**Bonventure Tours & Travel Limited v Kiplagat & Bundotich & 8 others (Civil Appeal 244 of 2016) [2021] KECA 171 (KLR) (19 November 2021) (Judgment)**

Neutral citation: [2021] KECA 171 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL 244 OF 2016**

**DK MUSINGA, MSA MAKHANDIA & S OLE KANTAI, JJA**

**NOVEMBER 19, 2021**

**BETWEEN**

**BONVENTURE TOURS & TRAVEL LIMITED ..... APPELLANT**

**AND**

**JULIUS KIPLAGAT & EDISON KIPLAGAT BUNDOTICH .... 1ST RESPONDENT**

**LINROSE INVESTMENT LIMITED AND INTERFARM LIMITED .... 2ND RESPONDENT**

**ROSE CHEBET & ROBERT GICHURA ..... 3RD RESPONDENT**

**ARCHMAN HOLDINGS LIMITED ..... 4TH RESPONDENT**

**MYTA DEVELOPMENT LIMITED ..... 5TH RESPONDENT**

**CITY COUNCIL OF NAIROBI ..... 6TH RESPONDENT**

**COMMISSIONER OF LANDS ..... 7TH RESPONDENT**

**ATTORNEY GENERAL ..... 8TH RESPONDENT**

**DIAMOND TRUST BANK ..... 9TH RESPONDENT**

***(An appeal from the Ruling of the High Court of Kenya at Nairobi (Gitumbi, J.) dated 20th December, 2013 in ELC Cause No. 79 of 2007)***

## JUDGMENT

1. On 20th December 2013 Gitumbi, J. delivered a ruling in respect of the 5th respondent's notice of motion dated 15th May 2013 that sought an order to declare that Environment and Land Case No. 79 of 2007 had abated, or in the alternative an order to dismiss the suit for want of prosecution.

2. The application was premised on the arguments that the suit was filed on 27th April 2007 simultaneously with an application seeking injunctive orders but had not been set down for hearing. It was further contended that summons to enter appearance had not been served upon the 5th respondent to enable it enter appearance and file a statement of defence.

3. The application was opposed by the appellant. In its grounds of opposition, the appellant stated that the application was incompetent and the orders sought could not be granted; that the affidavit in support of the application was defective and was not admissible in law and the application was frivolous and an abuse of the court process as it amounted to denying the plaintiff/appellant an opportunity to be heard contrary to the tenets of natural justice.

4. Allowing the application, the learned judge held that the appellant took out summons to enter appearance on 7th June 2007 but there was no evidence of service of the same, which was contrary to the provisions of order 5 rule 1(5). The trial court rejected the appellant's arguments that it was unable to trace some of the defendants for service of summons.

5. The appellant was aggrieved by that decision and proffered an appeal to this Court. The notice of appeal was filed on 23rd December 2013 and the record of appeal was subsequently filed.

6. The appellant also applied for certified copies of the proceedings but the same were not supplied until 27th September 2016. A certificate of delay was also issued and collected on 28th September 2016. The record of appeal was filed on 9th November 2016.

7. In its memorandum of appeal, the appellant faulted the learned judge for: finding that the respondents were not served with the plaint and summons to enter appearance; for holding that the appellant had made an admission that summons were neither issued nor served; for failing to address all the issues raised in the appellant's affidavit in reply to the 5th respondent's application, and for dismissing its suit for want of prosecution. The appellant urged this Court to set aside the impugned ruling and reinstate the suit to hearing on its merits.

8. On 8th December 2016, the 5th respondent filed an application under rule 84 of this Court's Rules seeking to strike out the notice of appeal and the appeal on the ground that the appeal was filed out of time without leave of the Court. The 5th respondent argued that copies of the proceedings were ready for collection and certified as at 5th April 2016; that the period excluded for preparation and supply of certified proceedings was a total of 883 days between 23rd December 2013 and 25th May 2016 and the appointed time for instituting the appeal was 60 days from 25th May 2016; that the appellant was duly notified and paid for the proceedings on 25th May 2016 but proceeded to collect the same on 14th September 2016; that the appointed time for instituting the appeal lapsed on or about 26th July 2016, yet the record of appeal was filed on 9th November 2016.

9. The appellant's advocate filed a replying affidavit and stated, inter alia, that after filing the notice of appeal and requesting for proceedings he kept on following up the progress of the typing and sent several reminders; and that eventually he was notified that the proceedings had been typed and was asked to prepare a draft certificate of delay, which he did, and lodged with the court's registry on 27th July 2016; that the certificate was amended and eventually signed on 27th September 2016 and he collected it on 28th September 2016. Counsel therefore contended that the record of appeal was filed within time, excluding the period of preparation of the proceedings and the certificate of delay.

10. Regarding the substantive appeal, the appellant filed submissions, but only the 5th respondent filed submissions in response. None of the other parties did so.

11. Regarding the application to strike out the appeal, having considered the affidavits filed by the parties, we are satisfied that the appeal was filed in time. We say so because the certificate of delay was signed on 27th September 2016 and collected on 28th September 2016, that is when time began to run. The appellant had up to 28th November, 2016 to file the record of appeal and since the record was filed on 9th November 2016, there can be no basis of arguing that it was filed out of time. Consequently, we dismiss the 5th respondent's application to strike out the record of appeal.

12. Turning to the merits of the appeal, there is no agreement whether summons to enter appearance were served. The 5th respondent stated that the appellant's advocates served summons upon its previous advocates, who had no instructions to receive them.

    On the other hand, the appellant submitted that the summons to enter appearance were served and received by the 6th, 7th and 8th respondents on 27th August 2007, 4th September 2007 and 13th August 2007 respectively; that the 1st, 2nd, 3rd, 4th and 5th respondents were previously represented in an earlier suit, HCCC No. 794 of 203 by the firms of Akoto & Co. Advocates, Mungu & Co. Advocates and E. N. Omotii & Co. Advocates, who were served with the plaint and the application dated 27th April 2007.

13. The three law firms accepted service but when the summons to enter appearance were issued on 7th June 2007, the said law firms declined to receive them, saying that they had no such instructions. The appellant sought and obtained leave to effect substituted service upon the 1st, 2nd, 3rd, 4th and 5th respondents by way of an advertisement in a newspaper, which was done. Another newspaper advertisement was done on 10th May 2013 notifying the 1st, 2nd, 3rd, 4th and 5th respondents that its application would come up for hearing on 16th May 2013.

14. The above facts regarding service are contained in the appellant's replying affidavit to the 5th respondent's application which gave rise to the impugned ruling. The advertisement that was placed in the "Daily Nation" newspaper was attached to the replying affidavit.

15. From the foregoing, it appears to us that there was no factual basis of finding that the 1st, 2nd, 3rd, 4th and 5th respondents were not served with summons to enter appearance. We do not think the learned judge considered the contents of the appellant's replying affidavit. Whereas the learned judge exercised her discretion in granting the orders sought by the 5th respondent, we are satisfied that she misdirected herself in finding that there was no service of summons. In *Mbogo v Shah & Another [1968] EA 93*, this Court held:

> " 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 failed to take into consideration and account and in doing so arrived at a wrong conclusion".

16. Although the learned judge stated that the appellant had made an admission that summons were neither issued nor served, the appellant denied having ever made such an admission. Our perusal of the record did not reveal any admission to that effect.

17. Regarding dismissal of the suit for want of prosecution, whereas it cannot be denied that the appellant's suit had been in court for nearly 7 years, it is not correct that no effort had been made to prosecute it. Before the 5th respondent's application for dismissal of the suit was filed on 17th May 2013, the appellant had set down its application dated 3rd May 2013 for hearing on 16th May 2013.

18. In D. T. Dobie & Co. (*Kenya) Ltd v Muchina [1982] KLR 1*, this Court cautioned against haste in striking out a suit if there is a cause of action with some chance of success; and held that the power

should only be exercised in plain and obvious cases and with extreme caution. We do not think that this was such a case.

19. In view of the foregoing, we allow this appeal, set aside the impugned ruling, and order that the High Court matter be reinstated to hearing on its merits. We hope that it will be given priority, considering that the dispute has been in court since 2007. Each party shall bear its own costs of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.**

**D. K. MUSINGA, (P)**

**.....**

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

**.....**

**JUDGE OF APPEAL**

**S. ole KANTAI**

**.....**

**JUDGE OF APPEAL**

***I certify that this is a***

***true copy of the original***

***Signed***

***DEPUTY REGISTRAR***