IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPEAL NO. 128 OF 2009

BETWEEN

MWANGI MAINA.....APPELLANT

AND

MWANGI MAGU.....RESPONDENT

(Being an appeal against the Ruling of the High Court of Kenya at Nyeri (Makhandia, J.), dated 14th April, 2008

in

H.C.C.C. No. 39 of 1989)

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JUDGMENT OF THE COURT

1. The original suit, **H.C.C.C. No. 39 of 1989, Nyeri**, was filed by Mwangi Maina (appellant), on 16th March, 1989, against Mwangi Magu (respondent).The original suit was amended and stated the appellant's claim was for a declaration that by virtue of adverse possession, he had become the owner of the parcel of land known as **Loc 19/RWATHA/217**. The appellant alleged that he entered into a sale agreement with the respondent in 1970, for the sale of the suit premises measuring 1 ½ acres for a sum of Kshs. 90,000/= out of which he paid a sum of Ksh. 87,700/= and took possession and planted his own crops. The agreement was reduced in writing on 25th July, 1988.

2. The respondent filed a defence denying the appellant's claim in general and specifically that he ever entered into a written agreement nor was he paid a sum of Ksh. 87,000/=. As is the practice in most of the land disputes the parties were involved in interlocutory applications seeking for interim orders of injunction and also seeking to set such orders aside, between 1989 and 1994. However, the matter was in a lull from 24th June, 1994 and Juma J. found it suitable for dismissal for want of prosecution under the provisions of the old **Order XVI Rule** of the **Civil Procedure Rules** on 12th January, 1999.

3. The appellant filed a Chamber Summons on 7th November, 2006 seeking for orders that the order made on 12th January, 1999, dismissing the suit be vacated and set aside. Unfortunately when that

application came up for hearing on 30th October, 2007 there was no appearance for the appellant and also for the respondent and it suffered a similar fate like the original suit. It was also dismissed for non appearance by both parties. The appellant filed yet another motion dated 20th December, 2007, seeking for orders of review and setting aside the dismissal order made on 30th October, 2007 and secondly seeking that the application dated 7th November, 2007 be re-instated for hearing.

4. That application was heard by **Makhandia, J**. (as he then was), and in a well reasoned ruling he dismissed the application for lacking in merit. The learned Judge observed the following in his ruling which is pertinent as far as this application is concerned:-

> ***"This case has been pending in this court for the last 19 years. The plaintiff is squarely to blame for the delay. At some point in time, the suit was dismissed for want of prosecution on 12th March, 1999. It was however, not until 18th January, 2007, that the applicant made an application to have the order dismissing the suit for want of prosecution vacated, reviewed and or set aside. Having filed the application, he did not at all bother to serve it on the respondent. It would be noted that the application was made 8 years after the dismissal of this suit without even going to the merit of the plaintiff's suit, as invited by the respondent. I do not think that the conduct of the applicant in the whole episode would endear himself to this court. I do not think that he has been serious in prosecuting the case. Time is nigh when this matter should be closed. I do not think that it is in the interest of justice to have the suit hanging around the respondent's neck for all those years. Litigation has to come to an end. The applicant has come to the end of his sojourn in this court."***

5. The appellant is still not relenting and being aggrieved, he filed this appeal that raises 5 grounds to wit:-

1. ***The learned Judge erred in law in allowing the counsel for respondent Mr. R. M. Kimani, to address him on points of facts and evidence whereas the respondent had filed grounds of opposition only.***

2. ***The learned Judge erred in law in exercising his judicial discretion on the basis of wrong principles and considering things he ought not to have considered.***

3. ***The learned Judge erred in law and fact in failing to consider the averments of the affidavit of the applicant which was not controverted by the respondent.***

4. ***The learned Judge erred in law and fact in failing to consider the submissions of the counsel for the applicant.***

5. ***The learned Judge erred in law in failing to find that there would have been no prejudice suffered by the respondent if applicant's application was allowed.***

6. When the appeal came up for hearing, our attention was drawn to a consent letter dated 9th May, 2013, signed by Mr. Gacheru, learned counsel for the appellant and Mr. Kimani, learned counsel for the respondent, agreeing that the appeal be disposed of by way of written submissions and such submissions be filed on 15th May, 2013. Mr. Gacheru thus relied on his written submissions. Counsel for the respondent did not file his written submissions nor did the respondent or his counsel attend court despite having been served with a hearing notice.
7. We have considered the submissions filed by Mr. Gacheru, he has summarized the history of this matter and highlighted what happened in court before the suit was dismissed and there after even the application for its reinstatement was dismissed. In conclusion, learned counsel stated the following in his written submissions which we consider as the gist of the appeal:

> ***"The absence of all parties in this suit without any explanation could have (sic) not***

made the court to dismiss the application. It is our contention that the approach (sic) of the court should be exercised judiciously, the court should strike balance between competing claims of the applicant and the respondent. In so doing, recourse must be had to the record and conduct of the parties prior and after dismissal was done. It should also be (sic) listed that the appellant has been in occupation of the suit land since 1970, to date and having paid the purchase price which money is still with the respondent ….."

8. In considering this appeal, it is important for us to look back at the orders that were sought before the learned Judge. It was an order for review and to set aside an order made dismissing the application that sought also for setting aside of the orders dismissing the suit. The learned Judge meticulously went through the provisions of the law regarding the jurisdiction exercised by the courts in reviewing its own decisions and pointed as follows:-

   "These are discovery of new and important matter or evidence, mistake or error apparent on the face of the record; or for any other sufficient reasons."

9. The Judge considered the reasons advanced regarding failure by counsel or his client to attend court on the date for the hearing. He noted they failed to attend court because the appellant was not aware his counsel had passed away. Nonetheless the appellant did not disclose in the application when his counsel passed away and the circumstances under which he came to know his counsel had passed. The Judge found and we quote him;-

"**This *information would have enabled the court to determine whether the instant application was made with circumspection and without inordinate delay***". Also the Judge was satisfied that the death of counsel was not a matter that the appellant could have failed to know had he exercised due diligence.

10. This being a first appeal, we are mandated by law to re evaluate the matter and arrive at our own independent conclusion. We have examined the all the elements that support an order of review and regrettably, we find no justification for interfering with the learned Judge's reasoning and conclusion in this respect. The delay in bringing the application was not explained, the information regarding the date when the appellant's counsel passed away was not disclosed, and finally if the appellant had been diligent in following up his court case, he would have taken up action to file the necessary application without unreasonable delay.
11. As regards the order seeking to set aside the order of dismissal, this was an order made in exercise of the Judge's discretionary powers. It is a well established principle that a Court of Appeal should not interfere with the exercise of the trial Judge's discretion unless it is satisfied that the Judge in exercising his discretion, misdirected himself in some matters and as a result, arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result, there was injustice. (See the case of ***Mbogo & Another v Shah E ALR 1968*****, page 13)**. We agree with this principle that the court's discretion to set aside an exparte judgment or order is intended to avoid injustice or hardships resulting from accident, inadvertence or excusable mistake or error. It is not meant to assist a person who has deliberately sought to delay or subvert the cause of justice.
12. Was the appellant trying to delay and subvert the cause of justice? First of all, the suit was dismissed after it lay in court dormant for 5 years. After dismissal, the application for reinstatement was brought 8 years later. We agree with the learned Judge this inordinate delay was not excusable even considering the circumstances of the case. Counsel for the appellant urged us to consider the merit of the suit that involved land where the appellant took possession in 1970, after entering into a sale agreement and paying almost the entire purchase price. He took possession, and has been in occupation growing his crops therein. To us, we look at this matter this way; if this was the case, it would have spurred the appellant to push for immediate resolution of the problem. Instead, he made no efforts to move the case forward, and this way, it was perhaps to his advantage as he continued to derive benefits from the land while the registered owner was locked out. There is nothing on record to prove otherwise.
13. We think we have said enough to demonstrate that this appeal lacks merit, there is no justifiable

reason for us to interfere with the judge's discretion. The appeal is dismissed with no order as to costs.

Dated and delivered at Nyeri this 6th day of June, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

….....

JUDGE OF APPEAL

J. OTIENO – ODEK

….....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR