



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO.16 OF 2015

BETWEEN

SAID SWEILEM GHEITHAN SAANUMAPPELLANT

AND

THE COMMISSIONER OF LANDS (being sued through

THE ATTORNEY GENERAL)1ST RESPONDENT

THE MUNICIPAL COUNCIL OF MOMBASA2ND RESPONDENT

NORMAN TAHERALI DAWOODBHAI3RD RESPONDENT

HASSAN TAHERALI DAWOODBHAI4TH RESPONDENT

ALI RAMANDHAN MWATSAU5TH RESPONDENT

MOHAMED NAMAN MOHAMED6TH RESPONDENT

(Being an appeal against the ruling/order of the Environment and Land Court at Mombasa

(Mukunya, J.) dated 26th May, 2014

In

ELC.CAUSE.NO.227 of 2002)

JUDGMENT OF THE COURT

Said Sweilem Gheithan Saanum (now deceased) brought against the respondents an action being Mombasa **H.C.C.C. No.227 of 2002** claiming ownership of the parcel of land known as **MOMBASA/BLOCKXVII/1098** by virtue of a land certificate issued to him on 11th October, 1976 and alleging that the Commissioner of Lands as the 1st respondent had directed him to surrender the certificate without explaining the purpose for such surrender, only to learn later that the land had been

subdivided giving rise to **MOMBASA/BLOCKXVII/1517** (the suit property) which was, without his knowledge, consent or consideration, transferred and registered in favour of the Municipal Council of Mombasa, the 2nd respondent, now the County Government of Mombasa. It was alleged that the 2nd respondent had in turn allocated the suit property and granted a 99 year lease jointly to Ali Ramadhan Mwatsau and Mohamed Naman Mohamed, the 5th and 6th respondents respectively; that this latter transfer was subsequently cancelled and the lease re-issued and registered in the names of Norman Taherali Dawoodbhai and Hassan Taherali Dawoodbhai, the 3rd and 4th respondents.

For these reasons the plaintiff contended that these activities were illegal and that the subdivision of the original **MOMBASA/BLOCKXVII/1098** and creation of the suit property were not only null and void but also in violation of his constitutional right to property.

In the result the plaintiff prayed in the aforesaid suit, *inter alia*, for a declaration that the repossession of his land certificate by the 1st respondent and the creation of the suit property was unprocedural, illegal and unlawful, an order directing the Registrar of Titles to revoke and/or cancel the title document in respect of the suit property and finally an order of injunction to restrain the 2nd, 3rd and 4th respondents from dealing with the suit property. The respondents in their respective statements of defence denied the accusations with the 1st respondent raising objection on a point of law in terms of section 16 of the Government Proceedings Act, the 2nd respondent insisting that the deceased as the registered owner of the very original parcel **No. MOMBASA/XVII/112** had applied for its subdivision to create parcel No.1098 and other subdivisions; that he was aware of a condition precedent that upon subdivision one plot from the subdivision would be surrendered and set apart for public purpose in favour of the 2nd respondent. The 2nd respondent further averred that the title in favour of the 5th and 6th respondents was created fraudulently and without the 2nd respondent's consent hence the resultant leasehold was, *ab initio* null and void as it did not exist on the ground.

The 3rd and 4th respondents similarly denied any wrong doing maintaining that they purchased the suit property for value and without notice; that the deceased had no interest whatsoever in the suit property.

Before the suit could be set down for hearing the deceased died on **28th August, 2004** of cardio pulmonary arrest due to tuberculosis at the age of 69 years.

On **20th August, 2009** a certificate of confirmation of a grant in respect of the deceased's estate was issued to his widow, Nur Sweilem Gheithan, in Msa. H.C. Succ. Cause No.75 of 2005. The grant that was confirmed had been issued to one Nur Salim Mohamed and not the appellant. How it was eventually confirmed in the name of the appellant is the challenge based on the question of her *locus standi*. By the time Nur Sweilem Gheithan took out the initial Chambers Summons on **17th August, 2010** expressed to be brought under **Order XXII rule 13 (1), 8(2) and 12** of the Civil Procedure Rules, the suit had abated some six years before this date. The application was subsequently withdrawn on 2nd September, 2013, on which date a fresh notice of motion was filed pursuant to **Article 159** of the Constitution, **sections 1A, 1B, 3A, 3B, 63(e) and 95** of the Civil Procedure Act, **section 3** of the Environment and Land Court Act and **Orders 24 rules (1) and (3) 3(1) (2) (8), 50 rule 6, 51(1)**. It should be clear as a matter of procedure in terms of **Order 51 rule 1** why the initial application by way of chamber summons was withdrawn. It ought to have been brought by a notice on motion.

In the fresh motion the appellant prayed that the **High Court** be pleased to enlarge time within which the application would be made, that the abated suit be revived and the appellant be made a party in place of the deceased. The appellant averred in support of that application that due to family wrangles following the death of the plaintiff the family was not able to agree on who should bring probate proceedings; that there was confusion in her advocate's chambers following his election as the Mayor of Mombasa. Other factors relied on included her ignorance of law, poverty, age, ill-health, effect on her of the death of her husband and delay in hearing the aforesaid withdrawn chamber summons as a result of the file missing. Although the learned Judge alludes to a response by the 1st respondent, on record we only are able to see

the grounds of opposition filed on behalf of the 2nd respondent. It would appear that the other respondents did not reply to the application. The 2nd respondent's grounds of opposition stated that the appellant was indolent, the delay was inexcusable, the revival of the suit would be prejudicial to it, the grounds proffered, namely, economic hardship, age and so on, are not sufficient for the court to exercise its discretion in favour of the appellant; that the application amounted to an abuse of the court process, was frivolous and vexatious and finally that the appellant had no *locus standi* to bring it.

The motion was argued before **Mukunya, J** who in a terse ruling found no “*good reason*” to warrant the granting of the orders for extension of time and revival of the abated suit. For instance, the learned Judge rejected the ground that the appellant did not know whether to pursue her matter with Mr. Nabhan Swaleh, advocate who was an employee in the firm of Taib A.Taib Advocates or to follow Mr.Taib, himself and the proprietor of the law firm who had been elected the Mayor of Mombasa. According to the learned Judge Mr.Taib, Advocate remained the appellant's advocate on record for all intents and purposes; that neither Mr.Taib nor Mr.Nabhan Swaleh had sworn an affidavit to clarify the confusion, if any; that nothing stopped the appellant from obtaining a grant of letters of administration *ad colligenda bona* for the purpose of filing application for substituting the deceased. The learned Judge concluded that the benefits of the overriding principle were not available to the applicant in view of the prolonged and unexplained delay of over 9 years; that the court must consider the interest of all the parties involved in a dispute without allowing any of them to suffer prejudice; that following the promulgation of the Constitution of Kenya, 2010 the legal status of the 1st and 2nd respondents have changed. With that the learned Judge dismissed the application with no orders as to costs.

Aggrieved by the dismissal the appellant now seeks in this appeal that we overturn that decision because the learned Judge misdirected his mind in declining to grant the main prayers sought in the aforesaid notice of motion, basing the exercise of his discretion on wrong principles of the law and on a technicality. Through written submissions the appellant reiterated these grounds and stressed that by relying on a technicality and dismissing the appellant's application, the learned Judge failed to consider that the appellant stood to suffer more prejudice than all the other parties, the suit property being the only asset of the estate of the deceased and that the delay was sufficiently explained. In support of the appeal the appellant relied on a number of authorities which we shall be making reference to in this judgment.

The combined effect of the respondents' submissions is that this Court should only interfere with the exercise of judicial discretion on settled principles; that in this appeal those principles have not been met as the learned Judge properly found that no “*good reason*” had been advanced to warrant the exercise of the discretion. The delay in bringing the application was not only inordinate but also inexcusable and that the grant of representation was issued to **Nur Salim Mohamed** and not the appellant **Nur Sweilem Gheithan**, hence the latter had no capacity to bring the action.

Because the basis of this appeal is Order 24 of the Civil Procedure Rules we reproduce below the pertinent part.

“1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

...

3. (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff.

Provided the court may, for good reason on application, extend the time.

...

5. Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff, or a deceased defendant, such question shall be determined by the court.

...

7. (1) ...

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit. (Emphasis supplied)

There are three stages according to these provisions. As a general rule the death of a plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the plaintiff or within such time as the court may in its discretion for “*good reason*” determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The “*good reason*” therefore relates to application for extension of time to join the plaintiff’s legal representative to the suit.

Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.

Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by “*sufficient cause*” from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff. There have been arguments, as to whether or not a formal order is necessary to confirm the fact of abatement. See **M’mboroki M’arangacha v Land Adjudication Officer, Nyambene and 2 others**, Meru H.C.C. Application No.45 of 1997 where the High Court held that an order to record the abatement of a suit was not necessary. See a similar holding in **KFC Union v Charles Murgor (Deceased)** NBI HCCC No.1671 of 1994. From the language of **Order 24 Rule 3(2)** aforesaid, earlier reproduced and highlighted, the fact of abatement has to be brought to the notice of the court, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may have already taken place, for convenience an order of the court is necessary for a final and effectual disposal of the suit. We borrow the statement of Lord Denning in **MacFoy v United Africa Co. Limited** (1961) 3 All ER 1169, that

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado. Though it is sometimes convenient to have the court declare it to be so....”

It follows that the question of whether or not to extend time or grant an order for revival of an abate suit is essentially one of discretion.

It is firmly settled that on appeal, this Court will not normally interfere with the exercise of discretion by a judge of the court below. These principles have been repeatedly stated but nonetheless bear repeating. In **Mrao Ltd v First American Bank of Kenya Ltd & 2 others** (2003) KLR 125 the court explained that;

“The Court of Appeal may only interfere with the exercise of the court’s judicial discretion if satisfied:-

- a. ***The Judge misdirected himself on law; or***
- b. ***That he misapprehended the facts; or***
- c. ***That he took into account or considerations of which he should not have taken account; or***
- d. ***That he failed to take into account of considerations of which he should have taken account; or***
- e. ***That his decision, albeit discretionary one, was plainly wrong”***

See also **Joseph Gachuhi Muthanji v Mary Wambui Njuguna**, Civil Appeal No.34 of 2014.

Because the deceased died on **28th August, 2004** and since no application was made within one year of his death to have his legal representative substituted in his place, there can be no debate on the fate of the suit. It abated. The only question to be determined thereafter is whether the learned Judge, in rejecting the application for extension of time and revival of the suit, misdirected himself in any of the instances enumerated in **Mrao** case (*supra*)

The appellant was permitted under **Order 24 rule 7** to bring and place before the court justification (referred to in the provision as “*sufficient cause*”) why her application ought to be considered and granted. The appellant relied on the grounds that there was confusion in her advocate’s firm following the election into a political office of her advocate, who incidentally is her advocate to date, even in this appeal. The advocate’s file, according to the appellant was handed over to another advocate, Mr. Swaleh Nabhan, then an employee in the law firm. She went on to state in her affidavit in support of the application that;

“3..for reasons that I am unable to understand, the matter was never dealt with by either advocate and each was sure or assumed the other was handling the matter and as a result of the confusion among the said advocates and the break in communication occasioned by the death of the plaintiff the issue of abatement of the suit was not dealt with...or brought to my attention.”

She pleaded that that mistake attributable squarely to her advocates ought not to be visited upon her. It is instructive to note that neither Mr. Taib nor Mr. Nabhan has sworn an affidavit to explain how the confusion arose and the efforts, if any they made to move the court appropriately.

We cannot, with respect, agree more with the learned Judge that the advocate on record cannot escape the blame. This Court recently restated the position of an advocate who admittedly has transgressed and caused some hardship to his client in the course of litigation as follows;

“From past decisions of this Court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justifiable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistakes of counsel should not be visited on a client, it should be remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side. (see Halsbury’s Laws of England, 4th Edn, Vol.44 at P.100-101 and also Re Jones (1870)6 Ch.App.497 in which Lord Hatherley communicated the court’s expectations this way: ‘ I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned’.”

See Tana and Athi Rivers Development Authority v Jeremiah Kinigho Mwakio and 3 others, Civil Appeal No.41 of 2014. The confusion in the law firm was not sufficient or excusable justification for the

delay of nearly nine years. After the deceased plaintiff died on **28th August, 2004** it took only one (1) year in August, 2005 to have the grant of representation issued. It then took another four (4) years for the grant to be confirmed. After confirmation of the grant on 20th August, 2009, the application for revival of the suit was initially brought on 17th August, 2010 but withdrawn on 2nd September, 2013, three years later.

The fact that the dispute involved land which is claimed to be the only asset of the deceased's estate and is of high value *per se* ought to have been the more reason for both the appellant and her counsel to be vigilant. Other reasons advanced for the revival of the suit, such as the appellant's lack of literacy, poor health, advanced age, bereavement, depending on the circumstances may be relevant considerations but do not in themselves constitute sufficient cause, particularly in view of the fact that the appellant was represented by counsel.

The delay attributed to court regarding a misplaced file in respect of the earlier application of 17th August, 2010 ignores the fact that between 2004 and 2010 there was already an unexplained delay of six (6) years. In terms of **Article 159** of the Constitution and **sections 1A, 1B and 3A** of the Civil Procedure Act on which the court below was invited to consider the application, the court's duty is to avoid any form of prejudice or hardship caused by delay to the parties.

"Justice shall not be delayed" is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the Civil Procedure Act are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge's conclusion that the suit in the High Court was not properly handled by the appellant's advocate. The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation. Likewise it cannot be fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed cannot be visited upon them. The warning of Madan JA in **Belinda Murai & others v Amos Wainaina** (1978) LLR 2784, reigns true today. He said:

"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel....The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate..." (our emphasis)

We also reiterate Lord Griffith's words is in **Ketterman v Hansel Properties Ltd** (1988) 4 All ER 769, that;

"Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their heads..."

In our view the learned Judge, guided by the interest of justice of the matter, properly exercised his discretion in accordance with those very overriding principles. Accordingly this appeal fails and is dismissed. We make no orders as to costs.

Dated and delivered at Malindi this 30th day of October, 2015

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR