



REPUBLIC OF KENYA



**Owuor v Owori (Civil Appeal E008 of 2023)
[2024] KEHC 3368 (KLR) (22 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3368 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E008 OF 2023
WM MUSYOKA, J
MARCH 22, 2024**

BETWEEN

ERNEST NICANOR OUMA OWUOR APPELLANT

AND

BENARD SIKUKU OWORI RESPONDENT

*(An appeal arising from ruling of Hon. L. Ambasi, Chief Magistrate,
CM, delivered on 4th February 2021, in Busia CMCS No. 621 of 2018)*

JUDGMENT

1. The appeal herein arises, according to the memorandum of appeal filed herein, from orders that were made on 4th February 2021, in Busia CMCS No. 621 of 2018, in the following terms:

“The main objective of the suit, was for reconstruction of the file which has since been achieved. In my view this matter having been listed for hearing today at the instance of counsel and both he and his client being absent in Court, the Notice of Motion of 2nd February 2020 be and is hereby dismissed with costs to the respondent”.
2. Being aggrieved, the appellant herein approached the High Court, in this appeal, raising 4 grounds: the ruling was delivered on a date when the matter was coming up for mention; the value of the estate exceeded the jurisdiction of the trial Court; the trial court had no jurisdiction on the matter as the grant had been issued by a superior court; and the trial court ought to have set out, in the ruling, the remedies sought, the issues for determination, the notable issues in the written submissions and the court’s considered finding.
3. I gave directions, on 11th December 2023, for the canvassing of the appeal by way of written submissions. I have seen written submissions, by the appellant, complete with the authorities that he



relies on. The respondent does not appear to have filed any. I have read through the submissions by the appellant, and noted the arguments made.

4. The first ground is on whether a court ought to give substantive orders on a date when the matter comes up for mention. There is ample authority that that ought not be the case. There should be no hearing conducted on a date when a matter comes up for mention, without the parties consenting to such a hearing, and it is also the position that a matter ought not be dismissed on a date when it comes up for mention.
5. So, what happened here? Was the matter coming up for mention or hearing? The appointment for 4th February 2021 was given on 21st January 2021 in open court, in the presence of the Advocates for both sides. The appearance on 21st January 2021, was for mention, and the court fixed the matter for 4th February 2021, for hearing by submissions. It is not clear what was to be heard by written submissions, but the court had earlier alluded to parties exchanging further documents in the substantive suit. The matter was a succession cause, and it is not clear what was meant by the substantive suit.
6. The orders made on 21st January 2021 were recorded as follows: -

“RULING

The file be and is hereby reconstructed as prayed and this Miscellaneous Application be and is hereby concluded. Parties at liberty to exchange further documents in the substantive suit.

HON. MRS. LUCY AMBASI

CHIEF MAGISTRATE

21/01/21

By consent hearing by submissions. Respondent to file by 4th February 2021.

HON. MRS. LUCY AMBASI

CHIEF MAGISTRATE

21/01/21”

7. My understanding of the orders is that the matter was fixed for hearing on 4th February 2021, and hearing was to be by way of written submissions, and the respondent was directed to file his by 4th February 2021. So, going by the record, it is not true that the matter was coming up for mention. It was coming up for hearing. The consequence of not attending court, on a date appointed for hearing, is that the process coming up for hearing could be dismissed, at the discretion of the court, for want of prosecution. My understanding, of the order of 4th February 2021, is that what was coming up for hearing on that day was the Motion, dated 2nd February 2020, by the appellant. The appellant was not present to present it, and, so, the trial court, within its discretion, dismissed it. In my view, what happened, on 4th February 2021, was perfectly within the discretion of the trial court.
8. The second ground is about the trial court lacking jurisdiction to handle the matter. The case before the trial court had been initiated in 2018. The application, dated 1st December 2020, not 2nd December 2020, for that is the date when it was filed, was raising the issue of jurisdiction. It was what was coming up on 4th February 2021. The dismissal order of 4th February 2021 was not on the merits of the application, but rather on account of non-attendance and want of prosecution. It cannot be the case then that the trial court did not have jurisdiction to dismiss an application whose mover had not attended court to prosecute it. The jurisdiction, to dismiss the process for non-attendance and want of prosecution, existed, and it was unaffected by want, if at all, of pecuniary jurisdiction, which was yet



to be considered. The trial court had jurisdiction to dismiss the application, dated 1st December 2020, on 4th February 2021, for non-attendance and want of prosecution.

9. The third ground is that there was no jurisdiction for the trial court to hear and determine a matter, relating to an estate, where a grant had been made and confirmed by a higher court. The argument here escapes me. In the first place, the trial court did not hear the application, dated 1st December 2020. There was no one to be heard, for the appellant was not in court to prosecute the application. Dismissing a process for non-attendance and want of prosecution does not amount to hearing a matter. Secondly, even though Busia CMCSC No. 621 of 2018 was formerly at the High Court, upon its transfer to the Chief Magistrate's Court, the orders made at the High Court became orders of the Chief Magistrate's Court, and the Chief Magistrate's Court was within jurisdiction to deal with the said orders as if they had been made by the Chief Magistrate's Court. That was the gist of my ruling, in *Musine vs. Osano* [2023] KEHC 20217 (KLR) (Musyoka, J), which I notice the appellant is citing to support his argument. To hold otherwise, would be to defeat the whole essence of transfer of a suit or cause from the High Court to the Chief Magistrate's Court.
10. The fourth, and the last, ground is that the ruling of 4th December 2021 did not set out the remedies sought in the application, dated 1st December 2020; identify the issues for determination; point out the notable items in the written submissions; and the considered finding of the court on each issue. The ruling of 4th December 2021 did not dismiss the application of 1st December 2020 on merits, but for non-attendance and want of prosecution. The said ruling was not a considered one, where the items raised in this ground could come up. There was no need for the trial court to get into mentioning remedies, identifying issues, looking at submissions, and giving reasons for its findings on the issues, when all it was doing was to dismiss the application for non-attendance and want of prosecution. There was no hearing. No arguments were made. So, there was no basis for having to write a detailed considered ruling.
11. There is absolutely no merit in the appeal herein, and I hereby dismiss it, with costs to the respondent.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 22ND DAY OF MARCH 2024

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Wasilwa, instructed by Wasilwa Makhakara & Company, Advocates for the appellant.

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the respondent.

