IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME JJ.A)

CIVIL APPEAL NO. 48 OF 2017

BETWEEN

CHARO THALI NGALA.....APPELLANT

AND

1. THE REPUBLIC

2. DISTRICT MAGISTRATE'S COURT AT KALOLENI

3. JAMES KALUKO KYALO

4. KATANA KITUKU KACHECHE

5. JAMES MWANGANGI.....RESPONDENTS

(Being an appeal from the decision of the Environment and Land Court at Mombasa, (Cherono, J.) dated 31st March, 2017

in

Judicial Review Application No. 5 of 2000)

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JUDGMENT OF THE COURT

[1] This is an appeal against the dismissal of suit for want of prosecution under Order 17 rule 2 of the Civil Procedure Rules, this rule provides that;-

> ***"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"***

The proceedings in question were in the form of an application for Judicial Review; filed by the *ex parte* applicant Charo Thali Ngala (appellant) on 20th January, 2000. The proceedings went on intermittently with the hearing of some preliminary matters and interlocutory applications, until 16th October, 2012; when everything appears to have stagnated and the substantive judicial review application left pending.

Come the 27th of February, 2017, the trial court acting *suo motu,* directed that the matter be listed for mention on 27th March, 2017 in order for parties to show cause why the same should not be dismissed for want of prosecution.

[2] At the mention, **Mr Kimani**, learned counsel for the *ex parte* applicant (now appellant), urged the court not to dismiss the judicial review application, citing the unavailability of the court file as one of the reasons why the matter had stagnated for five years. Further to this, he said, the matter had been stayed informally in 2008 by the court (**Azangalala J.**) to enable parties confirm whether the suit land was within an adjudication section and if so, chart the way forward. Counsel further stated that the parties were actively engaged in resolving the matter and they had even referred the adjudication issue to the District Land and Settlement Adjudication officer, who responded to the query on 31st January, 2011. Counsel also stated that the matter was fixed for hearing severally in 2012, but due to no fault of the appellant, the same never took off. Later that same year, he said, one of the *ex parte* applicants in the matter passed on and that it was on 4th September, 2015, while making efforts to substitute the deceased in the matter that he learnt that the court file had disappeared from the court registry. He submitted that in a bid to regularize matters, he had filed an application seeking the reconstruction of the court file, which application is still pending hearing.

[3] On the other hand was **Mr. Wafula** who held brief for **Ms. Mwangangi** for the 3rd interested party urging dismissal of suit. He submitted that the matter was unduly protracted owing to the *ex parte* applicants' indolence and that the status quo on the ground had even changed as the land in question was now under adjudication, following a notice published in the Kenya gazette. With regard to the application seeking the reconstruction of the court file, counsel termed the same an afterthought, having been filed after the issuance of the notice to show cause in question. All in all, that the *ex parte* applicants had failed to show cause why the suit should not be dismissed. A similar position was adopted by learned counsel **Mr. Njau** who held brief for **Mr Mulwa** for the 1st interested party. He submitted that the 1st interested party was also deceased and that the estate would suffer great prejudice if the suit were allowed to continue.

[4] By a ruling delivered on 31st March, 2017, the learned trial Judge (**Cherono J.)** found there was no satisfactory explanation that had been tendered by the appellant as to why the suit had remained unprosecuted for five years. Consequently, he ordered the dismissal thereof for want of prosecution. This is what the learned Judge posited in his own words in an extempore ruling the subject of this appeal;-

> ***"… I have also been referred (sic) on application by the Ex parte applicant seeking reconstruction of a skeleton file. Several documents are attached to the said application. However, there is no single document from the court Executive officer to the effect that, the court file was missing. I agree with the submissions by Mr. Wafula advocate holding brief for the firm of Julius Mwangangi Mulu that the said application by the Ex parte applicant is an afterthought. I therefore find and hold that no satisfactory explanation or cause has been shown by the Ex-parte applicant why this suit is was not prosecuted for a consecutive period of about (5) years since the year 2012. Consequently this suit is here by dismissed for want of prosecution under Order 17 Rule 2 of the Civil Procedure Rules"***

[5] This is the ruling that has precipitated the present appeal. The appellant contends that the learned Judge erred by; dismissing an application for judicial review without jurisdiction; failing to appreciate that the unavailability of the court file was a matter of fact given that the file in respect of Judicial review application No. 5 of 2000 had been erroneously transferred from the High Court registry to the Environment and Land Court's registry; misapplying the law on dismissal of suits under Order 17 of the Civil Procedure Rules and; holding that the *ex parte* applicant had failed to show cause why his suit should not be dismissed, notwithstanding the pendency of an application for reconstruction of the missing court file.

[6] With leave of Court, parties filed their respective submissions, with oral highlights at the hearing of the appeal. Appearing for the appellant, Mr Kimani once again reiterated that the judicial review

proceedings had been stayed by the court on 18th April, 2008 to enable the parties demonstrate by way of evidence, whether the suit land fell within an adjudication area. The halting of proceedings he said, was also meant to enable the interested parties file supplementary affidavits, which they failed to do. He also stated that at trial, the appellant had explained the delay between 2008 till 2011 was due to lack of a response by the District adjudication officer; and that further delay was occasioned by the demise of one of the *ex parte* applicants in January 2013; factors which the trial Judge failed to appreciate.

[7] Turning to the grounds of appeal, Mr. Kimani further submitted that a judicial review application is not a suit and was thus not subject to Order 17 rule 2 of the Civil Procedure Rules. In further elaboration, he stated that the jurisdiction of the court in judicial review is a *sui generis* jurisdiction that is exercised solely under the provisions of order 53 of the rules. Consequently, that the trial court lacked the jurisdiction to entertain the notice to show cause herein. Still on jurisdiction, counsel stated that the trial Judge, being an Environment and Lands Court (ELC) Judge, was not seized of jurisdiction to entertain a judicial review matter; since the jurisdiction of the said court is limited to disputes relating to the environment, use, occupation of and title to land. As such, judicial review proceedings are alien to that court and the only court with the mandate to hear judicial review application is the High Court. Mr. Kimani also persuaded us to find that the notice of mention for purposes of showing cause was never served upon the appellant and that in the interim; the appellant had already filed the application for reconstruction of the court file. That it was only when he attended the court registry to fix a date for the hearing of that application that he learnt of the impending notice to show cause.

[8] On the part of the 4th respondent, learned counsel **Ms. Nasimiyu** who held brief for **Mr. Lumatete** indicated to the Court that the 4th respondent had passed on and as such, did not participate in the proceedings.

[9] The appeal was however opposed by the 5th respondent through his learned counsel Mr. Wafula. In his written submissions and oral address to the Court, he stated that the trial court's dismissal of the suit was fair and in accordance with the overarching principles in the administration of justice that is judicious and efficient use of resources; including judicial time. Further, he contended that going by the record, it is apparent that the proceedings sought to be quashed in the judicial review, namely; **Kaloleni Court Case No. 48 of 1999** were withdrawn and as such, the substratum of the trial court proceedings no longer exists. In other words, that even if the dismissed proceedings were to be reinstated, the same would be unsustainable, having been overtaken by events. Secondly, that the land which formed the subject matter in the judicial review proceedings was subsequently declared an adjudication area and any ascertainment of rights to the land was to be done in accordance with the Land adjudication Act meaning judicial review proceedings would serve no useful purpose.

[10] From the grounds of appeal and the submissions of the parties, the issues that we discern as falling for determination by this court are two- fold that is; whether the trial Judge had the jurisdiction to hear the notice to show cause and if so, whether the trial Judge erred in dismissing the proceedings for want of prosecution.

[11] Given that the question of jurisdiction is a preliminary one, which may or may not dispense with the entire appeal, it is prudent depending on the circumstances of each case that the same be determined first. The Court of Appeal also emphasized the importance of a court or tribunal establishing its jurisdiction prior to considering the matter before it in **Joseph Njuguna Mwaura and 2 others vs Republic,** Nairobi Criminal Appeal No. 5 of 2008 when it stated that;

> ***"It is incumbent upon any court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice, and that is jurisdiction. The authority of the court is determined by the existence or lack of jurisdiction to hear and determine disputes. In essence, jurisdiction is the first hurdle that a court will cross before it embarks on its decision making function."***

[12] Counsel for the appellant was emphatic that the trial court lacked jurisdiction because what was before him were judicial review proceedings governed solely by the provisions of the Law reform Act

and consequently, Order 17 rule 2 had no application in the matter. Citing the decision in the case of **Commissioner of Lands v. Kunste Hotel KLR (E&L) 1,** counsel stated that judicial review proceedings are neither in the realm of civil nor criminal jurisdiction. Consequently, save for order 53 of the Civil Procedure Rules, all the other Rules of Civil Procedure and in particular Order 17 Rule 2 have no application in judicial review matters. In the Kunste case, it was categorically held by this Court that:

'An application for an order of certiorari or any of the prerogative orders is not an action.'

Further, that in exercising its powers of judicial review, the court is exercising neither a civil nor criminal jurisdiction but rather, is exercising a special jurisdiction. This position was reiterated in the case of;- **Republic v Attorney General & another, ex parte Kenya Airline Pilots Associations[2003] eKLR** where it was held that judicial review proceedings were not subject to the provisions of the Government Proceedings Act.

[13] It thus does appear to us that indeed judicial review proceedings are substantively governed by the provisions of the Law Reform Act and with the advent of the Constitution of Kenya 2010, and also the Fair Administration Act. What then is the fate of an application under Order 17 rule 2 which was invoked purely as a procedural vehicle of dismissing a matter that had been in the court without prosecution? The **Kunste** and the **Pilots Associations** cases are both distinguishable from the present set of circumstances in the sense that in both of those cases, the court's jurisdiction was being looked at vis a vis stipulations under substantive law; namely the Government Proceedings Act; section 13 which demands that in actions against Governmental entities, notice of proceedings must first be issued to the Attorney General. In this case, however, the bone of contention is with regards to procedural rules not substantive law. No law ousts the operation of procedural rules in judicial review application, nor has any been cited.

[14] On whether an ELC Judge had jurisdiction to determine judicial review proceedings, we are of the firm view, that as long as the germane issue that stood out for determination was an issue touching on environment, the use and occupation of, the title to land, all those proceedings be they by judicial review or otherwise can be determined by the ELC as per **the provisions of Article 162 (2) which provides for the establishment of courts with the status of the High Court. The principle dispute raised in the appellants' application for judicial review was over ownership of a parcel of land which fall under the jurisdiction of the Environment and Land Court.**

[15] That ground of appeal must therefore of necessity, fail. Turning to whether or not the dismissal was merited; counsel for the appellant has contended that sufficient cause was shown as to why the suit should not have been dismissed. He cited the death of one of the parties as well as the delays in receiving a response from the District adjudication officer. In that same spirit, he also pointed out that the court file had disappeared and that this contributed further to the non-prosecution of the matter. However, all these are issues which arose prior to 2012. Indeed, none of these explanations address the question of why the matter stagnated since 16th October, 2012 until the 27th of February, 2017 when it was directed that the same be listed for potential dismissal.

[16] The other significant argument raised by the appellant was that the notice to show cause was never served on any of the parties; and that the appellant's counsel only learnt of the impending notice to show cause when he visited the court registry to secure a hearing date for the application to reconstruct the court file. However, from the record, the issue of non-service of the notice to show cause was never raised at trial. If anything, at the time, what counsel contended then was that he visited the court registry for purposes of fixing a date for the judicial review and it was then that he discovered that the court file had disappeared, which in turn prompted him to file the application for reconstruction of the court file. As stated, no mention was ever made of the non-service of the notice to show cause. That argument therefore does not hold any water and in our view it cannot rescue this appeal.

[17] For the aforesaid reasons, that there is no law or procedure that precluded the Judge from applying the provisions of Order 17 rule 2 to dismiss judicial review proceedings for want of prosecution and the appellant failed to give justifiable reasons for their indolence in prosecuting the suit, we cannot say the Judge was wrong in the way he exercised his discretion. Consequently, we find no merit in this appeal

which is hereby dismissed with costs to the 5th respondent.

Dated and delivered at Mombasa this 7th day of June, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K.KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR