



IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPEAL NO. 108 of 2017

BETWEEN

ELIUD MUKHISA NALIANYA ..... 1<sup>st</sup> APPELLANT

JOHN MABONGA ..... 2<sup>nd</sup> APPELLANT

AND

JOSEPH WANJALA FULAFU ..... 1<sup>st</sup> RESPONDENT

JOSEPH WANJALA SIMON ..... 2<sup>nd</sup> RESPONDENT

*(Being an appeal from the ruling of the High Court of Kenya at Bungoma, (S. N. Mukunya, J.) dated 27<sup>th</sup> September 2016*

*in*

*Bungoma High Court Case No. 69 of 2010)*

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JUDGMENT OF THE COURT

1. The appellants and respondents are brothers. Their father was the late Paulo Fulafu who died in 1969. At the time of his death, he was the registered proprietor of Land Parcel No. Bokoli/Chwele/751 which has now been sub-divided to give rise to two titles namely Bokoli/Chwele/1191 and Bokoli/Chwele/1192.
2. By a Plaintiff dated 5<sup>th</sup> July 2010, the appellants filed suit against the respondents. In the plaintiff, it is alleged that on or about 16<sup>th</sup> February 1981, the 1<sup>st</sup> respondent fraudulently caused the late Paulo Fulafu's land to be transferred to his name without regard to the interest of the appellants when the said appellants were in actual possession of the property. That the 1<sup>st</sup> respondent secretly and fraudulently concealed the transfer to other family members and sub-divided the land giving a portion thereof, namely Bokoli/Chwele/1192, to the 2<sup>nd</sup> respondent.
3. In their plaintiff, the appellants sought an order for cancellation of land titles Bokoli/Chwele/1191 and Bokoli/Chwele/1192, re-transfer of the land back to be Bokoli/Chwele/751 and reverting it to the name of the deceased Paulo Fulafu.
4. The record of appeal shows that on 9<sup>th</sup> November 2015, the suit was fixed for hearing before the trial court. The hearing date was fixed by consent on 6<sup>th</sup> February 2015. The appellants (as plaintiffs) were not present in court for the hearing. One of the respondents/defendants was present in court ready to proceed with the hearing of the suit. Since the appellants were not present in court to prosecute their claim as per the plaintiff, the learned judge dismissed the suit under **Order 12 rule 3 (1)** of the **Civil Procedure Rules**.
5. Upon dismissal of the suit, the appellants filed an application dated 22<sup>nd</sup> July 2014 to set aside the order dismissing the suit for non-attendance. The appellants prayed for an order of re-instatement of the suit. The ground in support of the application for reinstatement was that the suit was dismissed on 9<sup>th</sup> November 2015 and the original plaintiff had died on 21<sup>st</sup> February 2015. That the death of the original plaintiff had caused breakdown of communication between the appellants and their counsel on record.
6. Upon hearing the parties on the application, the learned judge delivered a ruling on 27<sup>th</sup> September 2016 dismissing the application with

costs. In dismissing the application, the judge expressed as follows:

*[2] That going by the death certificate filed herein, by the time the suit was dismissed, the 3<sup>rd</sup> defendant was alive. That period between the filing of the case and fixing was 9 months. That there is no explanation why the applicants were unable to communicate over that period. The counsel argued that there were two other plaintiffs in this case and there is no explanation why those two never went to see the advocate or visit the court registry. .... When the suit was fixed for hearing, the 3<sup>rd</sup> defendant was still alive. There was over 2 weeks before his death (sic). There were other parties to the suit who could have pursued their lawyer and the court. I am not satisfied with the reasons given for not attending the court. This application is dismissed with costs.*

7. Aggrieved by the dismissal of the application, the appellants have filed the instant appeal citing the following grounds in their memorandum:

(i) That the learned judge's refusal to reinstate the suit was unjust in the circumstances of the case.

(ii) That the judge had no good reason for refusing the appellants reason or explanation for their absence in court on 9<sup>th</sup> November 2015.

(iii) That being a land matter and taking into account the limiting provisions of **Order 12 Rule 6 (2)** of the **Civil Procedure Rules**, the learned judge's decision did not address the ends of justice.

8. At the hearing of the instant appeal, learned counsel, Mr. Emmanuel Kipkurui holding brief for Mr. J. S. Khakula & Co. Advocate appeared for the appellants. Learned counsel Mr. J. O. Makali appeared for the 2<sup>nd</sup> respondent. Counsel for the 2<sup>nd</sup> respondent informed us that the 1<sup>st</sup> respondent had never participated in the proceedings before the trial court and this Court.

9. Whereas the appellant filed written submissions in the appeal, the 1<sup>st</sup> respondent opted to make oral submissions.

#### **APPELLANTS SUBMISSIONS**

10. The appellants relied on their written submissions dated 14<sup>th</sup> October 2019. It was submitted that the learned judge's refusal to reinstate the appellant's suit was unfair and unjust. That the appellant's counsel Mr. Kweyu informed the trial court on 9<sup>th</sup> November 2015 that the link between the advocate and client was the 3<sup>rd</sup> plaintiff who had died on 15<sup>th</sup> February 2015. That as a result of the death of the 3<sup>rd</sup> plaintiff, counsel was unable to get instructions. That the death of the link person is a good cause under **Order 12 Rule 3** of the **Civil Procedure Rules**.

11. It was further submitted that the learned judge did not have a good reason not to reinstate the suit. That the judge should have exercised his discretion and found that the death of the 3<sup>rd</sup> plaintiff was a sufficient explanation for failure of counsel to attend court.

12. That on the day the suit was dismissed, the defendant could not have proceeded with the defence case as the 1<sup>st</sup> defendant was also absent from court. It was further submitted that the judge erred as he failed to address the ends of justice. That the judge knew very well that failure to reinstate the suit dealt a death blow to the appellants' suit under **Order 12 rule 6** of the **Civil Procedure Rules**. That the failure to reinstate the suit heavily prejudiced the appellants who are fighting for their rights in their father's land and they can be disinherited if the suit is not reinstated.

13. In support of the submissions made, counsel cited on the case of **George Gatere Kibata –v- George Kuria Mwaura & another [2017] eKLR** where it was stated what matters is substantive justice through a judicious exercise of discretion.

#### **2<sup>nd</sup> RESPONDENT'S SUBMISSIONS**

14. The respondent submitted that the appellants sought to challenge the exercise of discretion by the learned judge. Counsel submitted that the judge did not capriciously exercise his discretion to decline to reinstate the appellants' suit. That when the suit was dismissed the appellants were not present in court. That the learned judge was satisfied that no good reason had been given for non-attendance in court by the appellants on 9<sup>th</sup> November 2015.

15. That in this matter, the appellants have not pointed out any misapprehension of facts by the learned judge to warrant the setting aside of the order dismissing the suit. Counsel submitted that the judge addressed his mind to the provisions of **Order 12 rule (3)** of the **Civil Procedure Rules** and was satisfied that no good course or reason was given for non-attendance.

16. The respondent further urged that the appellants never appealed against the order dismissing the suit but instead opted to apply for review and setting aside of the order. That the application before the learned judge for review was an ingenious way of appealing out of time the order dismissing the suit.

#### **ANALYSIS and DETERMINATION**

17. The appeal herein is against an order by the learned judge refusing to review and set aside an earlier order dismissing the appellants' suit for non-attendance. Under **Order 12** of the **Civil Procedure Rules**, the consequences of non-attendance by a party to a suit are stated. **Rule 13** is specific that when only the defendant attends and admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.

18. The record of proceedings of 9<sup>th</sup> November 2015 is as follows:

*Court: This matter is five years old. The case was fixed by consent on 6<sup>th</sup> June 2015. Plaintiffs are not present. The allegation that the 3<sup>rd</sup> plaintiff is dead is not backed by any document. No death certificate and no burial permit. There is no communication of that fact to the 2<sup>nd</sup> defendant who is in court and ready to proceed. No evidence is forthcoming from the plaintiffs. Since the 2<sup>nd</sup> defendant is opposing the adjournment and also ready to proceed and since he has no counterclaim and since he concedes to no part of the claim, this suit is dismissed under Order 12 rule 3 (1) of the Civil Procedure Rules with costs to the 2<sup>nd</sup> defendant.*

19. In this appeal, the appellant submitted that when the suit was dismissed on 9<sup>th</sup> November 2015, counsel for the appellant Mr. Kweyu informed the learned judge that the 3<sup>rd</sup> plaintiff, who was deceased, was the link between the appellants and their counsel. We have examined the record of proceedings before the learned judge on 9<sup>th</sup> November 2015. The proceedings were as follows:

*Kweyu – for Khakula for the plaintiff.*

*I am told the third plaintiff is dead. I do not know when he died. I have no death certificate or burial permit. The 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs are not in court. That is all.*

20. The record of proceedings does not support the submissions made before this Court by the appellant. The assertion that the 3<sup>rd</sup> plaintiff who died was the link between the appellants and their advocate is not borne out by the record. The narrative of a link person is thus an afterthought aimed at misleading this Court.

21. Further, we note that the order by the learned judge issued on 9<sup>th</sup> November 2015 dismissing the appellants' suit was an exercise of discretion. The Supreme Court in **Apungu Kibira – v- IEBC & Omulele, Supreme Court Petition No. 29 of 2018**, held that an appellate court will rarely entertain an appeal emanating from the exercise of discretion unless it is exercised whimsically. (See also **Francis Wambugu –v- Babu Owino, Supreme Court Petition No. 15 of 2018**). In **Deynes Muriithi & 4 others – v- Law Society of Kenya & Another; SC Application No. 12 of 2015; [2016] eKLR** the Supreme Court stated *inter alia* that the Court may only interfere with the exercise of discretion by another Court where there is plain and clear misapplication of the law.

22. In the instant matter, we remind ourselves dicta from **Mbogo & Another- vs- Shah (1968) E.A. 93** at page 95, where **Sir Charles Newbold P.** held:

*“...a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising 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...”*

23. Comparatively, in the Indian case of **Aribam Tuleswar Sharma -v- Ariban Pishak Sharma (1979) 45CC 389, 1979(11) UJ 300 SC**, it was held that:

*“The power of review may be exercised on the discovery of new and important matter or evidence which, after exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made. It may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercise on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits that would be province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court.”*

24. In the instant matter, there is no new fact that was discovered by the appellants that could justify the learned judge to review and set aside the order dismissing the appellants' suit for non-attendance. The appellants have not demonstrated to our satisfaction that in declining to reinstate the suit, the judge misapprehended or misapplied the law or indeed exercised his discretion injudiciously.

25. A ground urged in this matter is that the refusal by the judge to reinstate the suit was unjust as it prejudiced the appellants from pursuing their rights over their deceased's father's land. The record shows that the hearing date of 9<sup>th</sup> November 2015 was taken by consent of all the parties. There is nothing on record to show that the appellants did not personally have knowledge of the hearing date. In **Utalii Transport Co. Limited and 3 others –v- NIC Bank & another [2014] eKLR** it was stated that it is the primary duty of the party to take steps to progress their case since they are the ones who drag a defendant to court.

26. In this matter, when the suit was fixed for hearing before the learned judge, there were three plaintiffs. Even if the 3<sup>rd</sup> plaintiff was deceased, there is nothing on record to show what the appellants did to follow up their case and attend court.

27. It was further submitted that the dispute between the parties is a land matter that ought to be heard and determined on merits. Counsel urged that it is not only unjust, but prejudicial to the appellants if their suit is not reinstated. We note that there is no rule or principle of law that disputes involving land absolve a party from timeously following the rules, directions and orders of the Court. The hearing date was taken by consent. The appellants as plaintiffs in the suit had duty to prosecute their case on the scheduled date considering, as the learned judge noted, the case was already five years old.

28. For the various reasons stated above, we find this appeal has no merit and is hereby dismissed with costs.

**Dated and delivered at Eldoret this 28<sup>th</sup> day of November, 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.**