Kirimi v Mwirichia & 2 others (Environment and Land Appeal E033 of 2023) [2024] KEELC 1739 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEELC 1739 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E033 OF 2023

CK YANO, J

APRIL 11, 2024

BETWEEN

JOHN MARK KIRIMI ..... APPELLANT

AND

M'RUTERE MWIRICHIA ..... 1ST RESPONDENT

PETER GITONGA NKABU ..... 2ND RESPONDENT

FRANKLIN MATUMBI MWORIA ..... 3RD RESPONDENT

JUDGMENT

Background

1. The appellant filed suit against the respondents being Nkubu SPM ELC No. 53 0f 2017. The suit was dismissed on 5th July, 2022 for want of prosecution.

2. The appellant then filed a notice of motion application dated 28th November, 2022 seeking to have the suit reinstated. By a ruling delivered on 3rd May 2023, Honourable S.K Ngetich SPM dismissed the said application with costs to the respondents.

3. Being dissatisfied with the said ruling, the appellant filed this appeal on the following grounds-;

    1. The learned magistrate erred in law and in facts in failing to reinstate the suit for hearing on merit when there were sufficient grounds to do so.

    2. The learned magistrate erred in law and in facts in dealing with superfluous issues thus failing to arrive to a correct finding.

    3. The learned magistrate erred in law and in facts in failing to consider the circumstances of the appellant case in view of justice and fairness and as such he arrived to unjust and unfair ruling.

4. The learned magistrate erred in law and in fact in deciding the entire ruling against the weight of the law and evidence.

4. The appellant prays for the appeal to be allowed and the suit be reinstated for hearing on merit.

5. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 25th January, 2024 through the firm of L. Kimathi Kiara & Co. Advocates while the 1st and 2nd respondents filed theirs dated 1st March 2024 through the firm of Mbaabu M'Inoti & Co. Advocates.

Appellant's Submissions

6. With regard to ground 1 of the appeal, it was submitted on behalf of the appellant that the trial court's ruling was wrong since the trial court misdirected itself and acted on matters on which it should not have acted and failed to take into consideration matters which it should have taken into consideration.

7. The appellant's counsel relied on the case of Pkiech Chesimaya v Limakorwai Achipa [2020] eKLR which quoted the case of Ecobank Ghana Limited v Triton Petroleum Co. Ltd & 5 others [2018] EKLR and the case of Mbogo & another v Shah (1968) EA 96. It was the appellant's submission that even if the delay was inordinate, the learned trial magistrate failed to consider whether justice could still be done to the parties despite the delay. It was the appellant's submissions that the grounds that should have made the trial magistrate to reinstate the appellant's suit for hearing and determination on merit are that by dismissing the appellant's suit, the appellant suffered great prejudice and injustice, that the subject matter is land registered in the appellant's name and the appellant has been in occupation of the subject matter for 47 years and has made extensive developments thereon. That there is no evidence which was adduced to the effect that a trial could not have been conducted by reason of the delay as stated in Pkiech Chesimaya case.

8. Regarding ground 2 of the appeal, it was submitted on behalf of the appellant that the learned trial magistrate erred in law and facts by considering superfluous issues, to wit, about the appellant acting in person, withdrawal of the advocate by the appellant and other cases filed in other courts. It is submitted that these are not factors required in law in determining whether or not to dismiss a case for want of prosecution.

9. With regard to ground 3 of the appeal, it was submitted on behalf of the appellant that the following circumstances of the appellant's case should have been considered by the trial magistrate in order to allow his application in the interest of justice and fairness: that the suit land is registered in the appellant's name, that the appellant has been in occupation and possession and carried out extensive development for over 47 years, that the respondents illegally subdivided the appellant's original parcel of land and now selling the resultant subdivisions to the detriment of the appellant, that the appellant's right to ownership of property is protected under the law, and that Article 159 (2)(d) of *the Constitution* shields the appellant against procedural technicalities. That had the trial magistrate considered those circumstances, he could have allowed the appellant's application.

10. With regard to ground 4 of the appeal, it was submitted on behalf of the appellant that it is trite law that for one to succeed in an application to dismiss a suit for want of prosecution, he must show the court the prejudice he would suffer as a result of the delay. The appellant relied on the case of Ivita v Kyumbu (1984) eKLR and submitted that in this case, the respondents had no iota of evidence to demonstrate to the trial court that they were likely to suffer any prejudice due to the delay and that a trial would not have been possible due to the delay. The appellant also relied on the case of Essamji & another v Salanki (1968) EA 218 and urged the court to set aside the trial magistrate's ruling and allow this appeal with costs.

1st and 2nd Respondents' Submissions

11. The 1st and 2nd respondents' counsel gave a background of the case. With regard to ground 1 of the appeal, it was submitted on behalf of the 1st and 2nd respondents that the trial court rightly dismissed the appellant's suit and that no sufficient grounds were provided by the appellant in his application dated 28th November, 2022 before the trial court for the court to reinstate the suit. It is further submitted that the appellant did not explain the inordinate delay in prosecuting the matter, both before the trial court and this court. That the appellant seems to be belaboring under the misapprehension that it would not matter if a matter remains pending in court for a period of over 27 years for no sufficient reason whatsoever so long as the justice can still be done despite the delay. It is the respondents' submission that justice delayed is justice denied and that the right of the appellant to be heard must be balanced against the equally weighty right of the respondents to be freed from the burden of a never ending case. That litigation must come to an end one way or another.

12. The 1st and 2nd respondents submitted that it is clear from the proceedings at the trial court that the appellant had lost interest in prosecution of the matter and now only wishes to frustrate the respondents. The respondents pointed out that prior to the dismissal on 5th July, 2022, the case had been originally filed way back in the year 1995 as Meru HCC 27 of 1995 and had been pending before the trial court for well over 27 years. That since the commencement of the case, the same never proceeded for hearing of the man suit due to the appellant's laxity who filed numerous interlocutory applications which only served to delay the matter. It is submitted that it is for that reason that notice to show cause was issued by the trial court, not only once but twice, hence its dismissal on 5th July, 2022. It is therefore the 1st and 2nd respondents' submission that the appellant by his conduct is guilty of laches in prosecution of the case and as such is not entitled to the equitable discretionary orders sought in his application of 28th November, 2022 nor the present appeal. It is submitted that the present appeal just like the application of 28th November, 2022 before the trial court is unmerited and ought to be dismissed with costs.

13. With regard to ground 2 of the appeal, it was submitted on behalf of the 1st and 2nd respondents that orders for reinstating a matter which has been dismissed by court are equitable and/or discretionary which are to be exercised at the discretion of the court depending on the facts and circumstances in a matter. It is submitted that for the court to exercise its discretion, it is incumbent that all facts of a case and/or circumstances that led to the dismissal of the matter are taken into consideration. The respondents pointed out that the appellant in his affidavit in support of the application of 28th November, 2022 falsely stated on oath that neither he nor his advocate were served with the notice to show cause dated 11th April 2022 hence his absence on the date of the notice to show cause on 5th July, 2022, yet it was noted by the trial court that the appellant was served personally since at the time he had withdrawn his advocates on record. That the trial court also noted that the appellant despite blaming the inordinate delay in prosecuting the matter on his advocates, he reinstated the same advocates to file the application to reinstate the suit on 28th November, 2022. That the appellant sat on his hands and failed to prosecute the case for 1 year and 5 months thus prompting the trial court to issue a notice to show cause which culminated in the dismissal on 5th July, 2022.

14. With regard to ground 3 of the appeal in which the appellant argued that his suit against the respondents is merited and that the trial court should have considered this before dismissing the application to reinstate the suit, it was submitted on behalf of the 1st and 2nd respondents that the same was not argued by the appellant before the trial court and is attempting to now have this appellate court make a unilateral determination on merits of a case that the appellant failed to prosecute before the trial court. The court was urged to refrain from doing so.

15. It was also submitted on behalf of the 1st and 2nd respondents that ground 4 of the appeal is unmerited and must also fail. In this regard, learned counsel for the 1st and 2nd respondents referred the court to their submissions on grounds 1, 2 and 3 above.

16. The 1st and 2nd respondents relied on the case of Mbogo & another v Shah (1968) EA 93 and submitted that when the court is called upon to exercise its discretion judiciously, it is imperative that it looks into the conduct of the parties seeking the discretion, hence the maxim "equity aids the vigilant." That there was inordinate delay in prosecution of the matter before the lower court and the appellant is guilty of laches, and by invoking the Judicial discretion is now deliberately trying to obstruct or delay the course of justice by filing an unmerited appeal. The court was urged to dismiss the appeal with costs to the respondents. The 1st and 2nd respondents relied on the case of Savings and Loans Limited v Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002 and submitted that justice demands that litigation be conducted efficiently and that the appellant should bear the responsibility for the lackadaisical way he handled his case in the lower court. The court was urged to dismiss the appeal with costs to the respondents for being devoid of merit and an abuse of the process of this Honourable court.

Determination

17. I have perused the record of appeal. I have also 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 trial magistrate to dismiss the appellant's notice of motion application dated 28th November, 2022 which sought to set aside the dismissal of the appellant's suit for want of prosecution made on 5th July, 2022 and reinstate the suit for hearing on merit. Thus, in determining this appeal, the court has to be satisfied that the learned magistrate properly applied the laid down principles in refusing to reinstate the appellant's suit.

18. The Court of Appeal in Mbogo 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 ..."

19. From the record it is clear that the matter was filed on 3rd February, 1995 in the High Court of Kenya at Meru as Civil suit Number 27 of 1995. The case was later transferred to the Magistrate's court at Nkubu and given a new number ELC No. 53 of 2017. The record shows that from the time the suit was filed on 3rd February, 1995 upto 25th March 2019, the matter never proceeded for hearing of the main suit. All that time, the case only came up for various interlocutory applications and mentions. The record shows that on 25th March 2019, the matter came up for dismissal for want of prosecution. The appellant who by then was represented by an advocate, sought leave of the court to allow him proceed with the case without an advocate. The appellant was granted six Months within which to put in the necessary documents, if need be to enable him proceed in person and prosecute the matter to its finalization. The record further shows that the appellant was put on notice that at the lapse of the six months if no action will have been taken in the matter, the same shall stand dismissed for want of prosecution without any further notice to the parties. It appears from the record that no action was taken in the matter within those six months.

20. On 13th November, 2019, the matter came up for a notice to show cause under Order 17. The trial court again granted the parties six months within which to prosecute the matter to its logical conclusion

failure to which the same would stand dismissed for want of prosecution without further notice to the parties. On 10th August 2020, the suit against the 1st defendant in the case at the lower court was withdrawn as he was already deceased. It appears from the record that the matter was never prosecuted as directed by the trial court save for fresh interlocutory applications.

21. The suit was ultimately dismissed on 5th July, 2022 for want of prosecution. The applicant then filed the application dated 28th November, 2022 seeking to have the suit reinstated. By its ruling dated 3rd May, 2023, the trial court found that the application had no merit and dismissed it with costs. That prompted the appellant to file the present appeal.

22. 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 to 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 directions given under this order."

23. A reading of Order 17 Rule 2 is clear that a suit qualifies to be dismissed for want of prosecution if no application has been made or step taken in the suit by either party for at least one year preceding the notice to show cause given by the court or the presentation of an application seeking dismissal of the suit.

24. My perusal of the Lower Court proceedings and file discloses that the suit which was filed on 3rd February, 1995 had been pending before the court for about 27 years. The same was dismissed on 5th July, 2022 for want of prosecution. The appellant's application dated 28th November, 2022 was seeking to set aside the order dismissing the suit for want of prosecution and for the suit to be reinstated for hearing on merit. However, as rightly found by the learned trial magistrate, the appellant did not give a reasonable explanation for failing to prosecute the matter for about 27 years and for failing to attend court and show cause why the case should not be dismissed for want of prosecution. Instead, the appellant was out to mislead the trial court that he was not informed by his advocate of the hearing of the notice to show cause when the record clearly showed that by then, the appellant was acting in person and had actually been personally served with the notice to show cause. The record further shows that the trial court had on two previous occasions directed the appellant to prosecute the case within six months lest it be dismissed. It is not contested that there had been inordinate delay in prosecuting the case. In my view, the learned trial magistrate was justified in declining to reinstate the suit which had been dismissed after remaining pending in court for 27 years. The unexplained delay was clearly inordinate and inexcusable. It was incumbent upon the appellant to give sufficient reason for failing to prosecute his case for close to 27 years, and also for failing to attend court at the hearing of the notice to show cause. The prolonged delay no doubt prejudiced the respondents herein. Even one of the defendants in the case died during the pendency of the case. It is trite law that justice delayed is justice denied. The overriding objection under the *Civil Procedure Act* requires that a party to civil proceedings or an advocate for such a party is under a duty to assist the court in facilitating the just and expeditious disposal of suits. Even Article 159 (2)(b) provides that Justice shall not be delayed.

25. Based on the material on record, it is my view that the learned trial magistrate was justified in arriving at the decision he made. The findings and holding of the learned magistrate were well founded and I find no basis to interfere with the same.

26. In the result, I find that the appellant's appeal is devoid of merit and the same is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MERU THIS 11TH DAY OF APRIL 2024

In the presence of-;

Court Assistant – Tupet

Ms Githinji holding brief for Mbaabu M'Inoti for Respondents.

Ms Mugo Holding brief for Kimathi Kiara for Appellant

C.K YANO

JUDGE