IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & OTIENO-ODEK, JJ.A)

CIVIL APPEAL NO. 45 OF 2015

BETWEEN

FRANCIS OSIKE MASABA .....1ST APPELLANT

SEMEYO NYONGESA MASABA .....2ND APPELLANT

AND

HENRY KHAKHUBI WEDODO .....RESPONDENT

(An Appeal from the Ruling of the High Court of Kenya at Busia (S. M. Kibunja, J.) dated 13th November, 2014

in

HCCA No. 10 of 2010)

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JUDGMENT OF THE COURT

The appellants moved the High Court at Busia, (S. M. Kibunja, J.) by way of Notice of Motion seeking to set aside the decree of the High Court dated 19th November, 2012; stay of execution of the judgment and decree in Busia PMCC No. 154 of 2004 pending hearing and determination of the application and costs of the application. The five grounds in support of the application were that the High Court was partial in its judgment; the order of consolidation was made without jurisdiction or had It been applied for; the appellants had not sought for adjournment and that all they had requested for were directions from the Judge with regard to the two appeals, that is, Civil Appeal numbers 19 of 2007 and 10 of 2010 respectively. The supporting and supplementary affidavits in support of the application merely reiterated and expounded on the above grounds. It would appear that the respondent did not file any papers in response to the application.

Briefly, the background of this appeal is that the appellants filed HCCA NO. 10 of 2010 to challenge the judgment in Busia PMCCC NO. 154 of 2004 which ordered lifting of cautions which the appellants had registered on land parcel number Bukhayo/Kisoko/348, hereinafter “the suit land”. The appellants had also filed HCCA NO. 19 OF 2007 challenging the lower Court’s ruling restraining them from interfering with the suit land. The two appeals were consolidated on 19th November, 2012, when the appellants and counsel for the respondent appeared before Kimaru, J. for hearing of the two appeals. The appellants sought adjournment of the hearing of the appeals on the grounds that they were not ready to prosecute them. The application was opposed by counsel for the respondent. Eventually the application was declined. They were then directed to proceed with the prosecution of the appeals but they insisted on the adjournment they had sought earlier and which the Court had already declined. Subsequently, the Court was left with no choice but to dismiss the two appeals for want of prosecution thus prompting the appellants to file the application to set aside the order dismissing their appeals, whose ruling is the subject of the instant appeal.

The learned Judge in his considered ruling concluded that the appellants request to consolidate the two appeals was on record contrary to their submissions; that they sought an adjournment which was declined and their appeal dismissed on grounds that they were not ready to prosecute it; that each party was given an equal opportunity to be heard before the orders were made contrary to the allegations of the appellants; that no particulars were given to suggest that the appellants were discriminated against and that the Court had the obligation to ensure justice was not delayed; that the appellants had not demonstrated before him that they were now prepared to prosecute the appeal should the orders be set aside; nor they would suffer prejudice should the order not be set aside as the order lifting cautions was not about interests and privileges in the suit land. Accordingly, the application was dismissed with no order as to costs.

Aggrieved by the decision, the appellants filed the present appeal in which they raised six grounds of appeal that the learned Judge erred in

law by; neglecting to hear the appellants on their application; failing to note that there were some other cases pending in other Courts over the same suit land; misdirecting himself that the caution was lodged without any cause; failing to consider that interested parties Dickson Makokha and the 2nd appellant had a case claiming a share of the suit land; failing to address himself on the supplementary evidence that the respondent held the suit land in trust for the appellant for over 20 years; and failing to consider findings in succession cause No. 120 of 2014 and tribunal case No. 14 of 2007.

When the appeal came up for hearing the appellants were present in person while there was no representation by the respondent though served with the hearing notice. The appellants relied on their written submissions and opted not to highlight the same.

The appellants submitted that they were not heard when the two appeals were consolidated. That it was true they applied for an adjournment. Therefore they had not failed to prosecute the appeal. It was their contention that they were not given an opportunity to file submissions or prepare to prosecute the appeals as is the practice after consolidation. That the respondent, who is the appellants' brother, had been holding the suit land in trust for the 2nd appellant and Dickson Makokha Masaba (deceased) and that the suit land was to be shared equally among the three of them. They therefore urged us to reinstate the caution so as to safeguard the interests of the other two family members.

We have considered the record, submissions by the appellant and the law. The issue for determination is whether or not the learned Judge judiciously exercised his discretion in dismissing the appellants' application dated 11th December, 2012. We must however at once point out that the appellants' written submissions were irrelevant to the appeal. Indeed, they had nothing to do with their application dated 11th December, 2012. The submissions had everything to do with the decision of Kimaru J which is not the subject of this appeal.

Be that as it may, the main issue giving rise to the present appeal revolves around a family dispute regarding ownership of the suit land. The undisputed facts are that the parties to this appeal are related by being brothers and a son or nephew. The suit land is registered in the name of the respondent. It is not clear what prompted the appellants to register caution on the suit land but the said caution was nonetheless removed in Busia PMCC NO. 154 of 2004. The appellants appealed against the decision in the above suit and the appeal was dismissed on 19th November, 2012 which impelled the appellants to file the application before the High Court to set aside the order of dismissal. Their application was also dismissed thus prompting this appeal.

It is trite law that setting aside a judgment or ruling is a matter of absolute judicial discretion limited only by the justice of the case concerned. The Supreme Court of India, Civil Appellate Jurisdiction in K. Praksh v B.R. Sampath Kumar, Civil Appeal No.9047 of 2014 quoting with approval the King's Bench in Rookey's Case, 77 ER 209, described the exercise of discretion as follows:

"The King's Bench in Rookey's Case [77 ER 209; (1597) 5 Co.Rep.99] it is said: "Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to 16 Page 17 be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with". Emphasis ours.

An appellate Court is warned against readily interfering with the said discretion. Therefore, this Court must be slow to interfere with the exercise of discretion by the trial Court as was stated in: Mbogo & Ano. v Shah, (1968) EA 93; Mrao Ltd v First American Bank of Kenya Ltd, CA 39 of 2002; and Jomo Kenyatta University of Agriculture & Technology v Mussa Ezekiel Oebah, CA 217 of 2009.

The Court's discretion to set aside a judgment or an order for that matter is intended to avoid an injustice or hardship as a result of among other things, the laxity or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. In the case of Njagi Kanyugunguti & 4 Others v David Njeru Njogu, CA 181 of 1994 the Court held inter alia:

> "The discretion of the Court is not intended to assist a party who had deliberately sought to obstruct or delay the course of justice".

Similarly, in Gardner versus Jay, (1937) 2 ALL ER 646 at 655 Bowen LJ, in discussing the discretion of the Judge stated:

> "That discretion, like other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage of justice in the exercise of it will be reviewed".

In Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others, [2015]eKLR, this Court held that in determining whether to exercise the discretion in a party's favour, the Court pays regard to the damage sought to be forestalled vis-a-viz the prejudice to be visited on the opposing party. In the instant appeal, no prejudice has been alleged or inferred. Our view is that the appellants stood to suffer no prejudice as the orders appealed against did not interfere with their interests and privileges in the suit land as rightly held by the learned Judge.

We have considered the reasons given by the appellants for not being able to prosecute their appeals as well as the finding by the learned Judge that the appellants were not even ready to prosecute the appeals should the orders of the Court issued on 19th November, 2012 be set aside. The explanation given by the appellants for applying for an adjournment as was intimated in their written submissions was that they needed more time to prepare. The appeal before the High Court was by the appellants. They came to court knowing very well that the two appeals were scheduled for hearing. We do not see how the order for consolidation which they themselves asked for would have impacted negatively on their preparedness. Further, the Judge found the appellants to be less than candid to the court. The appellants claimed that they never sought the consolidation of the two appeals nor did they apply for adjournment. They also claimed to have been denied a hearing. All these allegations are not borne out by the record. The record is clear that the appellants applied for consolidation of the two appeals, followed by the application for adjournment. They were thereafter given an opportunity to be heard before the orders were made. A party who is not candid with the court is undeserving of the exercise of the court's discretion in his favour. These are the considerations that informed the Judge's refusal of the application. We do not see where the Judge erred in taking into account the foregoing.

The Judge also considered the effect of lifting caution placed on the suit land. He took the view and rightly so in our view that the order in Busia PMCC No. 154 of 2007 only lifted the caution on the suit land and was not about interests and privileges on the suit land, so that the appellants could not suffer any prejudice with such removal. That remains the position to date. If anything it might galvanize the parties into resolving this long standing dispute once and for all. As long as the caution remained intact and it does appear to us just like the lower court found that the appellants were not keen to move forward and have the dispute resolved. They were simply contend with the caution being in situ.

On the whole, we are satisfied that the learned Judge properly exercised his jurisdiction in favour of dismissing the appellants' application. Accordingly, we dismiss this appeal with no order as to costs.

Dated and delivered at Kisumu this 31st day of July, 2019.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.