



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 58 OF 2018

FIDESIO KINYUA MARK T/A JOBIN ENTERPRISE.....APPELLANT

VERSUS

ECO BANK KENYA LIMITED.....1ST RESPONDENT

ELIZABETH HINGA.....2ND RESPONDENT

VALLEY AUCTIONEERS.....3RD RESPONDENT

LAWRENCE MBAABU.....4TH RESPONDENT

RULING

1. Through a preliminary objection dated 8.10.2021 the 4th respondent urges the court to find the appeal dated 21.11.2018 and filed on 13.12.2018 to have abated on 23.8.2021 by virtue of **Order 24 Rule 2 (2) of the Civil Procedure Rules** and secondly to find the appeal overtaken by events since the suit property was transferred to the 4th respondent and a title deed issued on 14.11.2019.

2. The 4th respondent relies on written submissions dated 21.10.2021. He relies on **Kaboi Mucheru –vs- Gakua Mucheru Mbugi [2015]eKLR as quoted in Musha Chengo Kenga & Another –vs- Lexon Kahindi Fakuro on behalf of Fakuro Randu [2019] eKLR and Said Sweilen Gheithan Saanun –vs- Commissioner of Lands (being sued through Attorney General & 5 Others [2015] eKLR.**

3. Regarding the appeal being overtaken by events, it is submitted the appeal prayed for the setting aside the lower ruling and an order restraining the respondents from processing any transfer of **L.R No. Ntima/Ntakira/5478** in favour of the 4th respondent in the alternative an inhibition order.

4. It is submitted the property was sold through public auction on 2.5.2018 subsequent to which the 4th respondent and his co-purchaser were issued with a title deed on 14.11.2019.

5. Further, it is submitted the appellant's action to stop the transfer vide **Meru ELC 181 of 2018** was thwarted through a ruling on 14.11.2018.

6. The 4th respondent relies on **Eric V.J Makokha & 4 Others –vs- Lawrence Sagini & 2 Others [1994] eKLR.**

7. Looking at the court record, on 26.5.2021 the appellant filed an application dated 17.2.2021 seeking for the substitution of the appellant with Emily Gacheri Kinyua on the basis that he had passed on 23.8.2020 during the pendency of the appeal. The applicant attached a copy of a limited grant of letters of administration ad Coligenda Bona.

8. The applicant fixed the application for hearing on 12.10.2021. Come 12.10.2021, the applicant did not attend to prosecute her application. The respondents attended court and urged the court to deal with the matter appropriately given the preliminary objection dated 8.10.2021. The court dismissed the application for non-prosecution with costs and a date was given for 17.11.2021 for directions on the preliminary objection.

9. The appellant was served with the preliminary objection together with written submissions and an affidavit sworn on 25.10.2021 and filed on 1.11.2021. The appellant has not made any response to the preliminary objection and neither did she take any appropriate action after the application for substitution was dismissed.

10. Given the admission that the appellant passed on 23.8.2020, it goes without saying that as at 23.8.2021 no substitution had occurred and no application for the extension of time to substitute the deceased appellant had been made.

11. Similarly no application for the revival of the appeal has been made. **See Issa Masudi Mwabumba –vs- Alice Kavenya Mutunga & 4 Others [2013] eKLR & Abok James Odera T/A A.J Odera & Associates –vs- John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR. The court is therefore unable to exercise any discretion in favour of the appellant as held in Elizabeth Wanjiru Njenga & Another –vs- Margaret Wanjiru Kinyara & 2 Others [2018] eKLR. Vyatu Ltd & Another –vs- Public Trustee Njanza Province [2003] eKLR.**

12. The appeal therefore abated and hence uphold the preliminary objection on that account.

13. Coming to the issue of the appeal being overtaken by events, the court record shows on 17.7.2019 it was informed the auction sale and the transfer had taken place. The court declined to grant any orders for the status quo to be maintained.

14. The appellant has not denied the contention by the 4th respondent that the appeal is overtaken by events, the orders sought are spent and that the property passed hands to the 4th respondent hence making this appeal untenable and an academic exercise.

15. This court relies on the holding in **Samson Ngugi Ichungwa T/A Grenair –vs- National Industrial Credit Bank & 2 Others [2019] eKLR and Charles Wanjuki Miricho suit as the personal representative of the Estate of Stephen Miricho Ngunjiri –vs- Wanjiru Baari Thitwa [2021] eKLR.**

16. In the circumstances, I find the preliminary objection with merits. The same is upheld and the appeal struck out with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 19TH DAY OF JANUARY, 2022

In presence of:

Miss Oloo holding brief for Njiru for defendants

Mukaburu for Kiogora Mugambi for plaintiffs

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE