Kinnock Trading Limited v Evans Mangi Dogo & 131 others (Civil Appeal 153 of 2019) [2021] KECA 274 (KLR) (3 December 2021) (Judgment)

Neutral citation: [2021] KECA 274 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL 153 OF 2019

SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA

DECEMBER 3, 2021

BETWEEN

KINNOCK TRADING LIMITED ..... APPELLANT

AND

EVANS MANGI DOGO & 131 OTHERS ..... RESPONDENT

(An appeal from the Ruling and/or Order of the Environment &Land Court at Malindi (Olola, J.) delivered on 8th October, 2019 in ELC Case No 128 of 2015)

JUDGMENT

1. In this appeal, the appellant, Kinnock Trading Limited, has challenged a ruling delivered by the Environment and Land Court (ELC) (Olola, J.) on 8th October 2019 declining to set aside its order made on 16th January 2019 dismissing the appellant's suit for want of prosecution and declining to reinstate the suit. The principal question for determination is whether the refusal by the ELC to set aside the order of 16th January 2019 and to reinstate the suit constitutes a wrong exercise of discretion by the learned Judge.

2. The background in brief is that in July 2015, the appellant, as the registered owner of a property known as Plot No. 5054/1210 instituted suit against the respondents, some of whom are said to be deceased, seeking an order of mandatory injunction to compel them to vacate and hand over possession of the said property. It is the appellant's case that the respondents are trespassers on the property and that they illegally constructed structures thereon.

3. There are two statements of defence on record. One is filed through the firm of Kenga & Company Advocates for all the respondents in which it is contended that the respondents are the lawful owners and or legal beneficiaries of the property having resided or occupied it for over 12 years. The other statement of defence, which incorporates a counterclaim, is filed by Nyange Sharia Advocate of Kituo Cha Sheria on behalf of some of the respondents. In the latter defence, it is averred that the registration

of the appellant as owner of the property "was not proper and or lawful"; that by the time the appellant became the registered owner of the property it had "both actual and constructive notice" of the respondents' occupation of the property, and that the suit is time barred. Those respondents sought, in their counterclaim, an order that they have acquired the property by adverse possession; and that the appellant should be ordered to transfer the property to the respondents.

4. The record of proceedings shows that the suit was first listed for hearing before the learned Judge on 20th April 2017. On that occasion, counsel informed the Judge that the suit was not ripe for hearing; that the matter should have been before the Deputy Registrar for pre-trial; and that there was a problem of representation of defendants. It was adjourned to enable the parties "move the court for pre-trial directions." The matter was subsequently listed for directions before the Deputy Registrar on four occasions on all of which the record indicates there was "no appearance" for the respondents.

5. On 25th September 2018, counsel for both parties appeared before the learned Judge and requested for another date on grounds that they were "trying to settle the matter". On that occasion, Mr. Miller appeared for the respondents. The hearing was re-scheduled to 16th January 2019.

6. On the 16th of January 2019, when the suit was scheduled for hearing before the learned Judge, the record shows that Mr. Nyange appeared for 16 respondents. There was no appearance for the appellant. Mr. Nyange stated that all the unrepresented respondents "had all passed away", and prayed for the dismissal of suit in the absence of the appellant. Thereupon the court ordered that:

> "In the absence of the plaintiffs and or advocates and upon application of counsel for the defendants, this suit is hereby dismissed with costs for want of prosecution."

7. Few days later, the appellant presented the application dated 21st January 2019, that resulted in the ruling of 8th October 2019 the subject of the present appeal, seeking orders that the order of 16th January 2019 be set aside and that the suit be reinstated. In her affidavit in support of that application, Cynthea Onyango advocate (who has also been referred to as Mrs. Oballa) for the appellant deposed that she was inadvertently late to get to court on 16th January 2019; that prior thereto, the respondents' new advocates, Miller George & Gikonde Advocates had engaged her firm in negotiations with a view to amicably resolving the matter; that those negotiations had progressed to a valuation of the property being undertaken; that in her "mind, the date of 16th January 2019 was for recording a possible settlement"; and that as she "walked into court that morning she found the matter had already been dealt with and dismissed."

8. She deposed further that: it is unclear "who exactly acts for" the respondents, as there are effectively three different firms on record as acting for the respondents; that the order dismissing the suit is prejudicial to the appellant; and that some of the respondents had approached the appellant to surrender the property for consideration.

9. In opposition to the application, Daniel Mwanzia, one the respondents, deposed in his replying affidavit that no justifiable explanation was given for the absence of the appellant in court on 16th January 2019 and no reasons were given or explanation made on the nature of mistake by counsel; that the respondents did not at any time instruct the firm of Miller George & Gikonde Advocates to act for them in the matter and that firm had no authority therefore to negotiate on behalf of the respondents; that contrary to the claim by the appellant that the hearing of the suit had been adjourned on a previous occasion to facilitate negotiation, it was in fact adjourned because the appellant's witness was indisposed.

10. In rejecting the application, the learned Judge expressed that counsel for the appellant did not explain the nature of the mistake that led her not to attend court on the date for hearing and neither was there an explanation where the appellant or its representative was on the date of hearing. As already indicated, the appellant has challenged that decision primarily on the ground that the Judge did not exercise his discretion judiciously.

11. In his written submissions which he orally highlighted during the virtual hearing of the appeal, learned counsel for the appellant Mr. Kilonzo submitted that there are sufficient reasons for interfering with the decision of the lower court; that in the lower court, it was not possible to determine which advocate was properly on record for the respondents; that on the basis of the notice of appointment filed by the firm of Miller George & Gikonde Advocates, counsel for the appellant engaged with that firm in exploring settlement, which negotiations had reached an advanced stage and Mrs. Oballa for the appellant had reason to assume that there were prospects of recording settlement on 16th January 2019. It was therefore surprising, counsel urged, that it was Mr. Nyange, and not Mr. Miller who then appeared in court on 16th January 2019 and moved the court to dismiss the suit. Counsel concluded by urging that there was a glaring anomaly regarding the issue of the proper counsel on record with instructions to represent the respondents which led to the dismissal of the appellant's suit.

12. Mr. Kilonzo urged that the reason why the appellant's counsel,Cynthea Onyango, of the firm of Onyango Oballa & Partners Advocates was late in attending court on 16th January 2019 was sufficiently explained in her affidavit and that the mistake of counsel should not, in any case be visited on the appellant. In that regard, reference was made to the decisions of this Court in the case of *Belinda Murai & 9 others vs. Amos Wainaina, C.A. No. Nai. 9 of 1978* and *Savings & Loan Kenya Ltd vs. Onyancha Bwomote [2014] eKLR*, among others.

13. According to counsel, the effect of the decision of the lower court in dismissing the appellant's suit is to violate the appellant's right to fair trial. Counsel made extensive submissions in that regard, citing Articles 25(c), 47 and 50 of the Constitution and decisions of this Court in *David Mwangi Muiruri vs. Mirko Blatterman (suing through his power of attorney Shabir Hatim Ali) and another, Civil Appeal No. 25 of 2017*;*Multiscope Consulting Engineers vs. University of Nairobi & another [2014] eKLR* in urging the right to be heard before an adverse decision is taken is fundamental and permeates our entire justice system and that the right to a hearing is a fundamental human right and the cornerstone of the rule of law.

14. Opposing the appeal, learned counsel for the respondents Mr. Nyange also relied on written submissions which he highlighted. He submitted that the appellant has not demonstrated that the decision of the lower court is wrong or that the Judge misdirected himself or took into consideration matters he should not have and thereby arrived at a wrong decision. In that regard, counsel referred to the decision in *Mbogo vs. Shah [1968] EA 93* regarding the circumstances when an appellate court may interfere with the exercise of discretion by the lower court urging that such circumstances do not exist in the present case.

15. Counsel submitted that the complaint regarding representation of the respondents has no basis as it is evident from the replying affidavit of Daniel Mwanzia that the firm of Miller George & Gikonde Advocates was never instructed in the matter; that there is no doubt that Mr. Nyange is on record for the respondents who are alive, and the firm of Miller George & Gikonde Advocates could not possibly have been acting for deceased persons.

16. According to counsel, the critical question is whether counsel for the appellant gave sufficient and plausible reasons to justify reinstatement of the suit. In that regard, counsel expressed that the

argument that mistake of counsel should not be visited on a client no longer holds sway. In support, reference was made to decisions of this Court in *Habo Agencies Limited vs. Wilfred Odhiambo Musingo [2015] eKLR* and *Tana & Athi Rivers Development Authority vs. Jeremiah Kimigho Mwakio & 3 others [2015] eKLR*. In present case, counsel maintained, no attempt was made to explain why there was no appearance by either counsel or by the appellant.

17. Regarding the contention by the appellant that its right to fair hearing was violated, counsel for the respondents submitted that it has not been demonstrated how that right was violated as the appellant was accorded the opportunity to prosecute its case but failed to attend court.

18. We have considered the appeal and the submissions. Although in making the order for the dismissal of the appellant's suit on 16th January 2019 the learned Judge expressed that he was doing so "for want of prosecution", the dismissal was undoubtedly on account of non-attendance. In that regard, Order 12 Rule 3(1) of the *Civil Procedure Rules* provides that:

> "(1) If on the day fixed for hearing, after the suit has been called on for hearing outside the court,only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court."

19. As already noted, following the dismissal of the suit on 16th January 2019, the appellant, by its application dated 21st January 2019 applied to set aside that order and to reinstate the suit. In doing so, the appellant invoked Order 12 Rule 7 of the Civil Procedure Rules among other provisions of the *Civil Procedure Act* which provides that:

> " Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

20. In view of that provision, the learned Judge was exercising judicial discretion when he declined the appellant's application to set aside the order of dismissal. We can only interfere with that decision in the circumstances stated in Mbogo vs. Shah (above) where Sir Charles Newbold stated that:

> " ...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercise of his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

21. In concluding that the appellant had not made out a case for exercise of the court's discretion in its favour, the Judge stated that no discernible reason had been given why the advocate or her client had failed to attend the court. The Judge stated:

> " In the absence of any discernible reason why the Advocate and/or her client failed to attend court, I find not basis upon which to exercise my discretion in their favour."

22. However, in her affidavit in support of the application for setting aside the dismissal order and for reinstatement of the suit, Cynthea Onyango advocate, as already noted, deposed that her failure to attend court on time on 16th January 2019 was due to an inadvertent mistake. She did not explain or clarify the reason why she was late in attending court. She did however state that prior thereto, the firm of Miller George & Gikonde Advocates (which she described as the respondents' "new counsel", having filed an appearance in the matter a few months earlier on 25th September 2018) had commenced

negotiations that had progressed to a valuation of the property being undertaken and that she was under the impression that a consent was going to be recorded in court on 16th January 2019.

23. In our view, whether a consent was to be recorded on 16th January 2019 cannot be a justification for counsel seized of a matter before court to saunter into court at leisure without regard to time. As pointed out, beyond the general statement that she was not in court in time on 16th January 2019, Cynthea Onyango advocate made no effort to give reasons in her affidavit that led to her being late to attend court. Moreover, during the plenary hearing of the application before the learned Judge on 25th February 2019, all Mrs. Obala is recorded as having submitted is, "I was late in arriving in court. It was a mistake" again, without expounding what the mistake was. In those circumstances, the learned Judge cannot be faulted for taking the view that no sufficient explanation was given by counsel why she did not attend court in time.

24. That said, there was material placed before the court through the supporting affidavit of Cynthia Onyango that demonstrated that: on 1st August 2016, Nyange Sharia Advocate filed a notice of appointment and a statement of defence and counterclaim on behalf of six respondents; on 10th August 2016, the firm of Kenga & Company entered appearance and filed a statement of defence in the suit on behalf of "the defendants"; and on 25th September 2018, the firm of Miller George & Gekonde Advocates filed a memorandum of appearance "for the defendants."

25. The record further shows that when the matter was first scheduled for hearing before the learned Judge on 20th April 2017, Mr. Nyange appeared for the respondents. On a subsequent occasion, on 25th September 2018, a Mr. Miller appeared for the respondents before the learned Judge and stated that, "I had spoken to Mrs. Oballa and we are trying to settle the matter. We pray for another date" whereupon the learned Judge re-scheduled the hearing to 16th January 2019. On this date, it was Mr. Nyange, and not Mr. Miller, who appeared for the respondents and prayed for the dismissal of the suit. There was also a valuation report that was exhibited to demonstrate that negotiations with a view to settlement had progressed, even though it is contended that firm of Miller George & Gekonde Advocates had no mandate in the matter.

26. In rejecting the application to set aside the order dismissing the suit, and in declining to reinstate the suit, the learned Judge does not, respectfully, appear to have considered any of this material. Neither does the learned Judge appear to have considered that the respondents had themselves mounted a counterclaim, asserting rights over the suit property. In our view, had the Judge considered the additional material to which we have referred, we think he would, proportionally, have come to a different conclusion. We are persuaded that the learned Judge misdirected himself in failing to consider those matters with the result that he arrived at a wrong conclusion.

27. We are therefore entitled to interfere with his decision, which we hereby do. We allow the appeal. We set aside the order of the Environment and Land Court dismissing the appellant's application dated 21st January 2019. We substitute therefor an order allowing the appellant's application dated 21st January 2019 but award the costs of that application to the respondents. The result is that the appellant's suit, being ELC Case No. 128 of 2015 is hereby reinstated. Each party shall bear its own costs of the appeal.

28. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 3RD DAY OF DECEMBER 2021.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR