Savage v O'keefe (Environment & Land Case 134 of 2017)
[2024] KEELC 3602 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3602 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 134 OF 2017

EK MAKORI, J

APRIL 25, 2024

BETWEEN

JONATHAN SAVAGE ..... PLAINTIFF

AND

PATRICK O'KEEFE ..... DEFENDANT

RULING

1. This suit is a significant instance of a dereliction of duty bestowed on counsel and serves as a crucial reminder of the rigmaroles parties endure in the ever-murky waters of litigation in this Country.

2. It commenced via plaint on 20th June 2017, together with an application for injunctive orders. Meanwhile, the defendant raised a preliminary objection dated 9th November 2017 seeking to strike out the plaintiff's suit for want of jurisdiction. The judge (Olola J.) delivered a ruling on the 21st of March, 2018, and directed as follows:

> " Accordingly, the plaintiff is hereby directed to make the necessary application to join all the proper and necessary parties herein within 30 days from today (read from 21st March 2018). In the event of failure to bring the necessary application within the said time, the suit shall stand dismissed without any further reference to this Court."

3. Instead of amendments, an appeal was preferred to the Court of Appeal in Malindi Civil Appeal No. 54 of 2018 between Jonathan Savage v Patrick Okeefe. It is reported as *Patrick Okeefe v Jonathan Savage* [2020] eKLR. The Superior Court dismissed the appeal in this manner:

> " We have carefully considered the record of appeal as well as the submissions on record.
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> 26. Regarding the boundary dispute and the action taken by the Land Registrar, the trial Court traced the history of the dispute very well. It observed that

the appellant lodged a complaint with the Permanent Secretary several years ago; that the Permanent Secretary sent a team of the Public Complaints and Resolutions Committee to visit the site with a view to resolving the dispute, but the said officials were not able to resolve the dispute; eventually the Land Registrar directed that the status quo be maintained until the Ministry obtains a Court order to correct erroneously erected boundaries affecting listed parcels of land.

27. It cannot therefore be said that boundaries between the parcels of land had been fully determined. The status quo was maintained pending determination of the dispute by Court.

28. As rightly pointed out by the trial judge, to hold that the trial Court lacked jurisdiction would have been improper in the circumstances. We find no basis of interfering with the learned judge's decision.

29. We now turn to the second ground of appeal. It is not disputed that parcels of land numbers 1138 and 1139 are owned by Digitel Communications System Ltd and not the respondent as pleaded. The learned judge was of the view that the defect could be corrected by way of an amendment to the plaint instead of striking out the entire suit. He, therefore, ordered that an amendment to the plaint be effected. In so holding, the learned judge exercised his discretion. Did that amount to injudicious exercise of discretion? We do not think so. Ndichu Associates & Company Advocates drew the plaint on behalf of the respondent. It would have been unjust to punish the respondent for a basic error of law made by the respondent's advocates that could be corrected without occasioning prejudice to the appellant.

30. We find that the trial Court was perfectly entitled to invoke the provisions of order 1 rule 10(2) of the *Civil Procedure Rules* to order amendment to the plaint to reflect the real owner of the property. The provisions of Article 159(2)(d) of the *Constitution* of Kenya, 2010 require that justice be administered without undue regard to procedural technicalities.

31. All in all, we find this appeal lacking in merit and dismiss it with costs to the respondent."

4. Meanwhile, the matter went into a lull until the 21st of June 2023, when it was listed before this Court for a mention to take directions on the hearing – parties oblivious of the orders by Olola J. (supra). The Court was notified that the orders of Olola J. had not been complied with. On 13th July 2023, this Court notified the parties of the effect of the orders dated 21st March 2018, which were self-regulating, and that the dismissal orders by Olola J. took effect on 21st April 2018.

5. Surprisingly, another suit was on the side over the same issue, Malindi ELC No. 26 of 2023; a preliminary objection was raised under the res judicata doctrine. I made a ruling over the same, it is reported as *Digi Telecommunication Systems Limited v O-Keefe & 4 others* (Environment & Land Case

26 of 2023) [2023] KEELC 20305 (KLR) (28 September 2023) (Ruling). I held as follows on the preliminary objection:

> " Meanwhile, from the primary suit, I can see an application filed under a certificate of urgency dated 24th July 2023 seeking to reinstate the suit dismissed (sic) on 13th July 2023. The application comes for an inter parte hearing on the 18th of October, 2023.
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> From the history above, we have two parallel files covering the same subject matter, fatiguing this Court and the parties who are desirous of a conclusion to this matter. At best, this is an abuse of the entire court process occasioned by the lawyers representing the parties on a simple boundary dispute issue.
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> As held by Wabwoto J. in *Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 others* [2022] eKLR, abuse of the Court process consists of the following:
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> > "I also wish to add that the practice of filing new and separate cases despite the existence of a similar case relating to the same subject matter amounts to an abuse of the Court process. Courts usually frown on this practice since it leads to an unnecessary backlog of cases and a waste of the precious judicial time.
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> > 28. In the case of *Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No. 25 of 2002 (2009) eKLR 229, the Court of Appeal stated as follows;-
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> > > "The term abuse of Court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious, or oppressive.
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> > 29. Abuse of judicial process is a term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. It also means abuse of legal procedure or improper use of the legal process. It creates a factual scenario where a party is pursuing the same matter by two Court processes. In other words, a party by the two-court process is involved in some gambling, a game of chance to get the best in the judicial process.
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> > 30. The point to underscore is that a litigant has no right to pursue pari passu more than one process that will have the same effect at the same time or at different times with a view of obtaining victory in one of the processes or both. I have in previous decisions stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. Litigation is a contest by a judicial process where the parties place on the table of justice their different position clearly, plainly, and without tricks.
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> > 31. Multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an

abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than the exercise of the right per se. The abuse consists of the intention, purpose, and aim of the person exercising the right, to harass, irritate, and annoy the adversary and interfere with the administration of justice

32. Abuse of the Court process is an obstacle to the efficient administration of justice. Tinkering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which such abuse cannot complacently be tolerated consistent with the good order of society."

This matter has a bearing with Malindi ELC Cause No. 134 of 2017, which is coming for a hearing on 18th October 2023. This means the issues raised here have not been fully and finally determined. Let us all migrate to that file Malindi ELC Cause No. 134 of 2017 to avoid the annoying proliferation of suits and waste of judicial time.

At the end, the entire suit and pending application are hereby struck out for being an abuse of the court process. Costs to abide by the outcome of Malindi ELC Cause No. 134 of 2017."

6. That is how we are back to this suit in full circle. The pending application seeks reinstatement of the suit. The reasons proposed range from the appeal, which took time, COVID -19 et al. The respondent opposes that it's now over five years since Olola J. made orders for amendments, which have never been done, leading to the dismissal of the suit.

7. It is the main issue that I have to resolve here.

8. The applicant cites authorities, including the leading decision in *Shah v Mbogo & Another* [1967] EA echoed in *Bilha Ngoyo Issac Kembu Farm Ltd & Another* [2018] eKLR, that this Court has discretion to reinstate a suit to avoid injustice or hardship on parties resulting from inadvertence or excusable mistake or error. Still, the same is not designed to aid a lethargic party in subverting justice.

9. On the other hand, the respondent believes that this suit represents a severe abuse of the Court process and ought to remain dismissed. Since the orders issued by Olola J. have never been observed, there is nothing to reinstate. The 30 days granted by the judge expired. The issue of COVID-19 cannot be raised here, given the judiciary's digital strategy and the advent of online platforms, including the Virtual Courts.

10. The respondent cites a passage from *Ivita v Kyumbu* [1984] KLR 441, which quotes Lord Denning's rendition in *Fitzpatrick v Batger & Co. Ltd* [1972] ALL ER 657 that the Court's business ought to be handled expeditiously.

11. I wholly agree with the respondent's assertions on the delays in this matter. It is inexcusable. The applicant is guilty of larches and delays in the prosecution of this matter; instead of adhering to the directions of the Court, an appeal was preferred. It flopped. The amendment to the plaint 'to include all necessary parties,' as ordered by this Court, has never been implemented. Meanwhile, another suit was filed over the same issue. I directed we have one file (this one) to deal with to avoid the convolution of issues. This suit still remains defective. The applicant has dragged the respondent in the corridors of

justice now for close to seven years. As held in *Ivita v Kyumbu* [1984] KLR 441, citing Lord Denning MR in *Fitzpatrick v Batger & Co. Ltd* [1972] ALL ER 657 at page 658:

> "…….it is the duty of the plaintiff's adviser to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. Just consider the times here. The accident was on December 13, 1961…….. It is impossible to have a fair trial after so long a time. The delay is far beyond anything which we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution."

14. It is going to be seven years since this suit was filed. It is at the preliminary stage of amendments of pleadings. The legal advisers of the applicant have not been fair to him, or he has been giving the wrong instructions. I don't know. There have been parallel suits that contributed to the delay herein. The land question that the applicant sought to be determined persists. I will reluctantly be inclined to grant the orders sought herein but at a cost as provided under Rule 43 of the ELC Practice Directions, 2014:

> "Non-compliance with relevant *Civil Procedure Rules*, orders and or directions issued by a Judge, shall attract sanctions including but not limited to imposition of costs, fines, striking out of pleadings, the dismissal of a suit and/or meting out punishment prescribed in the *Environment and Land Court Act* or any other Statute as the court may deem fit bearing in mind the overriding interests of justice."

15. I will not strike out this cause; I will impose the following orders, which must be strictly adhered to:

    a. The suit is hereby reinstated.

    b. The plaintiff is to amend the complaint immediately and serve all the necessary parties within 21 days hereof, with a corresponding leave of 7 days for the defendant to amend the defence if need be.

    c. The plaintiff is to pay thrown-away costs to the defendant to the tune of Kshs. 100,000/- to cushion the defendants arising from the prolonged litigation herein.

    d. The plaintiff bears the costs of this application.

    e. Failure to comply, the suit once again to stand dismissed.

THIS RULING IS DATED, SIGNED, AND DELIVERED AT MALINDI ON THIS 25TH DAY OF APRIL 2024 IN THE ABSENCE OF PARTIES. SINCE THE COURT WAS NOT SITTING, IT WILL BE TRANSMITTED ELECTRONICALLY, AND ALL PARTIES WILL BE EMAILED THE SAME.

E. K. MAKORI

JUDGE