



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & J MOHAMMED, J.J.A)

CIVIL APPEAL NO. 16 OF 2017

BETWEEN

PKIECH CHESIMAYA.....APPELLANT

AND

LIMAKORWAI ACHIPA.....RESPONDENT

(Appeal from the Ruling of the Environment and Land Court of Kenya at Kitale, (Obaga, J.) dated 29th August, 2016

in

KITALE ELC CASE NO. 200 OF 2006)

JUDGMENT OF J. MOHAMMED, JA

Background

1. This is an interlocutory appeal against a ruling delivered by the Environment and Land Court (ELC) (Obaga, J.) dismissing the appellant's suit for want of prosecution. The appellant, **Pkiech Chesimaya**, filed suit against **Limakorwai Achipa**, (the respondent) by way of plaint dated 9th December, 2006.
2. A brief background of the suit is that the appellant sought a declaration that he was the sole legal and beneficial owner of the whole Land Parcel No. West Pokot/Chepareria/812 (the suit property) and a permanent injunction restraining the respondent from interfering in any manner whatsoever with the appellant's ownership and occupation of the suit property.
3. The appellant averred that he was the registered owner of the suit property which registration was effected on 1st July, 1998; that the respondent was the registered owner of Land Parcel No. West Pokot/Chepareria/813 which bordered the appellant's property and which registration was effected on 1st July, 1998; that the respondent filed an originating summons against the appellant in Kitale HCCC No. 117 of 2001 (O.S.) claiming adverse possession of 8 acres of the appellant's land and that the said suit was dismissed on 25th October, 2002.
4. The appellant further averred that in 2004, the respondent filed a dispute against the appellant before the Chepareria Land Disputes Tribunal numbered variously as Tribunal case No. 13 of 2004, 19 of 2004 and 28 of 2004; that the appellant notified, the Tribunal (the Tribunal) of the suit previously filed by the respondent before the Kitale High Court (Kitale HCCC No. 117 of 2001 (O.S.)) and its decision; that nonetheless, the Tribunal went ahead to hear the dispute and purported to make an award against the appellant; that the award was adopted as a judgment of the court in Kitale SPMCCC Land Case No. 22 of 2005; that the award of the Tribunal was illegal, null and void as the Tribunal did not have the jurisdiction to determine a claim relating to land registered under the **Registered Land Act (Cap 300 Laws of Kenya) – (now repealed)**; that the dispute was *res judicata*; that the respondent's claim before the Tribunal was not instituted, registered, served, adjudicated, determined and signed in the manner mandatorily prescribed under **section 3 of the Land Disputes Tribunal Act No. 18 of 1990** and that being the first registered owner, the appellant's rights to the suit property are indefeasible save in accordance with the provisions of the **Registered Land Act (now repealed)**.
5. In response, the respondent filed a Statement of Defence dated 17th January, 2007 in which he averred that he is the holder of a valid decree as no appeal was preferred against the award of the Tribunal nor was an application for judicial review made to challenge the same; that the suit was incompetent and an abuse of the due process of the Court as it is a "backdoor" appeal against the award of the Tribunal; that Kitale SPMCCC Land Case No. 22 of 2005 (O.S.) was struck out and not dismissed as alleged by the appellant; that the court did not have

jurisdiction to entertain the suit or make findings on issues of law raised as the matter has not come before the court in the form of an appeal as stipulated in the Land Disputes Tribunal Act.

6. The respondent filed an application dated 7th June, 2016 for dismissal of the appellant's suit under the provisions of **Article 159 of the Constitution, Section 1A(1,2,3) 1B(1)(b) and (d) of the Civil Procedure Act and Order 17 Rule 2(3) of the Civil Procedure Rules, 2010**. The said application also sought for costs of the application. The application was made on the following grounds:-

- “a) That the Respondent/Plaintiff herein filed this case against the Defendant/Applicant on the 9th day of December, 2006**
- b) That summons to enter appearance were served upon the Applicant and who subsequently filed memo and defence on 27th January, 2007 respectively**
- c) That since then, the Respondent has never taken any step to prosecute this suit**
- d) That it is now a period of over 10 years and the delay is extremely long and inexcusable**
- e) That the Applicant/ Defendant is now 78 years old and his memory continues to deteriorate with time and he is likely to suffer gross injustice if the suit is allowed to continue pending**
- f) That the Plaintiff/ Respondent seems to have lost interest in this matter**
- g) That the application has been made in good faith**
- h) That the Applicant is in occupation of the suit land without any interruption from the Plaintiff/Respondent, his agents, servants and or his family members hence his claim against the Defendant holds no water”**

7. The appellant opposed the application and filed a replying affidavit deposing that he has not been able to prosecute the suit due to ill health and old age; that notwithstanding the delay in prosecuting the matter and which was not intentional, the respondent has been in actual possession and user of the suit property hence no prejudice has been occasioned to him.

8. Upon hearing the parties, the learned Judge, (**Obaga, J.**) dismissed the appellant's suit for want of prosecution. The learned Judge found that the appellant did not show sufficient cause why the suit should not be dismissed as he did not produce evidence that he had been sick and in and out of hospital. Moreover, the learned Judge found that the appellant did not appeal against the decision of the Tribunal to the Provincial Appeals Committee as provided under the **Land Disputes Tribunal Act No. 18 of 1990** (now repealed) and that he was trying to get a second bite of the cherry through the suit.

9. Aggrieved by that decision, the appellant preferred this appeal on grounds that the learned Judge: failed to exercise his discretion properly in all circumstances of the case; erred in law and fact when he held that sufficient cause had not been shown to salvage the suit; failed to appreciate that the respondent is in possession of the suit property and proceeding with the suit could therefore not prejudice him; failed to appreciate that the dispute touched on registered land and that the Tribunal had no jurisdiction to adjudicate on the dispute; erred in law when he held that the appellant's suit could not be used to challenge a decision of the Tribunal, without having heard the parties' arguments and that the findings of the learned trial Judge were against the weight of the available evidence.

10. The appellant sought that the appeal be allowed and the ruling of 29th August, 2016 set aside with a further order that the appellant's suit in the ELC be heard on merits, with costs in this Court and in the ELC.

Submissions

11. At the hearing of this appeal, learned counsel, **Mr. Kiarie** appeared for the appellant while learned counsel, **Mr. Samba** appeared for the respondent. **Mr. Kiarie** relied on the appellant's written submissions and list of authorities. Relying on the case of **Ngwambu Ivita v Akton Mutua Kyumbu [1984] KLR 441**, (Ivita case), counsel submitted that the learned Judge failed to consider whether justice could still be done to the parties despite the delay. Moreover, counsel submitted that there was no evidence by the respondent that any circumstances had changed and that a trial could not have been conducted by reason of the delay.

12. **Mr. Kiarie** further submitted that the learned Judge failed to consider whether the respondent would be prejudiced if he would have allowed the matter to proceed to hearing on merits. Citing the case of **Essanji & Another –vs- Solanki [1968] EA 224**, **Mr. Kiarie** contended that the administration of justice should normally require that the substance of all disputes should be investigated and determined on their merits and that error and lapses should not necessarily debar a litigant from pursuit of his rights. Finally, **Mr. Kiarie** further faulted the learned Judge for finding that the appellant was in essence seeking to appeal against the verdict of the Land Dispute Tribunal through the “back door” as the issue could only be determined after a full hearing.

13. **Mr. Samba** relied on the respondent's written submissions and list of authorities. Citing the **Ivita case** (supra), he submitted that the learned Judge exercised his discretion properly in granting the application for dismissal of the appellant's suit; that the learned Judge properly considered that the respondent was holding a decree in his favour in Kitale SPM Land Case No. 22 of 2005 and supported the learned Judge's finding that the suit was a “backdoor” appeal from the award of the Land Dispute Tribunal; and that the issue of whether the Tribunal had jurisdiction to deal with registered land was not properly before the Court.

Determination

14. I have considered the grounds of appeal, the written submissions, the authorities cited and the law. The instant appeal is against the exercise of discretion on the part of the learned Judge to dismiss the appellant's suit for want of prosecution. Thus, in determining this appeal, the Court has to be satisfied that the learned Judge properly applied the laid down principles in dismissing the appellant's suit. In this respect, this Court, in Mbogo & Another v Shah [1968] EA 96 stated as follows:-

“I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its 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 matters which it should have taken into consideration and in doing so arrived at a wrong conclusion...”

15. The respondent filed the application for dismissal of the suit under **Order 17 Rule 2 (3) of the Civil Procedure Rules**. It is clear that the discretion under **order 17** is upon the trial court and not an appellate court. **Order 17 Rule 2 of the Civil Procedure Rules** provides that:-

“ (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”

16. On the test for dismissing a matter for want of prosecution, this Court in Moses Muriira Mainigi & 2 Others v Mainigi Kamuru & Another Civil Appeal No 151 of 2010, adopted the decision of **Chesoni, J.** (as he then was) in the Ivita case (supra) where it was held that:-

“The test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the defendant so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time; the defendant must satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced; he must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff.”

17. Discussing the same issue, **Salmon LJ** in the case of Allen - Vs- Sir Alfred McAlpine & Sons Ltd [1968]1 All ER 543 stated as follows:-

“When delay in the conduct of an action is prolonged or inordinate and is inexcusable, (as is, per Salmon L.J) the natural inference in the absence of credible excuse), and there is substantial risk by reason of the delay that a fair trial of the issues will no longer be possible or that grave injustice will be done to one party or the other, or to both parties, the court may in its discretion dismiss the action straight away, without giving the plaintiff an opportunity to remedy the default, but leaving him to his remedy against his solicitors for negligence.”

18. Further, this Court in the case of Salkas Contractors Limited v. Kenya Petroleum Refineries Limited [2004] eKLR held as follows:-

“The principle that pervades these decisions (Ivita V. Kyumbu (supra) and Allen V. Sir Alfred McAlpine (supra) is that the court has to be satisfied that the inordinate delay is excusable and if so satisfied, then the court has to consider whether justice can still be done to the parties notwithstanding the inordinate delay. If the court is satisfied that justice can still be done, then it will, in the exercise of its discretion, refuse the application for dismissal for want of prosecution. It follows that if the court is not satisfied that the inordinate delay is excusable, then it will, again in its discretion, allow the application and dismiss the suit for want of prosecution.”

19. Simply put, this Court in the case of Ecobank Ghana Limited v Triton Petroleum Co Limited & 5 Others [2018] eKLR observed that:-

“...it is well settled that in considering whether to dismiss a suit for want of prosecution the courts will consider the following guiding principles; whether the delay is inordinate, and if it is, whether the delay can be excused and lastly, whether either party is likely to be prejudiced as a result of the delay or that a fair trial is not possible as a result of the delay.” (Emphasis supplied)

20. Applying the principles outlined above to the instant matter, I find that the learned Judge rightly held that the appellant's delay in prosecuting the suit was inordinate and that no sufficient cause had been shown by the appellant for the delay. This is because the appellant conceded that there was delay in prosecuting the suit and that there was no evidence adduced to prove his illness or cause of delay. The court however failed to consider whether justice could still be done to the parties despite the delay. From the record, no evidence was adduced that any circumstances had changed and that a trial could not have been conducted by reason of the delay.

21. On the question of whether either party is likely to be prejudiced as a result of the delay, it is upon the party making the application to

show the court the prejudice it would suffer as a result of the delay. In this respect, the court in the *Ivita case (supra)*, found that:-

“The Defendant must however satisfy the court that he will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution.”

22. When dealing with the question of whether the learned Judge failed to consider whether indeed the respondent had suffered prejudice, in *John Harun Mwau v Standard Limited & 2 others [2017] eKLR*, this Court observed thus:-

“Nothing was shown by the respondents to demonstrate what prejudice they suffered due to unavailability of witnesses, or that due to the prolonged delay, a key witness had suffered memory loss or did not have a clear recollection of the events leading to the suit. Without evidence to show that the prolonged delay was prejudicial to the respondents’ case, such that a fair trial was thereby rendered impossible, we are not persuaded that the two requisite tests for dismissal were sufficiently fulfilled. We are also cognizant that justice is better served by having matters determined on their merits, unless delay and inaction resulted in intolerable prejudice.”

23. From the supporting affidavit and the submissions before the ELC in the instant matter, I note that the respondent contended that the delay in prosecuting the suit has caused him prejudice and that he would suffer injustice if the suit continues pending, as he is elderly and his memory continues to deteriorate. The learned Judge allowed the respondent’s application and dismissed the appellant’s suit for want of prosecution. The learned Judge took into account the respondent’s contention that he would suffer prejudice due to his age. From the record, I note that the respondent was in occupation of 8 acres of the suit property. The question is whether the learned Judge balanced this prejudice against the appellant’s quest for justice?.

24. The appellant or his representative should have been more prudent or keen in the presentation of this suit. From the record, the respondent had been in occupation of the suit property, which is 8 acres and registered in the appellant’s name. I note that the respondent had previously filed an originating summons (Kitale HCCC No. 117 of 2001(OS) claiming the suit property by adverse possession but the suit was dismissed on 25th October, 2002.

25. In *Essanji & Another vs Solanki [1968] EA 218* it was observed:

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that error and lapses should not necessarily debar a litigant from the pursuit of his rights.”

26. The prejudice that may be suffered by the appellant who is over 89 years old is apparent. The learned Judge failed to consider the prejudice that will be suffered by the appellant who is elderly and weigh it against that which may be suffered by the respondent who was also elderly and in occupation of the suit property. The appellant stands to lose 8 acres of land which is registered in his name. Accordingly, it is prudent to consider whether locking out the appellant from the seat of justice is justifiable in the circumstances. It is clear to me that in refusing to allow the application on the sole ground of delay, the learned judge did not exercise his discretion judicially in the circumstances.

27. In *D. Chandulal K. Vora & Co. Ltd. V Kenya Revenue Authority [2017] eKLR* this Court stated as follows: -

“The main consideration for courts is do (sic) justice to the parties in the suit. The discretion to dismiss a suit or strike out an appeal or pleadings generally should be exercised sparingly judicially and only in deserving cases which cannot be mitigated. The practice nowadays is to elevate substantial justice to the parties over and above the strictures of rules of procedure, which have been stated to be mere hand maidens of justice.

... In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159(2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document.

The court in that regard exercises judicial discretion.”

28. Accordingly, to avoid injustice to both parties and to prevent prejudice to one party, justice behoves me to allow this appeal. The suit should be heard on its merits and since a hearing would cause no greater prejudice to either party while the appellant will be greatly prejudiced if he is locked out from the seat of justice in the circumstances. 29. I further note that the learned Judge considered the appellant’s previous conduct and conduct prior to filing the suit. In this regard, the learned Judge found as follows:-

“When the court is considering an application of this nature, the respondent’s previous conduct and conduct prior to filing of the suit has to be looked at. The applicant herein had filed a claim before the Chepareria Land Disputes Tribunal. The Tribunal ruled in favour of the applicant. The respondent never appealed against the verdict of the Tribunal to the Provincial Appeals Committee as provided under the Land Disputes Tribunal Act No. 18 of 1990 (now repealed). He did not even file a Judicial Review Application in the High Court. He only came to file this suit in which he is faulting the process which led to the verdict of the Tribunal which was adopted as judgment of the court. What in essence the respondent is seeking to do is to appeal against the Tribunal’s verdict through the back door. Under the repealed Act, the procedure for faulting such decisions was clear. One could not file a separate suit to challenge the decision of the Tribunal other than in the manner provided for in the Act. It is apparent that the respondent failed to act as per the repealed Act and he is now trying to get a second bite through this suit.”

30. In my view, the appellant's previous conduct and conduct prior to filing the suit was not an issue properly before the court in determining whether to dismiss the suit for want of prosecution. Therefore, I am inclined to agree with the appellant that the issue could only have been competently dealt with by the court after a full hearing.

31. In the circumstances, in not taking into consideration matters which he should have taken into consideration, I find that the learned Judge erred in dismissing the appellant's suit for want of prosecution. I would therefore allow this appeal but with no orders as to costs. The Ruling and Order of the Environment and Land Court dated and delivered on 29th August, 2016 is hereby set aside and the Kitale Environment and Land Court Land Case No. 200 of 2006 is hereby reinstated. I order that the appellant do proceed to fix the suit for hearing within 60 days from the date hereof.

Dated and Delivered at Nairobi this 3rd day of April, 2020.

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR

JUDGMENT OF H. OKWENGU, JA

I have read the judgment in draft of J. Mohammed, JA. I am in agreement that this appeal ought to be allowed as the learned Judge did not properly exercise his discretion having taken into account matters he should not have taken into account and failed to consider relevant matters.

In the circumstances, the orders will be as proposed by J. Mohammed JA.

This ruling has been delivered in accordance with Rule 32 (3) of the Court Rules as Githinji, JA has since retired.

Dated and Delivered at Nairobi this 3rd day of April, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL