



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CIVIL CASE NO. 157 OF 2008

JACKSON NGUNGU KAGUAE.....PLAINTIFF

VERSUS

HON. ATTORNEY GENERAL.....1ST DEFENDANT

D.C. KIRINYAGA DISTRICT.....2ND DEFENDANT

KIRINYAGA COUNTY COUNCIL.....3RD DEFENDANT

AND

MUTHIKE KARANJA & 592 OTHERS.....PROPOSED INTERESTED PARTIES/APPLICANTS

RULING

1. This is the application dated 27/10/2015 seeking for orders that leave be granted to the firm of Simba & Simba to come on record for the applicants; that the applicants be enjoined in the matter as interested parties; that the court be pleased to set aside the orders made on 23/11/2005 and 7/10/2009 and to reinstate the application dated 10/8/04 and 19/7/2007.
2. The applicants also seek that the court be pleased to set aside the judgment dated 26/9/2002 and the proceedings leading to o the orders issued thereto. The application is supported by the affidavit of Muthike Karanja who deponed that he has authority of the other applicants to swear the affidavit on their behalf.
3. In the affidavit it is stated that the applicants have been farming on parcel number Mutira/Kirimunge/219 till now which is enough ground for the court to join them in the proceedings. On 6/10/2015 the County Commissioner was ordered to have the decree executed and to have the applicants evicted from the subject land. The act of eviction would cause a real threat to the applicants who are in possession of the land as they stand to loose their livelihood and income.
4. The applicants appointed one Joseph Gachanja Kibuti to be their representative and appointed the firm of Chege Wainaina Advocates to handle the matter. When their application dated 10/8/2004 came up for hearing on 23/11/2005 the same was dismissed for non attendance as the said advocate did not attend court.
5. It is stated that after that the dismissal the said Joseph Gachanja unilaterally decided to act in person. The applicants should not be punished for the mistake of their previous advocate. The applicants have all along thought they are parties to the suit as they are lay people who do not understand the procedures of court. The applicants argue that in a judgment delivered on 26/9/2002 the court found that the 3rd

defendant still holds parcel Mutira/ Kirimunge/219 in trust for the plaintiffs but the applicants cannot benefit as they were not enjoined as plaintiffs and beneficiaries of the said land. According to the applicants, it is only if the court sets aside the judgment of 26/9/2006 that the applicants will be able to defend the source of their livelihood.

6. The respondent filed grounds of opposition dated 20/11/2015 stating that the application is incompetent and bad in law and an abuse of the court process. In the replying affidavit sworn on 2/12/2015, it is stated that the suit was filed in the year 1996 with the plaintiffs seeking a declaration that the 3rd defendant still holds the subject land in trust for the plaintiff pursuant to the 3rd defendant's council meeting of 19/10/1993.

7. In the minutes of the said meeting the 3rd defendant outlined specific members of 11 sub clans which were to benefit from the subject land. These are the members on whose behalf the suit was instituted in 1996. The said minutes also included the acreage that each member of the clan should get. The court allowed the plaintiffs claim but indicated that the question of the rightful beneficiary in each of the 11 clans had not been determined.

8. The court then referred the matter to the 2nd defendant who later submitted a list of beneficiaries of the subject land. The list was adopted as the court's award on 20/7/2007. This was pursuant to the interested parties application dated 10/8/2004. The interested parties cannot therefore claim for reinstatement of the application dated 10/8/2004 as the same was heard and determined on 27/9/2004.

9. The respondent further argued that some of the interested parties herein are not the same parties in the application dated 10/8/2004 and 19/7/2007 and cannot therefore seek reinstatement of an application they were not party to. The applicants have woken up from slumber since 17/10/2009 after they have realized that the decree is being implemented.

10. Both parties filed written submissions for disposal of the application.

11. The proposed applicants/interested parties submitted that the applications dated 10/8/2005 and 19/7/2007 seeking leave for the firm of Chege Wainaina & Company Advocates to come on record were dismissed by court on 23/11/2005 and 7/10/2015. The applicants argued that they have always cultivated the said parcel of land. For an application for enjoinder to succeed, the applicant must demonstrate personal interest and the prejudice to be suffered by the interested party.

12. The fact that the applicants were in possession of the land was not disclosed to court by the parties. Finally, that they stand to suffer irreparable loss if the application is not allowed. The mistake of their previous advocate should not be visited on them.

13. The applicant cited the case of **BELINDA MURAI & OTHERS VS AMOS WAINAINA [1978] KLR** where the court held that a mistake is a mistake and that the door of justice should not be closed because a mistake has been made.

14. In the case of **MUTUA MWANGANGI & ANOTHER VS JAMES MUTUA MUTIO [2016] eKLR** where the court excused mistake of counsel. The applicants could not articulate their cause after the applications were dismissed and hence the judgment should be set aside.

15. The plaintiff submitted that the question of who were the beneficiaries of the land was not determined in the judgment dated 26/6/2002. The applicants have no locus to pray for stay of execution of the decree issued on 26/9/2002 as they are not the same parties in the applications dated 2/8/2004 and 19/7/2007 and were also not parties in the main suit that led to the judgment delivered on 26/9/2002 and the award of March 2007. The suit was filed way back on 14/5/1996 and litigation must come to an end in the interests of justice.

16. The issue arises as to whether the court should set aside the orders made on 23/11/2005 and on

7/10/2009 and proceed to reinstate the applications dated 10/8/2004 and 19/7/2007. The background is that the court dismissed two applications for non-attendance.

17. The application dated 10/8/2004 filed by the beneficiaries sought to have the firm of Chege Wainaina & Company Advocates come on record on their behalf and that the plaintiffs and the defendants restrained from subdividing, alienating, transferring or dealing in any way with Mutira/Kirimunga/219 until the acreage was determined. The application also sought to have persons appearing in the attached list declared the rightful beneficiaries of Mutira/Kirimunga/219. It was on 23/11/2005 the court dismissed the application for non-attendance.

18. The application dated 19/7/2007 sought to set aside and declare the District Commissioner's Report filed on 19/3/2007 declared as null and void. The application also sought to have the matter referred back to the District Commissioner Kirinyaga to determine the rightful beneficiaries. On 7/10/2009 the court dismissed the application for non-attendance.

19. In this kind of scenario and given the passage of time since the dismissal of the applications, the question is whether the applicants should entirely blame the advocate. In the case of **JOHN ONGERI MARIARIA & 2 OTHERS V SPAUL MATUNDURA CIVIL APPLICATION NO. NAI. 301 OF 2003 [2004] 2 EA 163** cited in the case of **TEACHER SERVICE COMMISSION VS EX-PARTE PATRICK M NJUGUNA [2013] eKLR** it was held that:

Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders...Whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him...Whereas it is true that the Court has unfettered discretion, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone...Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent.

20. In the case of **UTALII TRANSPORT COMPANY LIMITED & 3 OTHERS VS NIC BANK LIMITED & ANOTHER [2014] eKLR** it was held as follows:-

Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court's mind on the delay, caution is advised for courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality."

21. These applications were dismissed about 10 years before this application was filed. Is this kind of delay justified in the circumstances? The applicants have not explained why there was inordinate delay in bringing the current application for reinstatement. The only reason given is that they are laymen and did not know of the dismissal. They honestly believed that they were still parties in the case.

22. In an application of reinstatement, time is of essence. A party cannot instruct an advocate in his case and then go to sleep. He has a duty to follow through his case with his counsel. The case belongs to him and not to the counsel and for this reason, the party must exercise due diligence in pursuing his case. The explanation given by the applicants does not justify or mitigate the inordinate delay.

23. It has not been denied that some of the parties in this application were not parties in the previous applications. The new comers have joined the former applicants to seek reinstatement of the former applicants' applications. This kind of mix-up of parties and non-parties has not been explained and had no legal basis. The scenario does not work in favour of the applicants.

24. On whether the court should set aside the judgment delivered on 26/9/2002 and the proceedings thereto, the court will refer to the facts and to the relevant law as well as the grounds on which the prayer is based.

25. For this court to exercise its discretion to set aside the judgment, the applicants must establish that they deserve the orders sought. The suit was heard and determined in Nairobi and was transferred to this court for purposes of execution. The judgment the applicants seek to set aside was delivered way back in the year 2002 which is about 14 years ago.

26. *The delay in bringing this application has not been explained to the satisfaction of the court. Ignorance of the law and facts has been pleaded but this does not justify granting of the orders sought.*

27. *The applicants have come at execution stage where several attempts to execute the judgment have been already made. New parties have joined others who had earlier unsuccessfully attempted to join this suit.*

28. *No ownership documents have been annexed to show that the parties have any tangible interest in the land in mitigation of setting aside the judgment. Neither have the applicants shown that they have been occupying the land for many years as alleged.*

29. Prayer 3 of the application seeks to enjoin the applicants as interested parties in the suit.

30. Order 1 Rule 10 (2) which provides that:

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

31. In the case of **LILIAN WAIRIMU NGATHO & ANOTHER V MOKI SAVINGS CO-OPERATIVE SOCIETY LIMITED & ANOTHER [2014] eKLR** Judge Nyamweya held as follows;

The provisions of Order 1 Rule 10(2) state that joinder of a party can be made “at any stage of the proceedings”. “Proceedings” are defined in Black’s Law Dictionary Ninth Edition at page 1324 as “the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment”. A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the court has already made its findings on the issues arising.

Similarly, the main purpose for joining a party as a Defendant under Order 1 Rule 3 of the Civil Procedure Rules is to claim some relief from the said party, and therefore such joinder can only be made during the pendency of a suit. As this court has declined to set aside the judgment herein, there is no suit pending before this court, and the Applicants cannot therefore be joined as parties at this stage.”

32. I have explained in the foregoing paragraphs that the applicants are coming in too late in this case which was determined about 14 years ago before filing this application. To join them as parties at this stage will not serve the interests of justice.

33. It is my finding that the interested parties have failed to demonstrate any merit in their application.

34. I hereby dismiss the application with costs to the respondent/plaintiff.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF SEPTMBER, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Thungu for Wangeci Munene for Plaintiff