2013; and that the costs of his application be in the cause.
 9. By its ruling delivered on 18th July 2017, the ELC (Y. M. Angima, J.) dismissed the appellant’s application with costs to the respondent. According to the learned Judge, the appellant was

“... not diligent in the prosecution of his case from the word go. He filed suit in 2011 and simply sat pretty and waited for time to pass by.”
 10. The appellant comes to this Court on appeal from the ruling of Y. M. Angima, J. on the following grounds that the learned Judge erred in law and in fact: in dismissing the appellant’s application without considering the merits of his case; in failing to take into account that the delay in prosecuting the suit was occasioned by the negligence of his advocates then on record; in dismissing the appellant’s application whereas the appellant had instructed a new firm of advocates to prosecute the suit on his behalf; in disregarding the subject matter of the suit, which is land and an emotive subject; in failing to take into account the failure by the appellant’s previous advocates to advise him that his suit had been dismissed; in dismissing the appellant’s application by vesting mistake of counsel upon him; and by denying the appellant the opportunity to ventilate and access justice on a mere assertion that the suit was old.



11. In support of the appeal, learned counsel for the appellant (M/s. Nyangito & Associates) filed written submissions dated 7th August 2020. The respondent was unrepresented, but filed his written submissions dated 28th June 2022. When the appeal came for hearing on the GoTo Meeting virtual platform, Mr. Nyangito made oral submissions on the highlights of his submissions while the respondent was represented by his son (Moses Irungu, who adopted his submissions.
12. Having considered the record of appeal together with the respective submissions of learned counsel for the appellant and those of the respondent, we begin by pointing out at the onset that, this being a first appeal, it is also our duty, in addition to considering the submissions made herein, to analyze and re-assess the evidence on record and reach conclusions in the matter. This approach was adopted by this Court in *Arthi Highway Developers Limited v West End Butchery Limited and 6 others* [2015] eKLR citing the case of *Selle v Associated Motor Boat Co.* [1968] EA p.123.
13. In *Selle's case (ibid)*, the Court held that:

“An appeal to this Court from a trial by the High Court is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”
14. Having carefully considered the record of appeal, the grounds on which it is anchored, and the contending submissions of counsel for the appellant and those of the respondent, we form the view that the appeal before us stands or falls on our findings on the following 5 issues: whether the appellant was guilty of inordinate delay in prosecuting his case; whether the subject matter of the dispute is relevant to the exercise by a court of its discretion in determination of applications made under order 17 rule 2(1) and (3) of the *Civil Procedure Rules*; if the answer to the 1st question is in the affirmative, whether the alleged mistake of counsel would excuse the appellant from the consequences of such delay; whether the learned Judge erred in law or in fact by dismissing the appellant’s application; and what orders ought we to make in determination of this appeal.
15. On the 1st issue, the record is clear as to the inordinate delay on the part of the appellant to prosecute his case. The respondent having filed his defence on 24th November 2011, the suit was ripe for pretrial motions leading to hearing and determination. However, he took no steps to prosecute his case until his interest was rekindled by the respondent’s application dated 18th June 2013 seeking to have the case dismissed for want of prosecution.
16. A golden opportunity to prosecute his case presented itself when, on 22nd October 2013, the learned Judge dismissed the respondent’s motion and imposed conditions on the appellant to undertake pretrial proceedings and set the suit down for hearing within 30 days from the date of that ruling. He failed to do so.



17. As to what constitutes inordinate delay, this Court in *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another* [2014] eKLR held that –

“There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case.”

18. Having failed to comply with the orders of the court, the appellant’s suit stood dismissed. It took him another 3 years to approach the court on 22nd November 2016 for stay of execution of the said ruling, a ruling whose negative orders were, in any event, incapable of being stayed. The High Court of Kenya in *Raymond M. Omboga v Austine Pyan Maranga* Kisii HCCA No. 15 of 2010, Makhandia, J (as he then was) held:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order. This is not an order capable of being stayed because there is nothing that the applicant has lost.”

19. The 2nd prayer for extension of time to comply with the orders of the court also came too late in the day. The delay in prosecuting the appellant’s case was, in our considered view, inordinate, and we find nothing to fault the findings of the learned Judge in that regard. We reach this conclusion mindful of the provisions of article 159(2) (d) of the *Constitution*, which mandates courts to exercise their judicial authority without undue regard to procedural technicalities.

20. The matter before us can hardly be categorised as one in which the learned Judge had “undue regard to procedural technicalities”. Far from it, the appellant was given ample time to take steps to prosecute his case. Instead, he sat back. It matters not that the dispute related to land, which learned counsel termed as

“emotive,” the more reason why the appellant should have taken steps to prosecute his claim without delay. Indeed, the subject matter of the dispute is not relevant to the exercise by a court of its discretion in determination of applications made under order 17 rule 2(1) and (3) of the *Civil Procedure Rules*. That settles the 2nd issue before us.

21. In addition to the foregoing, we associate ourselves with the words of our brother Kiage, JA. in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR where he had this to say:

“I am not in the least persuaded that article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost- effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even- handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in



which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."

22. The appellant also blames the delay on his counsel, who he says was negligent in failing to inform him that his case had been dismissed. We do not think that such an excuse would stop time from running. Section 1A (3) of the *Act* places a duty on him as well as on his advocate to, among other things, participate in the processes of the court, and to comply with the directions and orders of the court. He did not, and cannot lay blame on his former advocates for his own indolence. Moreover, proceedings belong to the parties and not to their advocates.
23. As the Latin maxim goes: *Vigilantibus non dormientibus jura subveniunt* - meaning that the law protects those who are vigilant of their rights and not those who sleep upon it. This maxim stresses the importance of one being careful and watchful of their rights as only such people are entitled to the benefits of the law.
24. For the appellant to blame counsel for his indolence is, to say the least, vain.
Faced with a similar issue, the High Court of India had this to say in *Panchsheel Electronic v Jupiter General Insurance Co.* 1974 RLR 453:

"The law is settled that mistake of counsel may in certain circumstances be taken into account in condoning delay although there is no general proposition that mistake of counsel by itself is always a sufficient ground. It is always a question whether the mistake was bona fide or was merely a device to cover an ulterior purpose such as laches on the part of the litigant or an attempt to save limitation in an underhand way."
25. The 3rd issue stands settled. As stated by this Court in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR –

"It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."
26. On the 4th issue, we hasten to observe that the learned Judge was not in error in dismissing the appellant's Motion. We find nothing to fault him for exercising his discretion. Neither do we find sufficient material to justify interference with the impugned ruling. In *Mbogo v Shah & Another* [1968] EA 93, the Court of Appeal set out circumstances under which an appellate court may interfere with a decision of the trial court as follows:

"I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into account matters which it should have taken into consideration and account and in doing so arrived at a wrong conclusion."
27. In conclusion, we find that the learned Judge did not misdirect himself. Neither did he consider matters that he ought not to, or failed to consider matters which he ought to have considered. In view of the foregoing, we find that the appeal herein has no merit and the same is hereby dismissed with costs to the respondent. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.



W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

