



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR JJ, A)

CIVIL APPEAL NO. 91 OF 2015

BETWEEN

EDWARD WAFULA WAFUBWA.....APPELLANT

AND

MOSES NYONGESA MUREZIA.....1ST RESPONDENT

GEORGE MUREZIA.....2ND RESPONDENT

THE LAND REGISTRAR OF BUNGOMA.....3RD RESPONDENT

(Being an Appeal from the ruling of the High Court of Kenya at Bungoma (Mukunya, J) given on 23rd July 2015, in E&LC. NO. 6 of 2014)

JUDGMENT OF THE COURT

This appeal is against the decision of Mukunya, J. dated 23rd July 2015 where the High Court at Bungoma dismissed the appellant's *Civil Suit Environment & Land Court Case. No. 6 of 2014* for want of prosecution.

The decision arose from the 1st respondent's Notice of Motion dated 19th May 2015 wherein the following orders were sought:

1. *“That the High Court be pleased to dismiss the suit for want of prosecution;*
2. *That the cost of the suit be provided for”.*

The application was premised on the grounds that the suit was filed on 9th July 2014, and that for over a period of one year since the suit was filed, no steps had been taken to fix the suit for hearing; that demonstrated that the appellant was not interested in pursuing the suit, and that the continued maintenance of the suit was a source of burden to the 1st respondent.

The application was supported by the sworn affidavit of the *Moses Nyongesa Murisa, the 1st respondent*, which to a great extent reiterated the grounds in support of the orders sought.

In a replying affidavit dated 19th June 2015, the appellant deponed that the application was premature since the pleadings had not yet been closed as the suit was against three parties and that he had only been

able to serve the 1st respondent. That in respect of the 2nd respondent, his efforts to serve him had not borne any fruits. He prayed that in the interest of justice he be afforded an opportunity to serve the 2nd respondent.

The learned judge dismissed the suit for want of prosecution, for reasons that summons for service on the 2nd and 3rd respondents had since lapsed, and no application had been made for the issuance of other summons. The appellant was aggrieved by that decision and has filed this appeal on the grounds that; the learned judge dismissed the appellant's suit yet the pre Trial Conference had not taken place to confirm whether the suit was ready for hearing; that the court ignored the appellant's submissions to afford him more time to serve the 2nd respondent and that the decision to dismiss the suit was draconian and denied the appellant a chance to ventilate his case.

When **Mr. Situma**, learned counsel for the appellant, appeared before us, he complained that the dismissal of the suit was premature, as the appellant had not served the 2nd & 3rd respondents who had not entered appearance. As such the pleadings had not been closed, and **Order 11** of the **Civil Procedure Rules** had not been complied with to enable the suit to be fixed for hearing. Counsel was of the view that since the dispute concerned land the parties ought to have been afforded an opportunity to ventilate their case.

There was no appearance from counsel for the respondent though they were served on 13th January, 2016.

We have considered the application and the submissions. The history of the suit, which was against three parties, is that it was filed on 9th January 2014. On 13th March 2014, the 1st respondent filed a defence. According to the appellant, between the date the suit was filed and the filing of this application, he had not been able to serve the 2nd respondent as he could not be traced. He was also unable to serve the 3rd respondent during this period. On account of this, when the application came up for hearing before the High Court he sought additional time within which to locate and serve the 2nd appellant.

While we agree with the learned judge that the summons had lapsed and extension of summons had not been sought from the court, when we consider the facts of the dispute where fraud is alleged in the subdivision and transfer of the subdivided portions of land to the 1st and 2nd respondents by the 3rd respondent, we find that this is a matter that requires to be adequately ventilated and determined with finality by the court. In any event, under **Order 5 rule 2(1) of the Civil Procedure Rules**, even where no application has been made to extend the validity of summons, it still remains the discretion of the Court to dismiss the suit or not.

We also note that the period between the filing of the suit and the date the application was filed was barely one year, which in the circumstances we do not consider to be an unreasonable period of delay for a matter such as this.

In paying deference to **Article 159 (2) (d) of the Constitution**, which requires that that courts should administer justice “...**without undue regard to procedural technicalities**”, we consider that the learned judge should have taken cognizance of the factors, brought to the attention of the court, and accorded the appellant further time to trace and serve both the 2nd and 3rd respondents, more particularly as the dispute involved land.

Accordingly, we allow the appeal, and set aside the decision of the High Court of 23rd July 2015, with costs to the appellant

It is so ordered.

Dated and delivered at Kisumu this 27th day of May, 2016.

D. K. MUSINGA

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR