



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JUDICIAL REVIEW NO. 15 OF 2008

IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF LEAVE OF MERU HIGH COURT SUCCESSION CAUSE NO. 59 OF 1995

BETWEEN

HENRY MURITHI KIRIMA.....APPELLANT

VERSUS

LAND REGISTRAR IMENTI NORTH DISTRICT.....RESPONDENT

FLORENCE KANANU MUTIGA.....1ST INTERESTED PARTY

JAPHET KOBIA MARANYA.....2ND INTERESTED PARTY

RULING

1. Before the court is an application dated 9.6.2010 brought under **Order IX A Rule 10, 11 and XB Rule 8, Sections 3, 3A and 63** of the **Civil procedure Act**.
2. The orders sought are that the court be pleased to set aside the ex parte judgment entered against the interested party on 28.5.2010, the 1st interested party be allowed to file a replying affidavit out of time and the court do make such other orders as in the interests of justice in this case. The application is supported by an affidavit sworn by Florence Kananu Mutiga on 9.6.2010.
3. The grounds upon which the application is based are that: the 1st interested party was misled by the 2nd interested party hence did not file the replying affidavit and or attend court during the hearing; he had an arguable defence to the notice of motion; there will be no prejudice if the application is allowed and that the application was filed without undue delay.
4. The applicant admits he was served with the application dated 15.10.2008 and visited the offices of M/s B.G. Kariuki & Co. Advocates who was to represent them and put in their defence with the 2nd interested party footing the legal fees.
5. The 1st interested party states the said 2nd interested party unfortunately did not leave his contact with the aforesaid law firm hence could not be traced on time or at all. Further states he did not leave his address since he was to get all the communication from his lawyers through the 2nd interested party.
6. Again the 1st interested party states she has a good defence regarding the **Succession Cause No. 59 of 1995** which had transferred the land to her and only came to know the judgment herein on 2.6.2010 when she accidentally met the clerk to M/s B.G. Kariuki and Co. Advocates.
7. Further the applicant states unless the judgment is set aside, she stands to suffer loss of her land hence prays for an opportunity to be heard. She also takes the view the notice of motion had been filed outside the statutory period as the order complained about was made on 8.3.2004.
8. The application is opposed through grounds of opposition filed on 6.10.2011.
9. The respondent states:-

- 1) **The application is frivolous, vexatious and an abuse of the court process.**
- 2) **The cited provisions are not applicable in judicial review proceedings.**
- 3) **The applicant was always represented by counsel and the question of being misled by a party does not arise.**
- 4) **The application is made too late in the day, is overtaken by events as the estate has been distributed and the subject land gone to third parties.**
- 5) **Litigation has to come to an end especially where a party has been indolent and not diligent.**
- 6) **The enactment of Article 159 of the Constitution and Section 1A and B of the Civil Procedure Act were intended to stop these practices of delaying justice.**

10. With leave of court parties agreed to dispose the application through written submissions dated 27.10.2021 and 12.11.2021 respectively.
11. The 1st interested party submits **Order 10 Rule 11** allows the court powers to set aside ex parte judgments since he has offered a genuine reason which was also captured at page 2 of the judgment. He relies on *Esther Wamaiitha Njihia & 2 Others –vs- Safaricom Ltd [2014] eKLR* on the principles the court has to consider in setting aside an ex parte judgment as well as *CMC Holdings Ltd –vs- Nzioka (2004) 1KLR*.
12. On the other hand, the respondent submits the application was filed after an inordinate delay and seeks to overturn a judgment after ten years which will gravely prejudice the respondent. He relies on *Mwangi S. Kaimenyi –vs- Attorney General & Another [2019] eKLR* and *Dickson Miriti Kamonde –vs- Commercial bank [2000] eKLR*.
13. Secondly it is submitted the delay has not explained, was intentional and hence inexcusable. He relies on *Invesco Assurance Co. Ltd –vs- Oyange Barrack [2018] eKLR*.
14. Thirdly the respondent submits the delay amounts to an abuse of the court process contrary to **Articles 48 and 50 of the Constitution**. He relies on *Mobile Kitale Service Ltd –vs- Mobil Oil Kenya (unreported)*, *Catherine Wanjiku Nduati –vs- Johanne Bakery & Another [1999] eKLR* and urges the court to dismiss the application with costs as per **Section 27 (1) of the Civil Procedure Act**.
15. The court has looked at the application, grounds of opposition and rival submissions. The issue for determination is whether the applicant has made a case for this court to set aside the judgment delivered on 28.5.2010.
16. There is no dispute service of the notice of motion was effected upon the 1st interested party who instructed the firm of B.G. Kariuki & Co. Advocates to enter appearance for her on 17.3.2009. The said notice of appointment was specific that the 1st interested party instructed the law firm to act for her and not the 2nd interested party. Whether or not there was local arrangement on who was to effect the instructions is not for this court to determine for those are matters governed by the **Advocates Act** which is privileged communication between a party and his advocates.
17. The 1st interested party cannot therefore hide behind the curtain and purport to shift the blame to a person who did not enter appearance and or instruct counsel to act for him.
18. Again the firm of B.G. Kariuki advocates entered appearance on time but did not file the requisite defence though they were given adequate time to do so. If indeed the applicant herein instructed counsel and abdicated her responsibilities, left it to the 2nd interested party to do and did not follow up with her aforesaid advocates for proper prosecution of her instructions, she cannot blame her lawyers or the 2nd interested party for the same.
19. In *Shah –vs- Mbogo & Another [1967] E.A. 116* it was held the courts discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.
20. In *Stephen Wanyee Roki –vs- K-Rep Bank Limited & 2 Others [2012] eKLR* the Court of Appeal held that setting aside is not a right of a party but an equitable remedy that is only available at the discretion of the court.
21. In this case, there is no dispute the applicant was given an opportunity to present her defence but chose not to do so. The applicant has not attached the intended defence or grounds of opposition or a draft replying affidavit. She has only raised issues regarding a copy of the letter for consent from the land control board, a transfer dated 15.9.1993 and proceedings in **Meru Succession Cause No. 59 of 1995**.
22. In my considered view, all these are issues which the amended statement of facts dated 26.4.2010 alluded to which were annexed in and the verifying affidavit to the statement as **HM 1, 2, 3, 4, 5 and 6**.
23. Similarly the judgment dated 28.5.2010 captured all these issues including the Court of Appeal judgment over the estate of the deceased.
24. Lastly the respondent submits the setting aside would prejudice her since the land was transferred to the 2nd interested party who is not complaining at all. The 1st interested party has not said anything regarding the issue of prejudice and the inordinate delay to lodge and

prosecute her application.

25. In my view and given the foregoing it is quite obvious the applicant has taken over ten years to prefer and prosecute the application. The delay has not been explained and the prejudice occasioned to the respondents has also not been addressed.

26. The application therefore lacks merit. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 26TH DAY OF JANUARY, 2022

In presence of:

Gikundi for appellant

Mbubuya for 1st interested party

Kendi for respondent

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE