



IN THE COURT OF APPEAL

MALINDI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ. A.)

CIVIL APPEAL NO. 70 OF 2019

BETWEEN

CHRISTINE MWENDE.....1ST APPELLANT

ANITA A. PAMBA.....2ND APPELLANT

AND

NICHOLAS KOPU KATANA KARISA.....1ST RESPONDENT

BARAKA MOHAMED.....2ND RESPONDENT

HAMIS ORE.....3RD RESPONDENT

KASUNGU MASHI.....4TH RESPONDENT

KASUNGU WANJE.....5TH RESPONDENT

PETER CHARO.....6TH RESPONDENT

KATANA MASHAKAKA.....7TH RESPONDENT

MWAMULANDA MAKIRANDA.....8TH RESPONDENT

SANDEI ZIRO.....9TH RESPONDENT

KITI J. JEWAS.....10TH RESPONDENT

MAMA RITA.....11TH RESPONDENT

(Being an appeal from the Ruling and Order of the Environment and Land Court of Kenya at Malindi (J.O. Olola, J.) delivered on 9th April 2019 in E.L.C Case No. 33 of 2010.)

JUDGMENT OF THE COURT

1. This appeal challenges the decision of *Olola, J.* dated 9th April 2019 refusing to set aside his orders made on 18th October 2018 dismissing the appellants' application for want of prosecution, in which application the appellants had sought the reinstatement of the suit. In that application, the appellants' advocate, *Mr. Gakuo*, stated in his affidavit that his office received the notice to show cause (NTSC) why the suit should not be dismissed for want of prosecution on 12th October 2018, a day after the date set for the hearing of the NTSC; that unless the suit is reinstated the appellants would suffer great loss and prejudice as they would lose their property; and that the application had been made without undue delay. Counsel further stated that the court file had been missing at the registry since 19th May 2017 when it was last in Court, and therefore it was not possible to fix a hearing date when the file was unavailable. Besides, his firm came on record on behalf of the appellants on 13th April 2018.

2. The respondents opposed the application. They argued that apart from the physical service of the NTSC, the same had also been served by email and placed on the Court's notice boards for almost two weeks before the suit was dismissed. The court was therefore justified in its action of dismissing the suit for want of prosecution.

3. The learned judge observed that not much effort had been made by the appellants towards prosecution of the suit since 15th April 2010 when it was instituted and as a consequence he proceeded to dismiss the application.

4. Being aggrieved by that decision, the appellants filed this appeal, stating that the learned judge totally disregarded the facts set out in the notice of motion; that they had taken action towards prosecution of the suit; and that they had been condemned unheard.

5. Parties filed submissions before this Court. When the appeal came up for hearing **Mr. Gakuo** briefly highlighted his submissions but **Mr. Lughanje**, who was represented by **Mr. Kinyua**, relied on his submissions entirely without any oral highlights.

6. This is an appeal against the exercise of judicial discretion by the trial judge. It is a settled principle of the law that this Court will only interfere with the exercise of such discretion where it is demonstrated that the judge misdirected himself in law, or where he misapprehended the facts, or took account of considerations which he ought not to have taken, or where he failed to take account of considerations which he ought to have taken, or where it is demonstrated that his decision, albeit a discretionary one, is plainly wrong. See **United India Insurance Co. Ltd & Others vs East African Underwriters (Kenya) Ltd [1985] eKLR**.

7. It is against these well-established principles that we shall consider this appeal. It is evident that the learned judge did not interrogate the main reason for the appellants' advocates' non-attendance to court on 11th October 2018 when the NTSC came up for hearing. The appellants' advocate had stated that the NTSC was served upon his firm on 12th October 2018, a day after the suit was dismissed for want of prosecution. He annexed to the supporting affidavit the NTSC with a date stamp of 12th October 2018. That averment was not challenged at all.

8. If indeed the suit was dismissed a day before the NTSC was served, the appellants' advocate could not have attended court on 11th October 2018. Had the learned judge taken this factor into consideration we think he would have exercised his discretion differently.

9. Even if there had been some past indolence on the part of the appellants' former advocates, that per se could not have disentitled the appellants from the court's favourable consideration as long as there was late service of the NTSC.

10. We think the explanation given for the non-attendance was sufficient. The application was also made without inordinate delay.

11. That aside, we think the learned judge ought to have considered the nature of the dispute that he was summarily dismissing. The dispute between the parties was over a parcel of land known as **Kilifi/Mtwapa/1528** measuring 3.76 Hectares which the appellants alleged is registered in their name but the respondents have encroached into it. The respondents on the other hand claimed they had lived on the land for over 35 years, and they were the lawful owners of the land. In our view, this is a dispute that is best resolved after a full trial.

12. Taking all the above into consideration, we are inclined to allow this appeal, which we hereby do. Consequently, we set aside the orders made by the trial court on 9th April 2019 and substitute therefor an order allowing the appellants' Notice of Motion dated 2nd November 2018. Each party shall bear its own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb.

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR