IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A.)

CIVIL APPEAL NO.156 OF 2018

BETWEEN

KENYA COMMERCIAL BANK LIMITED.....1ST APPELLANT

MARY WAMBUI CHEGE.....2ND APPELLANT

AND

MUNICIPAL COUNCIL OF MOMBASA.....1ST RESPONDENT

CHEMBE HOLDINGS LIMITED.....2ND RESPONDENT

AUCKLAND AGENCIES.....3RD RESPONDENT

(Being an Appeal from the Ruling and order of the High Court of Kenya

at Mombasa of (L. Komingoi, J.) dated 20th day of June, 2018

in

Mombasa High Court Civil Case NO. 289 of 2007

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JUDGMENT OF THE COURT

Background

1. The genesis of this appeal is a ruling by Komingoi, J. delivered on 20th June, 2018 in HCCC No. 289 of 2007, where the learned judge dismissed the appellants' application dated 21st November, 2017. In that application, the appellants were seeking an order to set aside orders issued on 11th October, 2017 dismissing the aforesaid High Court suit for want of prosecution.

2. The appellants had filed the suit as the executor and executrix respectively of the will of Stevenson Chege Kimotho, (deceased) who died testate on 2nd February, 1997. Among the properties forming part of the deceased's estate was a property known as ***sub-division NO. 2525 section 1 mainland North*** situated in Nyali, Mombasa County, (**the suit property**), whose value as at 2007 was Kshs. 35,400,000/=.

Proceedings before the Magistrates' Court

3. In 2006, the 1st respondent filed a suit in the Chief Magistrates' Court at Mombasa, **CMCC No. 2813 of 2006** against the deceased for recovery of land rates and interest, all amounting to Kshs. 562,210/= accrued on the suit property. The Plaint and summons were allegedly served upon the deceased by way of registered post. Obviously the deceased could not have received the court process as he was already dead, but that notwithstanding the matter proceeded by way of formal proof and judgment was entered against the deceased on 5th October, 2006. The suit property was thereafter advertised for public auction by the 3rd respondent and sold to the 2nd respondent.

4. Upon learning about the same, the appellants filed an application to set aside the ex parte judgment and the consequential orders. The application was dismissed.

Proceedings before the High Court and E&L Court

5. Following dismissal of the said application, the appellants filed HCCC No. 289 of 2007 seeking, inter alia, an injunction to restrain the respondents from selling, transferring or disposing of the suit property; a declaration that the entire proceedings in Mombasa ***CMCC No. 2813 of 2006*** including the sale of the suit property were null and void; re-conveyance of the suit property to the appellants; in the alternative payment of Kshs. 35,400,000/= being the market value of the suit property.

6. The suit was struck out on a preliminary objection, which order gave rise to ***Civil Appeal No. 155 of 2010*** before this Court; which allowed the appeal and reinstated the suit vide a judgment delivered on 17th October, 2013 where it was also directed that the suit be heard on a priority basis.

7. The appellants' advocates then were **M/S Omondi Waweru & Company**. The said advocates did not diligently prosecute the suit, with the result that sometime in October, 2007, the High Court earmarked the matter for dismissal for want of prosecution. It appears that two notices to show cause (N.T.S.C) why the suit could not be dismissed for want of prosecution were issued; one indicating that the matter would come up for consideration on 11th October, 2017 and the other and showing 16th October, 2017. The two notices were served upon M/S Omondi Waweru & Company advocates.

8. Meanwhile, **Miller & Company Advocates** took over the conduct of the matter from M/S Omondi Waweru and Company Advocates for and on behalf of the appellants. On 4th October, 2017, the new advocates filed a notice of change of advocates. Apparently, the N.T.S.C that was brought to their attention showed that the matter was listed on 16th October, 2017 and so when the N.T.S.C. came up on 11th October, 2017, there was no appearance for the appellant. Consequently, the High Court dismissed the suit for want of prosecution.

9. When the appellants learnt about the dismissal of their suit, they filed an application on 21st November, 2017 seeking to reinstate the matter, stating, inter alia, that they were not aware that the N.T.S.C was listed for hearing on 11th October, 2017 since the notice in their possession showed 16th October, 2017.

10. Dismissing the application, the learned judge stated;

" I have gone through the Court record and find that the Court of Appeal delivered its judgment on 17.12.2013. It also directed that the suit herein be given a hearing date on a priority basis. The suit herein was dismissed for want of prosecution on 11.10.2017.

It appears the plaintiffs/ applicants did not take any steps to set down the suit for hearing after they got the judgment from the Court of Appeal. The Notice to Show Cause was served on the Plaintiffs/Applicants Counsels way back in September.

I am of the view that the Plaintiff/ Applicants are not serious in prosecuting this case. I find that justifiable cause has been given to warrant this Court to set aside the orders of 11.10.2017".

Appeal to this Court

11. Being aggrieved by the aforesaid decision, the appellants preferred an appeal to this Court, stating that the learned judge erred in law and fact: in finding that no justifiable cause had been given by the appellants to warrant the court to set aside the orders of 11th October, 2017; in finding that the appellants were not serious in prosecuting the suit and in taking a draconian step that denied the appellants their constitutional right to be heard on a matter with far reaching implications on the estate of the deceased. They urged this Court to allow the appeal, set aside the ruling of 20th June, 2018 and reinstate HCCC No. 289 of 2007 to hearing.

12. ***Mr. Oduor***, learned counsel for the appellants, submitted that the learned judge misdirected herself in the exercise of her discretion. He contended that the learned judge did not give any consideration to the explanation proffered by the appellants for their non-attendance on 11th October, 2017. He cited, inter alia, ***Patel vs E.A Cargo Handling Services Limited [1974] E.A 75*** and ***Shah vs Mbogo & Another [1967] EA 1116*** on the principles that guide this Court in considering whether or not to disturb the exercise of discretion by a lower court.

13. ***Mr. Kinyua Kamundi***, learned counsel for the 2nd respondent, submitted that the learned judge's finding that the appellants had not taken any steps to set down the suit for hearing after this Court's judgment cannot be faulted; that the learned judge was right in finding that the appellants had been served with N.T.S.C for 11th October, 2017, and was therefore justified in dismissing the suit for want of prosecution. Counsel further submitted that the appellants had not filed any affidavit to explain the four-year delay in prosecuting the suit.

14. Mr. Kamundi further submitted that the judgment entered by the Chief Magistrates' Court had not been set aside; that the purchaser of the property would be prejudiced if the appeal is allowed, having concluded the purchase about 13 years ago; and that taking all the relevant factors into consideration, there is no basis for interfering with the learned judge's exercise of discretion.

15. ***Mr. William Wameyo,*** learned counsel for the 3rd respondent, told the court that his client was not aware of the High Court matter and did not participate in those proceedings; he became aware of this appeal when he was served with the record of appeal and submissions. Counsel urged the Court not to condemn the 3rd respondent to pay costs in any event. The 1st respondent did not participate in the appeal.

Analysis and determination

16. This Court is called upon to determine whether the learned judge exercised her discretion judiciously in declining to reinstate the appellants' suit to hearing. In so doing, we recall the words of the learned authors of ***Halbury's Laws of England, 4th Edition Vol. 37*** paragraph 448 that;

" The power to dismiss an action for want of prosecution without giving the plaintiff the opportunity to remedy his fault will not be exercised unless the court is satisfied that the default has been intentional and contumelious or that there has been prolonged or inordinate delay on the part of the plaintiff or his lawyer and that such delay will give rise to substantive risk, that is not possible to have a fair trial for the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendant either as between them and third parties."

17. In ***Shah vs Mbogo (supra)*** this court held that;

"The Court of Appeal should not interfere with the exercise of the discretion of a 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 exercise of his discretion and that as a result there has been misjustice."

18. We have perused the impugned ruling by the learned judge. With respect, the learned judge did not interrogate the appellants' reason for failure to attend court on 11th October, 2017. It was not in dispute that the court served two NTSC's bearing different dates.

Both notices were served upon the appellants' former advocates, M/S Omondi Waweru & Company Advocates. M/S Miller & Company Advocates were only aware of the hearing notice of 16th October, 2017. It is not clear why two notices were issued in respect of the same matter. Service of the two notices with different dates was not proper in law.

In ***Kanji Naran vs Velji Ramji, [1954] 21 EACA***, it was held that the court has no discretion where it appears that there has been no proper service.

19. Whereas it may not be disputed that M/S Omondi Waweru and Company Advocates did not exhibit promptitude in prosecuting the suit, particularly after this Court's judgment that reinstated the suit and directed that the suit be heard on priority basis, we must bear in mind the dicta by Madan, JA in ***Belinda Murai & Others vs Amos Wainaina [1978] KLR 2782*** that;

"The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The court may not condone it but it ought to certainly do whatever is necessary to rectify it if the interests of justice so dictate."

20. In our view, interests of justice required that the circumstances that led to the filing of a suit against a deceased person and the subsequent sale of a valuable property without notice to the deceased's family members be properly considered.

21. We are persuaded that had the learned judge carefully considered all the relevant factors in this matter, and particularly that there were two N.T.S.Cs with different dates, she would have arrived at a different conclusion.

22. Consequently, we allow this appeal, set aside the ruling delivered on 20th June, 2018 and reinstate ELC Cause No. 289 of 2007 to hearing. We further direct that the said suit be heard on priority basis.

Each party shall bear its own costs of this appeal.

DATED and Delivered at Mombasa this 19th day of December, 2019

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR