Mbuthia v Ngigi & 3 others (Environment and Land Appeal E025 of 2023) [2024] KEELC 13700 (KLR) (6 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13700 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL E025 OF 2023

JG KEMEI, J

DECEMBER 6, 2024

BETWEEN

PETER GACHOBE MBUTHIA ..... APPELLANT

AND

GEORGE NJENGA NGIGI ..... 1ST RESPONDENT

MARY WANJA KIBUNJA ..... 2ND RESPONDENT

LAND REGISTRAR, RUIRU ..... 3RD RESPONDENT

THE ATTORNEY GENERAL ..... 4TH RESPONDENT

RULING

1. The subject of this Ruling is an interlocutory appeal filed by the Appellant against the trial Court's Ruling in Ruiru MCL&E Case No. E061 of 2021 delivered 23/3/2023. The Appellant (Plaintiff in the trial Court) filed its Memorandum of appeal dated 4/4/2023 on grounds THAT;

    a. The Learned Magistrate erred in law and fact by by failing to consider that the Appellant has been always willing and ready to prosecute the matter.

    b. The Learned Magistrate erred in law and fact by failing to understand that it's difficult to obtain call logs made more than a month ago and the Appellant's efforts to reach the previous advocate proved futile.

    c. The Learned Magistrate erred in law and fact by failing to consider that the Appellant's previous advocate was to blame for failing to attend Court and prosecute the matter timely.

    d. The Learned Magistrate erred in law and fact in denying the Appellant an opportunity to prosecute his suit on merit.

e. The Learned Magistrate erred in law and fact by failing to issue a notice to show cause why the matter should not be dismissed.

f. The Learned Magistrate erred in law and fact by failing to consider that the Appellant's right to property is on the verge of being violated given the dismissal of the suit.

g. The Learned Magistrate erred in law and fact by failing to consider that the Appellant had instructed another Advocate who moved promptly to salvage the matter.

h. The Learned Magistrate erred in law and fact in the manner she analyzed the Application to reinstate the suit.

i. The Learned Magistrate erred in law and fact by failing to consider that the mistake of not visiting the Court premises was never intentional.

j. The Learned Magistrate erred in law and fact in declaring that the mistake of an advocate should be visited upon the client.

k. The Learned Magistrate erred in law and fact in not setting aside the orders made on the 20th April 2022.

2. The Appellant prays that its appeal be allowed, the impugned Ruling be set aside and his Application dated 6/12/2022 be allowed.

3. To place the appeal in context, a brief summary of the trial Court case is relevant. Vide his plaint dated 20/4/2021, the Appellant averred that on 30/3/2016 he entered in to a sale agreement with the 1st Respondent for sale of land known as RUIRU/RUIRU EAST BLOCK 2/8653 (hereinafter referred to as the suit land) at a consideration of Kshs. 500,000/-. That the 1st Respondent failed to honor the terms of payment of the purchase price and in particular only paid Kshs. 65,000/- leaving a balance of Kshs. 435,000/-. He levelled particulars of fraud against the Respondents at para 17 of the plaint leading to a fraudulent transfer and registration of the suit land in the 1st Respondent's name. Interalia he prayed for a declaration that the transfer of the suit property to the 1st and 2nd Respondents was illegal; an order of mandatory injunction against the 1st and 2nd Respondents from interfering with the suit land; cancellation of the 2nd Respondent's title deed and reversion of the title in his name.

4. Contemporaneous to filing his suit, the Appellant also filed an application of even date seeking temporary injunction against the Respondents pending the hearing and determination of the suit.

5. Denying the suit in toto, the 2nd Respondent filed her statement of defence dated 25/5/2021 and put the Appellant to strict proof. She averred that she duly entered into an Agreement for sale of the suit land from the 1st Respondent and was issued with a title deed on 15/9/2017. Similarly, she objected to the application for injunction vide her Replying affidavit sworn on 25/5/2021.

6. The 1st, 3rd and 4th Respondents neither entered appearances nor filed any defence.

7. The record before me shows that the application for injunction was granted in Ruling delivered on 23/7/2021.

8. Thereafter the matter was in Court on 9/3/2022; 31/3/2022 and 20/4/2022 in the absence of all parties. On 20/4/2022 the trial Court noted that there being no appearances despite virtual Court links having been sent to the counsels in the matter, the suit was marked as closed. It is this Order that prompted the filing of the Appellant's application dated 6/12/2022 seeking in the main setting aside

the dismissal order of 20/4/2022 and reinstatement of the suit for hearing on merit. The application was not opposed despite service. See Affidavit of Service sworn on 13/1/2/2022 by Kevin Mbugua.

9. On 23/3/2023 the trial Court proceeded to dismiss the Application dated 6/12/2022 provoking the instant appeal.

Written submissions

10. On 14/10/2024 the Appeal was admitted for hearing. Directions were taken and parties agreed to canvass the appeal by way of written submissions within 30 days. None of the parties complied with the directions with respect to filing of the written submissions.

Analysis & determination

11. As a first Appellate Court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is enunciated by Section 78 of the *Civil Procedure Act* which espouses the role of a first Appellate Court which is to: '... re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions.'

12. Besides, that duty has been affirmed in numerous decisions of the superior Courts. Notably in the case of Selle & Another Vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was pronounced thus:

> "... this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court ... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ..."

13. The germane issue for determination therefore is whether the appeal is merited.

14. Having outlined the background on the appeal in extenso in the preceding paragraphs, I now proceed to the gist of the appeal as follows;

15. In the impugned Ruling the trial Court observed that though the application was not opposed, the prayers sought therein were discretionary in nature and the Appellant was obliged to explain to the Court's satisfaction, why he failed to attend Court on diverse occasions. That the Appellant's averments touching on attempts to reach his former counsel were not proven by way of evidence and that nothing stopped the Appellant from personally visiting the Court premises to find out the status of his case, if at all. Further the Hon. Magistrate decried the delay in filing the subject application being 8 months after the order for dismissal had been issued. The totality of the forgoing led the trial Court to find that no basis had been laid for it to exercise the application for reinstatement and consequently dismissed it with no orders to costs.

16. Indeed, the nature of the application dated 6/12/2022 called for exercise of discretion as provided under Order 12 Rule 7 of the Civil Procedure Rules which provides;

> "7. Setting aside judgment or dismissal [Order 12, rule 7.]

Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just."

17. The above provision is preceded by Order 12 rule 1 which is to the effect that;

> " 1. When neither party attends [Order 12, rule 1.]
>
> If on the day fixed for hearing, after the suit has been called on for hearing outside the Court, neither party attends, the Court may dismiss the suit."

18. In the case of Mbogo & Another Vs. Shah (1969) EA 93, it was held, inter alia, that:

> " An appellate Court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which it should be taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not interfere with the exercise of the discretion of a judge unless satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice."

19. The above issue was also considered by the Supreme Court of Kenya in the case of Apungu Arthur Kibira Vs. Independent Electoral and Commissions Boundaries & 3 Others [2019] eKLR where the Court stated as follows in paragraph 39 of the judgment:

> " We reiterate that in an appeal from a decision based on an exercise of discretionary power, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of Kacem v Bashir (2010)NZSC 112; (2011)2 NLRI (Kacem) where it was held para 32]:
>
> > "In this context a general appeal is to be distinguished from an appeal against the decision made in exercise of discretion. In that kind of case, the criteria for a successful appeal are stricter: (i) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong."

20. A glean of the trial Court record reveals that via email communication to the parties, an email was sent on 21/7/2021 notifying them of delivery of Ruling on 23/7/2021 at 8.50 am. This Ruling was in respect of the application for injunction. The next email communication was on 16/2/2022 informing the parties' counsel that the matter would be mentioned for directions on the 9/3/2022 at 8.30 am. None of the parties attended on that day. There is no evidence of communication of the dates of 31//3/2022 and 20/4/2022 from the Court to the parties. That notwithstanding the Court went ahead to hold that parties were absent despite a Court link having been sent to them and proceeded to close the case.

21. In my view the trial Court proceeded to erroneously 'close the case' when the last position communicated to parties was for mention for directions. Indeed, no Notice to Show Cause was issued to put the Appellant on notice on the consequences to follow for non-attendance/non-prosecution of his case. Having blamed his counsel for communication breakdown, and there being no objection to this averment, I am of the view that the benefit of doubt ought to have been granted in favor of the Appellant albeit with conditions.

22. The mode of prosecution of suits is governed by Order 17 of the Civil Procedure Rules;

> " 1. Hearing from day to day [Order 17, rule 1.]
>
> (1) Once the suit is set down for hearing, it shall not be adjourned unless a party applying for adjournment satisfies the Court that it is just to grant the adjournment.
>
> (2) When the Court grants an adjournment it shall give a date for further hearing or directions.
>
> 2. Notice to show cause why suit should not be dismissed [Order 17, rule 2.]
>
> (1) In any suit in which no application has been made or step taken by either party for one year, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
>
> (2) If cause is shown to the satisfaction of the Court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
>
> (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
>
> (4) The Court may dismiss the suit for non-compliance with any direction given under this Order.
>
> (5) A suit stands dismissed after two years where no step has been undertaken.
>
> (6) A party may apply to Court after dismissal of a suit under this Order."

23. As alluded in the preceding paras, the suit was scheduled for mention on the 20/4/2022 when it met its dismissal. The rules are not explicit on the provisions for dismissal of the suit at the mention stage. I therefore find that the dismissal was not warranted and the same is overturned.

24. Final Orders for disposal:-

    a. In the end the appeal succeeds. I make no orders as to costs.

    b. The suit be and is hereby reinstated subject to the Appellant taking steps to fix the matter for hearing within the next thirty (30) days in default the suit shall stand dismissed on the 31st day following this Ruling.

25. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 6TH DAY OF DECEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Waweru HB Juma for the Appellant

1st Respondent - Absent

Wangui HB Maina for the 2nd Respondent

3rd and 4th Respondents - Absent

Court Assistants – Ann/Melita