



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPEAL NO. 151 OF 2010

BETWEEN

MOSES MURIIRA MAINGI 1ST APPELLANT

FRANCIS MUTUMA MAINGI 2ND APPELLANT

NAHASHON NDEREBA MAINGI 3RD APPELLANT

AND

MAINGI KAMURU 1ST RESPONDENT

GEOFFREY MWIRIGI MAINGI PAUL 2ND RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Meru (Kasango, J.) dated 19th March, 2010

in

H.C.C.C NO. 316 OF 1992)

JUDGMENT OF THE COURT

1. This is an appeal from the ruling of the High Court (Kasango, J.) dated 19th March, 2010 wherein the appellants' suit was dismissed for want of prosecution.
2. The genesis of this appeal arises from a family dispute over L.R. No. ABOTHUGUCHI/KATHERI/293 (suit property). The appellants are the 1st respondent's (deceased) sons and the 2nd respondent's step brothers. The appellants' case was that the suit property was registered in the name of their father, the 1st respondent, during the land adjudication process; and that it was held in trust for his family. Subsequently, on or about June, 1992 the deceased transferred the suit property to the 2nd respondent. The appellants' claimed that the said transfer was fraudulent and rendered them landless. Consequently, the appellants filed a suit in 1992 in the High Court against the deceased (1st defendant therein) and the 2nd respondent (2nd

- defendant therein) seeking *inter alia* an order of cancellation of the said transfer, rectification of the suit property register and an order directing the division of the suit property equally between the appellants and the 2nd respondent.
3. The deceased and the 2nd respondent entered appearance and filed a joint statement of defence denying the allegations made by the appellants. Thereafter on 26th April, 1998 the 1st defendant died and was substituted with Gideon Kiugu being the legal representative of his estate on 11th July, 2000. Following a consent recorded by the parties the dispute was referred for arbitration to the Chief of Katheri Location together with the clan elders. The arbitration award was entered in favour of the 2nd respondent. The elders directed the 2nd respondent to stay on the suit property since it was the 1st respondent's (deceased's) wish. Thereafter, the said arbitral award was set aside on 31st July, 2001 by the High Court.
 4. The respondents herein on 17th August, 2006 filed an application seeking *inter alia* dismissal of the appellants' suit for want of prosecution. The grounds upon which they relied on in support of their application was firstly, that the appellants' had not taken any step in prosecuting the suit since 31st July, 2001 and that it had been almost five years since any step had been taken in the suit; and secondly that the appellants had lost interest in the suit.
 5. The appellants in response claimed that before their father, the 1st respondent, died he requested them to resolve the dispute amicably as brothers; that pursuant to the late father's request there had been ongoing negotiations in respect of the dispute; and that if the respondents had indicated that they were not interested in the negotiations the appellants would have taken steps to prosecute the suit. The appellants maintained that the failure to set down the suit for hearing was not deliberate but that it was because they were under the honest belief that the respondents were committed to a negotiated settlement.
 6. The High Court (Kasango, J.) in her ruling dated 19th March, 2010 dismissed the appellants' suit for want of prosecution on the grounds that no reasonable explanation had been given by the appellants' for delay in prosecuting the suit; and that the 2nd respondent would be prejudiced if the hearing proceeded since the 1st respondent had died and his evidence was crucial to the defence case. It is against this decision that the appellants' have filed this appeal based on the following grounds:-
 - i. ***The learned Judge erred in law and in fact in holding that there was no reasonable explanation for the delay yet there was uncontroverted evidence by the appellants' that there were negotiations between the parties which prevented the appellants from pursuing the matter in court.***
 - ii. ***The learned Judge erred in law and fact in rejecting the explanation given by the appellants for the delay without giving any reasons for rejecting the same.***
 - iii. ***The learned Judge erred in law and in fact in holding that there was inordinate delay by merely looking at the age of the matter without considering the circumstances of the matter and the reasons for delay.***
 - iv. ***The learned Judge erred in law and fact in holding that a fair trial could not be reached at the end of the day without sound basis for reaching such a conclusion.***
 - v. ***The learned Judge erred in law and in fact in holding that a fair trial could not be reached at the end of the day since the 1st defendant (1st respondent) was deceased in spite of the fact that the 1st defendant had been substituted and therefore no prejudice would arise to any of the parties.***
 - vi. ***The learned Judge erred in law in holding that the affidavit sworn by counsel for the respondents' was competent without the deponent disclosing the source of his authority.***
 - vii. ***The learned Judge erred in law in failing to give the appellants an opportunity to ventilate their***

case in the wider interests of justice without being swayed by matters of procedures and technicalities.

7. Miss Nyaga, learned counsel for the appellants, submitted that the explanation given by the appellants for the delay in prosecuting the suit was reasonable and excusable. She argued that there were ongoing negotiations between the parties and the appellants believed a settlement was imminent. She submitted that this fact was uncontroverted by the respondents. She also argued that the respondents did not prove any prejudice they would suffer if the suit proceeded for hearing. Miss Nyaga argued that the learned Judge (Kasango, J.) erred in holding that since the 1st respondent had died the suit could not be heard and determined fairly.
8. Miss Nyaga, argued that the issue involved a land dispute which was quite emotive. She urged us to allow the appeal and to give the appellants a chance to be heard.
9. Mr. Ondari, learned counsel for the respondents, in opposing the appeal submitted that the decision of the High Court to dismiss the suit was based on the Judge's discretion and that this Court can not interfere with the same unless it is satisfied that the High Court applied wrong principles and or did not act judiciously. He referred to this Court's decision in ***Mugachai -vs- Mwakibundu- Civil Appeal No. 59&58 of 1983***. He submitted that five years had lapsed without the appellants' taking any action to prosecute the suit. He also submitted that there were no negotiations between the parties.
10. Mr. Ondari argued that there would be no fair trial where the 2nd respondent is concerned. According to him there are allegations of fraud leveled against the respondents and that the 1st respondent's (now deceased) evidence was crucial. He submitted that the contents of the affidavit he swore on behalf of the respondents' in support of the application for dismissal were facts within his knowledge.
11. We agree with Mr. Ondari that the learned Judge in dismissing the appellants' suit exercised her discretionary power. Therefore, before we can interfere with the learned Judge's discretion we must be satisfied that she misdirected herself in some matter and as a result arrived at a wrong decision or, that she 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....'

12. The power of the court to dismiss a suit for want of prosecution is a discretionary power, but which should be exercised judicially. We adopt the decision of the High Court in ***Ivita vs. Kyumbu [1984] KLR 441***, where 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."

13. Having perused the record we cannot help but notice the appellants' in opposing the application for dismissal filed a replying affidavit sworn by the 3rd appellant dated 14th July, 2009. The 3rd appellant deponed that the delay in prosecuting the suit was as a result of ongoing negotiations by

the parties. This fact was not disputed by the respondents in a further affidavit but was disputed by their advocate on record in his submissions to the High Court. We find that the submissions disputing the negotiations by the respondents' counsel were made from the bar and were of little value. We are therefore of the considered view that the parties herein were indeed involved in negotiations to settle the dispute amicably as per their late father's wishes, and that was precisely the reason why the appellants took no further action on the pending law suit. We find this explanation to be reasonable and excusable.

14. We are also of the considered view that the learned Judge erred in holding that the fact that the 1st respondent had died was prejudicial to a fair trial insofar as the 2nd respondent is concerned. This is because the appellants' cause of action against the 1st defendant did not abate since he was substituted on 11th July, 2000 with one Gideon Kiungu who is the legal representative of the deceased's estate. In any event the 2nd respondent had not complained of any such prejudice during the arbitration proceedings. Therefore, the cause of action survived the deceased.

15. Having expressed ourselves as above we see no reason to consider the other grounds of appeal. Accordingly, the appeal herein has merit and is allowed with costs to the appellants. We order that the High Court's ruling and subsequent order dated 19th March, 2009 be and is hereby set aside and the application dated 17th August, 2006 is dismissed with costs to the appellants. We order that the suit proceed for hearing at the High Court before any Judge, other than Kasango, J.

Dated and delivered at Nyeri this 3rd day of October, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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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