



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & ODEK, JJ.A)**

**CIVIL APPEAL NO. 144 OF 2008**

**BETWEEN**

**ELIUD MUNYUA MUTUNGI ..... APPELLANT**

**AND**

**FRANCIS MURERWA ..... RESPONDENT**

*(An appeal from the ruling of the High Court of Kenya at Meru (Ouko, J.)*

*dated 18<sup>th</sup> April, 2008*

**in**

**H.C.C.C NO. 39 OF 1994)**

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**JUDGMENT OF THE COURT**

1. This is an appeal from the ruling of the High Court (Ouko, J. as he then was) wherein the appellant's suit was dismissed for want of prosecution.
2. The appellant commenced a suit in the High Court vide a Plaint which was filed on 24<sup>th</sup> January, 1994. The appellant averred that the respondent held half of L.R No. Nyaki/Mulathankari/442 (suit property) in trust for him; the suit land was family land; at the time of registration the appellant was minor. The appellant sought *inter alia* a declaration that he was entitled to half a share of the suit property and an order directing the respondent to subdivide and transfer half of the suit property to him. The respondent filed his Statement of Defence and the pleadings were closed on 2<sup>nd</sup> November, 1994.
3. Despite the suit being set down for hearing on several instances, it did not proceed for a number of reasons. On 22<sup>nd</sup> October, 2002 the matter was listed for hearing but was marked as stood over generally because the appellant and his advocate were not present. Subsequently, the respondent filed an application dated 16<sup>th</sup> March, 2005 seeking dismissal of the appellant's suit for want of prosecution. The grounds upon which the respondent relied on in support of his application were that the suit was filed in the year 1994; the last time the matter came up for hearing was on 22<sup>nd</sup> October, 2002 when it was marked as stood over generally on account of the absence of the appellant and his advocate; since then the appellant had not taken any step to prosecute the suit; it had been three years since any step had been taken.

4. The appellant in opposing the application, filed a replying affidavit. He deponed that he has always been eager to prosecute the suit; the respondent's counsel had never invited his advocate to fix a hearing date; that there was an attempt to settle the matter out of court and hence he was not able to fix the matter for hearing. He maintained that the respondent had deceived him that he was open to settling the matter out of court yet he had filed the said application behind his back.
5. After *inter partes* hearing, the High Court vide a ruling dated 18<sup>th</sup> April, 2008 dismissed the appellant's suit for want of prosecution. The learned Judge held that the appellant had lost interest in prosecuting the suit. It is that decision that has instigated this appeal which is based on the following grounds:-
  - ***The learned Judge erred in law in holding that the appellant herein had lost interest in the suit in the Superior Court.***
  - ***The learned Judge misdirected himself in failing to observe that the proceedings in the Superior Court involved family land.***
  - ***The learned Judge erred in law and in fact in allowing the respondent's application for dismissal of suit for want of prosecution, when it was the appellant who had been fixing the same for hearing.***
  - ***The learned Judge erred in law in disregarding the submissions of the appellant's advocate to the effect that the application was not merited.***
  - ***The learned Judge erred in law by visiting the mistake of the appellant's advocate on the appellant.***
  - ***The ruling is against the weight of the evidence and the law.***
6. Mr. Kariuki, learned counsel for the appellant, submitted that when a court is faced with an application for dismissal of a suit, it ought to consider whether the delay in prosecuting the suit is excusable; whether justice can still be done despite the delay in hearing the matter. He argued that the appellant had deponed in his replying affidavit that the High Court diary was always full and hence they could not get a hearing date. He urged us to allow the appeal.
7. Mr. Muthomi, learned counsel for the respondent, argued that the delay was for 14 years and the appellant had not fixed the matter for hearing for a period of three years. He maintained that it was only after the respondent filed the application for dismissal that the appellant started taking steps to fix the suit for hearing. Mr. Muthomi submitted that the appellant had not given a reasonable excuse for the delay and that the respondent would be prejudiced if the matter proceeded for hearing.
8. The learned Judge in dismissing the appellants' suit exercised his discretionary power. Therefore, before we can interfere with the learned Judge's discretion we must be satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or, that he misapprehended the law or failed to take into account some relevant matter. In ***Mbogo & Another- vs- Shah (1968) E.A. 93*** at page 95, Sir Charles Newbold P. held,
 

***“.....a Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice....”***
9. The power of the court to dismiss a suit for want of prosecution is a discretionary power, but which should be exercised judicially. In ***Allen -vs- Sir Alfred Mc. Alpine & sons (1968) ALL ER***, the Court of Appeal of England established the following as principles governing applications for dismissal for want of prosecution;

- the delay is inordinate;
- the inordinate delay is inexcusable;
- or the defendant is likely to be prejudiced by the delay.

See this Court's decision in *Moses Murura Mwangi & 2 others -vs- Maingi Kamuru & another- Civil Appeal No. 151 of 2010*, wherein we adopt the decision of the High Court in *Ivita -vs- Kyumbu [1984] KLR 441*. Chesoni, J. (as he then was) held,

***“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff’s excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”***

10. From the record, it is clear that the suit had been set down for hearing on 22<sup>nd</sup> October, 2002; the matter was stood over generally because the appellant and his advocate were absent. No step was taken in the suit for almost three years until the respondent filed the application dated 16<sup>th</sup> March, 2005 for dismissal. We find that the delay in setting the matter down for hearing was inordinate. Was the inordinate delay excusable? The appellant argued that he failed to set down the suit because he had honestly believed that the parties were negotiating a settlement out of court. He attached a letter dated 13<sup>th</sup> May, 2002 as evidence of the negotiations. We have looked at the letter and find that the letter was addressed to the High Court requesting the respondent to allow the clan elders to settle the matter amicably. This letter in no way indicates that the respondent had agreed to an out of court settlement or if there were ongoing negotiations. The appellant did not give any other evidence in terms of meetings or negotiations which had taken place. We are therefore unable to make a finding that there were ongoing negotiations out of court.
11. The appellant contended that the learned Judge erred by visiting the mistakes of his advocate upon him. The appellant's advocate did not address us on this issue and from the record we find no basis for the said ground of appeal. Mr. Kariuki also argued that one of the reasons for failing to set the suit down for hearing was due to the fact that the High Court diary was always full. This fact was not deponed by the appellant in his replying affidavit he did not attach any letter to show any attempts were made to fix the matter but the court diary was not available. Moreover, this was only raised in this appeal. We find that this allegation had no basis. Therefore, we find that the excuses tendered for the delay are unreasonable.
12. We concur with the learned Judge's finding that the appellant had lost interest in the suit based on the foregoing and the fact that he only started taking steps when he was faced with an application for dismissal of the suit. It has been 20 years since the suit was filed in the year 1994 and we find that reinstating the suit would not meet the ends of justice. This is because we are alive to the fact that some of the witnesses may not even be alive and the status of the suit property may have changed. We therefore, find that the learned Judge exercised his discretion judiciously.
13. Accordingly, we find that the appeal has no merit and we hereby dismiss the same. We make no orders as to costs since this dispute involves family members.

***Dated and delivered at Nyeri this 11<sup>th</sup> day of February, 2014.***

**ALNASHIR VISRAM**

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***JUDGE OF APPEAL***

***MARTHA KOOME***

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***JUDGE OF APPEAL***

***J. OTIENO-ODEK***

.....

***JUDGE OF APPEAL***

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

***DEPUTY REGISTRAR***