Whitefield Place Limited v Gakuo & another (Civil Appeal E359 of 2021)
[2024] KEHC 7880 (KLR) (Civ) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7880 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E359 OF 2021

DKN MAGARE, J

JUNE 27, 2024

BETWEEN

WHITEFIELD PLACE LIMITED ..... APPELLANT

AND

MICHAEL KIBE GAKUO ..... 1ST RESPONDENT

SUSAN NJERI KIBE ..... 2ND RESPONDENT

(Being an appeal from the Ruling of Hon. A. N. Ogonda (SPM) in Nairobi CMCC No. 2441 of 2012, delivered on 4th June, 2021)

JUDGMENT

1. This is against a ruling and order of Hon. A. N. Ogonda (SPM) given on 4/6/2021 in Nairobi CMCC No. 2441 of 2012.

    1. The ruling was that the matter is reinstated and be heard within 6 months failing which the suit shall stand dismissed. The appellant was the respondent in the matter. The appellant raised the following grounds of appeal:-

        a. The learned trial magistrate erred in law and in fact by allowing the Notice of Motion Application dated 11th March, 2021.

        b. The learned trial magistrate erred in law and in fact by failing to appreciate that there was a court order directing that CMCC No. 2441 of 2012 be prosecuted within three months from the 14th October, 2019 which orders were not adhered to nor extended.

        c. The learned trial magistrate erred in law and in fact by failing to appreciate that court orders are not given in vain and have to be obeyed.

d. The learned trial magistrate erred in law and in fact by failing to appreciate the appellant's submissions as to the issues raised in the respondent's Notice of Motion Application dated 11th March, 2021.

e. The Learned Magistrate erred in law and in fact by failing to appreciate that the orders of 14th October, 2019 were not issued ex parte and could therefore not be set aside under Order 12 rule 7 of the *Civil Procedure Rules*.

f. The Learned Magistrate erred in law and in fact by failing to appreciate that it was functus officio in so far as the orders of 14th October, 2019 were concerned and that any party dissatisfied therewith could only challenge the same via appeal.

g. The Learned Magistrate erred in law and in fact in not appreciating that by allowing the said application she was sitting on appeal over the decision of her colleague with concurrent jurisdiction.

h. The Learned Magistrate erred in law and in fact by failing to appreciate that the reasons advanced by the Respondents were in any event unmeritorious and there was absolutely no justification in allowing the application.

Background

2. The lower court file is in bad state. The suit was filed against the defendant on 28/6/2012. The matter was adjourned many times for the respondent to comply. The matter was taken out of the hearing list on 4/12/2014.

3. The next time it was in court was on 28/11/2016 after the matter was fixed for mention on 17/10/2016. It appears it was for an application. The matter was to record a consent but put off to 7/2/2017. Subsequently on 7/2/2017 the application dated 14/10/2016 was marked as withdrawn.

4. The matter lay in abeyance until 5 years and 8 days later when the same was dismissed for want of prosecution. The earlier application was also for dismissal for want of prosecution. It was withdrawn by respondent. The respondent went to slumber land until woken by a dismissal on 16/2/2021. When the matter was due for hearing the appellants sought to cease acting.

5. The Notice of Motion filed on 11/3/2020 was for:-

   a. That this application be certified as urgent and be heard ex-parte in the first instance.

   b. That this Honourable Court does set aside and/or vary the orders issued on 14th October, 2019.

   c. That the suit herein be re-instated for hearing on merit and this Honourable Court do enlarge and extend the time within which this suit is to be prosecuted.

   d. That the costs of this Application be in the cause.

6. The court made the impugned decision which resulted in this Appeal. The appellant filed an amended Memorandum of Appeal dated 19/7/2022 which were as:-

   a. The learned magistrate erred in law and in fact by allowing the Notice of Motion Application dated 11th March, 2021.

   b. The learned Magistrate erred in law and in fact by failing to appreciate that there was a court order directing that CMCC No. 2441 of 2012 be prosecuted within three months from the 14th day of October, 2019 which orders were not adhered to nor extended.

c. The learned Magistrate erred in law and in fact by failing to appreciate that court orders are not given in vain and have to be obeyed.

d. The learned Magistrate erred in law and in fact by failing to appreciate the appellant's submissions as to the issues raised in the Respondent's Notice of Motion Application dated 11th March, 2021.

e. The Learned Magistrate erred in law and in fact by failing to appreciate that the orders of 14th October, 2019 were not issued ex parte and could therefore not be set aside under Order 12 rule 7 of the *Civil Procedure Rules*.

f. The Learned Magistrate erred in law and in fact by failing to appreciate that it was functus officio in so far as the orders of 14th October, 2019 were concerned and that any party dissatisfied therewith could only challenge the same via appeal.

g. The Learned Magistrate erred in law and in fact in not appreciating that by allowing the said application she was sitting on appeal over the decision of her colleague with concurrent jurisdiction.

h. The Learned Magistrate erred in law and in fact by failing to appreciate that the reasons advanced by the Respondents were in any event unmeritorious and there was absolutely no justification in allowing the application.

7. The application had been premised that the court directed that the same be prosecuted within 3 months failing which the suit stood dismissed. There was no application made to review the earlier order of October, 2019.

Analysis

8. The grounds of Appeal are prolixoius and unseemly. They raise only one question. The apppellant should learn to file concise grounds of Appeal. Order 42 Rule 1 of the *Civil Procedure Rules* provides are doth: -

> " 1. Form of appeal –
>
> 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

9. The Court of Appeal had this to say about compliance with Rule 86 of the *Court of Appeal Rules* (which is *pari materia* with Order 42 Rule 1 of the *Civil Procedure Rules*) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR: -

> "We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the *Court of Appeal Rules*. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the

myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v Firoz Hussein Tundal & 2 Others* [2013] eKLR) and *Nasri Ibrahim v IEBC & 2 Others* [2018] eKLR. In the latter case, this Court lamented:

> " We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues... "

10. In the case of *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] eKLR , the court of appeal observed that : -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross v Hezekiah Kiptoo Kimue & 4 others*, Civil Appeal No. 223 of 2013, this Court stated:
>
> > " The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

11. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

12. In the case of *Mbogo and Another v Shah* [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

13. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and Others* [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

> " ... 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 re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular

circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

14. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

15. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

16. Suits are filed to be heard. For the last 12 years the respondent had not taken a stand in court to state their case. There have been more than 2 occasions to dismiss the suit. However, the respondent survived by a whisker. The orders given in 2019 were interparties.

17. In the case of In the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969)EA 696 the court stated as follows: -

> " In cases falling outside the specific provisions quoted above. Farrel, J., adopted this view. Dalton, J., in Saldanha's case purported to follow the decision of Windham m C.J. in *Mulji v Jadavji*, [1963] EA. 217, but all that case decided was that the courts inherent jurisdiction could not be invoked where an l alternative remedy had been available. In the instant case, it is clear that none of the specific provisions for dismissing suits applied to the suit the subject of this appeal. That being so, I do not see how the courts inherent jurisdiction can be said to be fettered, as no alternative remedy existed."

18. In *Thathini Development Company Limited v Mombasa Water & Sewerage Company & another* [2022] eKLR, Hon. Justice L. L. Naikuni J, stated as follows: -

> " 10. When a party wishes to set aside an order of dismissal of suit for want of prosecution are guided by the provisions of Order 12 Rule 7 of the *Civil Procedure Rules*. It provides that, "
>
> > " Where under this Order judgement has been entered or the suit has been dismissed, the court on application may set aside or vary the judgement or order upon such terms as may be just."
>
> The Legal substratum for dismissal of suits for want of prosecution is founded on the Principles that litigation must be expedited, and concluded by parties who come to court for seeking justice. To assist in clearing backlogs in court and the ever increasing over-loads restoring bad public confidence and trust on the judiciary. Upon filing of cases parties should efficiently and effectively be seen to fast track their hearing and determination. There should be no delay at all based on legal maxim – Justice delayed is justice denied" Nonetheless, should there be any delay arising from one substantive and justifiable logistical cause or reason, the same should not be inordinate, unreasonable and inexcusable. I say so, as that would be doing grave injustice

to one side or the other or both and in such circumstance, the Honorable May in its discretion dismiss the action straight away.

11. Additionally, the Provisions of order 17 rule 2 (3) of the *Civil Procedure Rules* provides, *inter alia*:-

> " 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 dismissed and if cause is not shown to its satisfaction, may dismiss the suit."
>
> 2). .....
>
> 3). any party to the suit may apply for its dismissal as provided in Sub-rule 1".

19. In the case of *George Gatere Kibata v George Kuria Mwaura & another* [2017] eKLR, B.M. Eboso stated as follows: -

> My understanding of the framework contained in Order 17 Rule 2 is that a court may suo motto dismiss a suit for want of prosecution. Within the same framework, the court may dismiss a suit on the same ground on the application of either party to the suit.
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> Besides the legal framework set out in Order 17 Rule 2, the guiding criteria to be applied in considering whether or not a suit should be dismissed for want of prosecution has been articulated and settled in a number of leading authorities, among them, the case of *Ivita v Kyumbu* [1984] KLR 441 where it is summarized as follows:
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> " The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay."
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> 10. In *Mwangi S. Kimenyi v Attorney General and Another*, Civil Suit Misc. No. 720 of 2009, the court restated the test as follows:-
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> 1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.
>
> 2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;
>
> 1) whether the delay has been intentional and contumelious;

2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court;

3) whether the delay is inordinate and inexcusable;

4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and

5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties."

20. In the case of *Joshua Chelelgo Kulei v Republic & 9 others* [2014] eKLR, the court stated as follows: -

> " Irreparable prejudice must refer to something more than the disadvantage caused by the loss of evidence that can happen in any trial. Thus irretrievable loss of some evidence, even if associated with delay, is not determinative of irreparable trial prejudice. Irreparability should not be equated with irretrievability."

21. In this case, the orders were not issued exparte, ipso facto, a party aggrieved could only appeal from the exercise of discretion. There was no review or expression of inability to comply. Even if it were reviewed, the threshold was not met. Section 80 of the *Civil Procedure Act* states that:

> " Any person who considers himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit".

22. Section 63 (e) of the *Civil Procedure Act* states that:

> " In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient.

23. Order 45 of the *Civil Procedure Rules* provides for Review and it states as follows:

> "(1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or

evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"

24. I associate myself with the reasoning of Kuloba J (as he then was) in *Lakesteel Supplies v Dr. Badia and Anor* Kisumu HCCC No. 191 of 1994 where he opined that:

> " The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the *Civil Procedure Rules*. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."

25. In this case the respondent did not appear keen to proceed with the suit in that court. The court below stated it was exercising discretion. However, upon issuance of the order of 14/10/2019 the respondent was to comply or appeal. There can be no re-exercise of discretion. Once exercised and judiciously so, the court has no discretion to change its mind. Exercise of discretion is a question of law. If it was improperly exercised, a party appeals. There was no room for issuance of the orders that were issued herein.

26. The court does not have discretion to review merit applications. In the circumstances the suit was already dismissed. The court had discretion to extend time. It did not however have discretion to revive a dead suit.

27. The court could not revive a dead suit. No action had been taken from 1/8/2012 to the date of dismissal. The court was exercising jurisdiction it did not have. In In the case of *Samuel Kamau*

Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, The supreme court stated as doth: -

> " This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission* (Applicant), Constitutional Application Number 2 of 2011. Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

28. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists.

29. The reinstatement was therefore without jurisdiction. I set the same aside. In any case the period granted still ended without action. Litigation must come to an end. This is also an end.

30. The appellant shall have costs since the reinstatement was a nullity. In *Macfoy v United Africa Co. Ltd* [1961] 3 All ER 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

Determination

31. The upshot of the foregoing is that I make the following orders: -

    a. The appeal is allowed. Judgment in Nairobi CMCC 2441 of 2021 remains dismissed with costs to the appellant.

    b. Costs of Kshs.65,000/=.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27TH DAY OF JUNE,2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for parties

Court Assistant – Jedidah