



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OKWENGU, MWILU & OTIENO-ODEK, JJA)**

**CIVIL APPEAL NO. 246 of 2011**

**BETWEEN**

**GEORGE GIKUBU MBUTHIA.....APPELLANT**

**AND**

**KENYA COMMERCIAL BANK LIMITED ..... RESPONDENT**

***(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Sitati, J.)  
dated 17th February 2011***

**in**

**H.C.C.A No.44 of 2004)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. By the plaint dated 27<sup>th</sup> July 1995, the appellant filed Civil Case No. 7908 of 1995 against the respondent at the Chief Magistrate's Court seeking orders to restrain the respondent from exercising its statutory power of sale over **LR KIINE/KIBINGOI/NGUGUINI/1785** which was charged as security for Kshs. 200,000/= borrowed on or about 10<sup>th</sup> May 1993. The appellant also sought orders for discharge of the security.
2. The appellant's case before the Chief Magistrate lay dormant for over five years and was never prosecuted. On 28<sup>th</sup> October 2003, the trial magistrate directed that the case be set down for hearing within 30 days failure to which the suit shall stand dismissed. As at 28<sup>th</sup> November 2003, when the 30 days lapsed, the appellant had not set down the suit for hearing. Instead of setting down the suit for hearing, the appellant filed an application dated 24<sup>th</sup> November 2003 seeking leave to amend the plaint. In a ruling delivered on 20<sup>th</sup> January 2004, the trial magistrate dismissed the application to amend for reason that there was no suit whose pleadings could be amended as the suit stood dismissed on 28<sup>th</sup> November 2003 when the 30 day period lapsed.
3. Aggrieved by the ruling of 20<sup>th</sup> January 2004, the appellant lodged a first appeal to the High

Court. The learned judge dismissed the appeal expressing herself, as follows:

*“I have myself carefully considered the events leading to the order of 20<sup>th</sup> January 2004. The record of 28<sup>th</sup> October 2003 is clear as to what the appellant was supposed to do – fix the suit for hearing within 30 days otherwise the suit would stand dismissed. The question of whether it was the main suit or an application that was to be set down for hearing does not therefore arise. The appellant did not do so, but instead chose to file an application for leave to amend while well aware that there was an undischarged obligation hanging over his head. In my humble view, what the appellant should have done was to apply for extension of time within which to fix the suit for hearing. Such extension would have given him ample time to file and prosecute the application for leave to amend. I find that the appellant took the court for granted by assuming that the earlier order of 28<sup>th</sup> October 2003 did not have to be complied with...In the circumstances, I am persuaded that the ruling of 20<sup>th</sup> January 2004 was properly made and premised on sound legal principles. There is therefore no reason for interfering with that decision....In the premises, the appellant’s appeal lacks merit. The same is hereby dismissed in its entirety with costs to the respondent.”*

4. Aggrieved by the High Court’s decision, the appellant has filed the present second appeal citing, *inter alia*, the following grounds of appeal:

*“(i) The learned judge erred in law in holding that the orders granted by the trial magistrate on 28<sup>th</sup> October 2003 and 20<sup>th</sup> January 2004 were made on sound legal principles;*

*(ii) The judge erred in failing to find that the orders made on 28<sup>th</sup> October 2003 and 20<sup>th</sup> January 2004 were made on an application that was a nullity in law.*

*(iii) The trial judge erred in law in failing to hold that the respondent’s amended defence was based upon a defective charge dated 16<sup>th</sup> May 1993 and the equally defective instrument of guarantee dated 17<sup>th</sup> May 1993 and both instruments were nullities.*

*(iv) The learned judge erred in law in failing to hold that if indeed the respondent wished to exercise its statutory power of sale at a future date under Section 74 of the Registered Land Act (Cap 300), it should have complied with Sections 65 (1) and 110 (2) of the Registered Land Act and Section 35 (1) of the Advocates Act (Cap 16) in the charge and Section 35 (1) in the guarantee instrument.*

*(v) The learned judge gravely erred in law when she failed to hold that the purported charge dated 16<sup>th</sup> May 1993 was unregistered and therefore void.*

*(vi) The learned judge erred in law when she failed to apply the principle of “*ex-turpi causa non oritur actio*.”*

5. At the hearing of this appeal, the appellant appeared in person while the respondent was represented by learned counsel Mr. Martin Munyu.
6. The appellant reiterated the grounds of appeal as set out in the memorandum and emphasized that the charge and guarantee instruments sought to be enforced by the respondents were null and void; that the instruments are void because they did not comply with the mandatory provisions of **Sections 65, 74** and **110** of the Registered Land Act and **Sections 34** and **35** of the Advocates Act; that there was neither an endorsement of the name or firm of advocates nor address of the

advocate who prepared the charge; that the charge being a conveyance was prepared by an unqualified person because it had no endorsement indicating the name and address; that **Section 110** of the **Registered Land Act** was not complied with as there was no acknowledgement in the charge that the person executing the same did appear before an advocate as prescribed to ascertain that the charge was freely and voluntarily executed; that acknowledgment is a mandatory requirement under **Section 110** of the Act and its absence render the charge instrument null and void; that the charge also violated the provisions of **Section 34** and **35** of the Advocates Act and it was illegal from the very beginning and could not form basis for exercise of any statutory power of sale; that this Court should not aid and assist in enforcing an illegality; that the Land Registrar acknowledged the illegality of the charge and declined to issue a certificate of registration of the charge in compliance with the legal caveat contained in **Section 35 (2)** of the Advocates Act. The appellant cited the case of **Scott -v- Brown Doering, Mc Nab & Co. (3) (1982) 2 QB 724** where it was stated that no court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction that is illegal, if the illegality is duly brought to the notice of the court.

7. Counsel for the respondent reminded this Court that this was a second appeal which must be confined to points of law only. In opposing the appeal, it was submitted that the relevant issue in this appeal is whether the learned judge properly exercised her discretion in declining to interfere with the orders made by the trial magistrate dismissing the appellant's case for non-prosecution. It was emphasized that there was a five year delay in prosecuting the appellant's case before the magistrate's court; that both the trial magistrate and the learned judge found there were no good reasons why the suit was not fixed for hearing and prosecuted. It was submitted that validity of the charge instrument and violation of the Advocates' Act were not issues canvassed before the trial magistrate; and that there was only one issue before the learned judge as the first appellate court and that is whether the trial magistrate erred in law in upholding the dismissal of the appellant's suit for want of prosecution. Counsel submitted that the appellant had not demonstrated in this appeal how the learned judge erred in exercise of the discretion to decline setting aside the ruling by the trial magistrate.
8. We have considered the grounds of appeal, the judgment by the learned judge, submissions by counsel as well as authorities cited. As properly reminded by counsel, this is a second appeal which must be solely confined to points of law. (See **Johstone Barasa Kakokha -v- Daniel Akwala [2015] eKLR** and **Joseph Gicheru Muchiri -v- Chairman Kiangima Trading Centre & 2 others [2015] eKLR**).
9. The appellant urged us to find that the learned judge erred in law in finding that the rulings by the trial magistrate were sound in law. The *ratio decidendi* in the decision by the learned judge in dismissing the appellant's first appeal is that the appellant did not fix his case for hearing within 30 days as directed in the order of 28<sup>th</sup> October 2003 but instead chose to file an application for leave to amend while well aware that there was an un-discharged obligation hanging over his head; and that the appellant took the court for granted by assuming that the earlier order of 28<sup>th</sup> October 2003 did not have to be complied with.
10. It is our duty to consider whether the *ratio decidendi* by the learned judge is erroneous in law. It is not disputed that the appellant did not fix the Chief Magistrate's Case No. 7908 of 1995 for hearing within 30 days as ordered and directed. The fixing of the case for hearing was the condition precedent to be fulfilled to enable the appellant's suit not to stand dismissed on expiry of 30 days.
11. In **Ivita -v- Kyumbu [1984] KLR 441**, it was stated that the test applied by the courts in an application for dismissal for want of prosecution is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay. Even if the delay is prolonged, if the court is satisfied with the excuse for delay and that justice can still be done to the

parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time; this is a matter in the discretion of the court.

12.The record shows that the appellant was given 30 days within which to set down the case for hearing. This is in line with the dicta in **Ivita -v- Kyumbu [1984] KLR 441**. In our view, the rulings made by the trial court on 28<sup>th</sup> October 2003 and 20<sup>th</sup> January 2004 were self-executing and did not require action on the part of the court but on the part of the appellant himself to fulfill the condition precedent. Having failed to fulfill the condition precedent, the appellant let the rulings by the trial court to self-execute.

13.Before the learned judge and this Court, the appellant is seeking a discretionary relief to set aside the order dismissing the case for want of prosecution. Delay defeats equity, the two courts below observed that there was a five year delay in prosecuting the case before the trial magistrate; this notwithstanding, the trial magistrate exercised discretion and gave the appellant 30 days to fix the case for hearing; the appellant opted not to embrace and utilize the time given. When one is given an option, one does not exercise an option that is not granted. In **Paxton - v- Allsopp [1971] 3 All ER 370** as adopted in **Ivita -v- Kyumbu [1984] KLR 441** Salmon J. expressed that in cases of dismissal for want of prosecution, “if he (i.e. plaintiff) is personally to blame for the delay, no difficulty arises. There can be no injustice in his bearing the consequences for his own fault.”

14.Equity and the discretionary powers come to the aid of the vigilant. The five year delay was not only inordinate; no sufficient excuse was given to explain it. The appellant offered an explanation that his daughter, now deceased and who was his counsel, was the one handling the matter and he was not kept abreast of proceedings before the trial magistrate. We have examined the record and neither in the pleadings nor in the replying affidavit is this explanation given; it is being tendered before us for the first time.

15.On the issue that the instruments of charge and guarantee were null and void, we refer to the case of **Openda -v- Ahn [1983] KLR 165** where this Court stated that it cannot consider or deal with issues that were not canvassed, pleaded and or raised at the lower court unless the facts, if fully investigated, would have supported it. This is an appellate court whose jurisdiction does not generally extend to investigation of facts. In the instant case, the learned judge sat as a first appellate court and only issues that were raised and canvassed before the trial magistrate were relevant for consideration and determination by the judge. As the first appellate court, the only issue before the judge was whether the trial magistrate properly held that the appellant’s case stood dismissed as at 28<sup>th</sup> November 2003 for want of prosecution after the lapse of the 30 day period.

16.It is clear from the record that appellant’s suit was not dismissed on merit but for want of prosecution. Issues relating to validity of the charge and guarantee instruments were not before the two courts below. The learned judge correctly stated that the grounds raised by the appellant fell outside the decision of the lower court appealed from; that the appellant asked the High Court to deal with matters that did not form part of the decision of the trial magistrate that was appealed against. We concur and hold that the issue of validity of the charge and guarantee instruments were issues not before the trial magistrate and the issues could not in law be grounds of appeal before the first and second appellate courts in this case.

17.For the reasons stated above, we find that this appeal has no merit and is hereby dismissed with costs to the respondent.

***Dated and delivered at Nairobi this 16<sup>th</sup> day of October, 2015.***

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**P. M. MWILU**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**