



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC PETITION CASE NO. 14 OF 2017

IN THE MATTER OF ARTICLES 10, 22, 23, 24, 40, 42, 43, 47, 60, 66, 68, 69,

70, 73, 162 (b), 232, 258 & 259 OF THE CONSITUTION OF KENYA, 2010

IN THE MATTER OF ENFORCEMENT OF RIGHTS AND FUNDAMENTAL FREEDOMS

UNDER CHAPTER 4 ARTICLES 22 AND 23 (1) & (3), ARTICLE 47 AND CHAPTER 10

ARTICLE 162 (b), ARTICLE 174 OF THE CONSITUTION OF KENYA, IN 133 OF 2001

CONSITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS

AND FREEDOMS OF THE INDIVIDUAL, PRACTICE AND PROCEDURE RULES)

IN THE MATTER OF THE NEW ENVIRONEMNT AND LAND COURT ACT

IN THE MATTER OF THE ENVIRONEMNTAL, MANAGEMENT & COORDINATION ACT

IN THE MATTER OF SECTIONS 4 & 5 OF THE FAIR ADMINISTRATIVE ACTION ACT

IN THE MATTER OF SECTIONS 87, 91, 102, 103, 105 & 107 OF THE COUNTY GOVERNMENTS ACT

IN THE MATTER OF ALLEGED THREATENED CONTRAVENTION OF SECTIONS 4 & 5 OF

THE FAIR ADMINSTRAVIE ACTION, SECTIONS 87 & 103 OF

THE COUNTY GOVERNMENTS ACT & THE NATIONAL

VALUES & PRINCIPLES OF NATIONAL GOVERNANCE

UNDER ARTICLES 10 & 232 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ILLEGAL DEVELOPMENT OF MULTIPLE

DWELING UNITS ON LANDPARCEL NO. 12715/12673 AT SYOKIMAU

BETWEEN

JUSTUS KALII MAKAU.....1ST PETITIONER/APPLICANT

MOHAMED ISMAILI ABDI (CHAIRMAN).....2ND PETITIONER/APPLICANT

SHADRACK GATORE MBURU(SECRETARY).....3RD PETITIONER/APPLICANT

KELVIN OCHIENG NYAMOR (TREASURER).....4TH PETITIONER/APPLICANT

(Suing in their own name and on behalf of the Syokimau Residents Association)

VERSUS

LINET ACHIENG AMALLA.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF MACHAKOS.....2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....3RD RESPONDENT

RULING

INTRODUCTION

1. On 4th September 2017, the petitioners in this matter filed their petition dated the same date, seeking for several orders including declaratory and mandatory orders against the respondents. Simultaneous with filing the petition, the petitioners also filed a Notice of Motion dated 4th September 2017 whereby they sought for orders of injunction against the 1st respondent to bar them from construction of multiple dwelling units and or any further developments on Plot L. R. No. 12715/12673 in Syokimau, as well as orders directing the 2nd and 3rd Respondents to avail records in respect of transactions in regard to parcel numbers 12715/12673 and L. R. No. 12715/261 in Syokimau, pending hearing of the application and the petition.

2. On 28th September 2017, interim orders were granted by this court in terms of prayer 2 of the application until 1st November 2017. The temporary injunction orders granted restrained the 1st Respondent, her agents, servants or anyone acting on her behalf from constructing multiple dwelling units and/or undertaking any further development on Plot L.R. No. 12715/12673 in Syokimau pending hearing and determination of the petition herein.

3. The orders of 28th September 2017 were extended on 1st November 2017, 20th November 2017, 29th November 2017, 21st January 2018, 6th February 2018 and 20th April 2018. This matter came up in court severally thereafter but the interim orders were not extended. On 5th May 2021, the court ordered the Respondents to file and serve their Replying Affidavits to the petition in 7 days while the petitioners were directed to file and serve their supplementary affidavit together with submissions in respect of the petition in 14 days of service. The Respondents were granted 14 days to file and serve their submissions, upon being served by the petitioners. The matter was then fixed for mention on 22nd June 2021. On 22nd June 2021, counsel for the petitioners was absent in court. Upon hearing counsel for the Respondents, the court noted that the directions of 5th May 2021 were not complied with and that counsel for the petitioners though served, was not in court. Consequently, the court vacated the interim orders of injunction issued on 28th September 2017, and stood over the petition generally.

4. Therefore on 20th August 2021 the petitioners filed their application dated 19th August 2021 seeking for the following orders;

(a) Spent

(b) **That this Honourable Court be pleased to set aside the orders issued on 22nd June 2021 setting aside the interim orders of injunction issued against the 1st respondent.**

(c) **That any other orders as this Honourable Court may deem just and expedient to uphold its dignity under all the circumstances of this case.**

(d) **That the costs of this Application be provided for.**

5. Consequently this ruling is in respect of the application dated 19th August 2021. The application is premised on grounds on the face thereof together with the affidavit of **TABITHA MUTINDI MAVINDU**, Advocate for the petitioner, sworn on 19th August 2021, where she deposed that on 28th September 2017, the court issued orders directed at the 1st Respondent directing her, her agents, servants or whomsoever acting on her behalf to stop and or halt the construction of multiple dwelling units and or any further developments on Plot L.R. No. 12715/12673 in Syokimau, Mikato Court; that the interim orders had been in force since 28th September 2017 till 22nd June 2021 when the same were vacated in the absence of the petitioner's advocates; that on 22nd June 2021, counsel for the petitioners experienced power shortage before this matter was called out and hence could not log in or address the court then; that she could not trace the court file immediately but on 29th July 2021, she was served with orders made on 22nd June 2021 and that unless the interim orders are reinstated, the petitioners case will be rendered otiose, and they will further be subjected to irreparable damage.

6. The application is opposed. Mr. Okweh Achiando, Counsel for the 1st Respondent swore a Replying Affidavit dated 20th September 2021 and filed on the same date, where he deposed that it is the applicants' non compliance with the orders of 5th May 2021 that informed this court's decision to vacate the orders of 28th September 2017; that the applicant had enjoyed interim orders for four years with no attempt to prosecute the petition; that failure to attend court and blaming internet hiccups and power shortage were mere excuses on the part of the applicants; that on 22nd June 2021 when this matter was called out, the court placed it aside for one hour, waiting for the applicants counsel, who never turned up and that the court should not tolerate parties' indolence.

7. The 2nd Respondent filed a replying affidavit sworn on 13th September 2021 by one **PATRICK KIBAYA**, the Chief Officer Lands and Physical Planning Machakos County, where he deposed that the petitioners abandoned the petition and the Respondents cannot prosecute the petition on their behalf; that the petitioners and their counsel have habitually failed to attend court whenever this matter comes up in court and cannot continue to enjoy interim orders; that on 28th January 2020, 5th May 2021 and 22nd June 2021, counsel for the applicant was absent in court; that the petitioners had abandoned their application dated 4th September 2017 and the court had already directed how the petition should proceed, and that the application and the petition should be determined together so as to determine this matter expeditiously.

THE APPLICANTS' SUBMISSIONS

8. The applicants filed their submissions on 29th September 2021. The applicants reiterated the averments in their supporting affidavit and submitted that failure to attend court on 22nd June 2021 was not deliberate but due to internet hiccups and power shortage. Counsel relied on the case of **Emma Wanjiru Ndiguri & Another vs. Equity Bank Kenya Ltd [2021] eKLR**, where the court held that parties need to come to court with honesty and integrity and should not take advantage of the absence of the other party. Reliance was further placed on the case of **Patriotic Guards Ltd vs. James Kipchirchir Sambu [2018] eKLR**, where the court held that, in exercising its discretion, a court should do so judiciously and not on caprice, whim, likes or dislikes.

9. Counsel argued that the interim orders of 28th September 2017 were granted because the court was satisfied that the petitioner's rights were being or likely to be, trampled upon. Counsel relied on the cases of **Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & Another [2004] 1 KLR** and **National Commercial Bank Ltd vs. Olint Corporation [2009], eKLR** all of which this court has considered.

10. It was further contended for the Applicants that mistakes are inevitable and a party should not suffer the consequences of their counsel's mistake. Counsel referred to the case of **Philip Chemweno & Another vs. Augustine Kubende [1982 – 88] KR 103** where the court held as follows;

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit”

Counsel concluded that the Respondents will not suffer if the orders are granted.

THE 1ST RESPONDENT'S SUBMISSIONS

11. The 1st Respondent filed their submissions on 15th October 2021 and reiterated the contents of his replying affidavit and submitted that the purpose for mention of this matter on 22nd June 2021 was to confirm compliance with the orders of 5th May 2021, which orders had not been complied with by the Applicants. Further that the file had been placed aside for one hour to wait for counsel for the applicant who never showed up on 22nd June 2021. Counsel argued that setting aside the orders of 22nd June 2021 is in the court's discretion which should be exercised judiciously and not capriciously.

12. It was contended for the 1st Respondent that under Order 40 Rule 6, of the Civil Procedure Rules, the lifespan of an injunction is 12 months. It was further argued that the applicant had enjoyed interim orders for far too long at the detriment of the other parties. Counsel relied on the case of **Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & Another [2004] 1 KLR**, where it was held that;

“An interlocutory injunction, being an equitable remedy would be taken away (discharged) where it is shown that the person's conduct with respect to matters pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter. The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only meant for a specific purpose to shield the party against violation of his right or threatened violation of the legal rights of the person seeking it.”

Further, counsel relied on the cases of **Benl Development Limited vs. First Community Bank Limited [2021] eKLR**, **Ochola Kamuli Holdings Ltd vs. Guardian Bank Ltd [2018] eKLR** and **Rukenya Buuri vs. M'arimi Minyora & 2 Others [2018] eKLR** all of which this court has considered.

THE 2ND RESPONDENT'S SUBMISSIONS

13. The 2nd Respondent filed their submissions on 13th October 2021, restated the averments in their replying affidavit and submitted that under Order 40 Rule 6 of the Civil Procedure Rules, this court has power to discharge an interim injunction where the suit has not been determined within 12 months. Counsel argued that the petitioners have enjoyed interim orders at the expense of justice to all parties. Reliance was placed on the case of **St. Patricks Hill School Ltd vs. Bank of Africa Kenya Ltd [2018] eKLR** where it was held that this court has unfettered discretion to discharge or vary or set aside an injunction where the ends of justice so demand or if the injunction does not serve the ends of justice it was intended to serve when it was issued. Counsel also relied on the cases of **Mobile Kitale Service Station vs. Mobil Oil Kenya Ltd & Another [2004] eKLR** and **Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another [2016] eKLR**, both of which have been considered by this court. Counsel concluded by arguing that it is unfair and unjustifiable for the petitioners to continue enjoying interim orders at the expense of the Respondents.

ANALYSIS AND DETERMINATION

14. I have considered the application, the affidavit in support, the replying affidavits as well as the rival submissions of each party. The sole issue that arise for determination is whether the Applicants are entitled to the orders sought. The orders sought are within the discretion of

this court. As has been held severally by the courts, a court can only exercise its discretion judiciously and not whimsically or capriciously. I have considered the court record and noted that the orders of 28th September 2017, had been made on interim basis. For one reason or another, the application dated 4th September 2017 has not been determined. I also note that the orders dated 28th September 2017 were extended six times, when this matter came up in court, and the last time the orders were extended was on 20th April 2018. After the said date, this matter came up severally but the interim orders were not extended. It is therefore clear from the record that as at 22nd June 2021 the orders of 28th September 2017 had lapsed and therefore not in force.

15. In addition, on 22nd June 2021, this court held that the directions of this court of 5th May 2021 had not been complied with and that the petitioners' advocates though served were not in court. The court proceeded to vacate the interim orders of injunction of 28th September 2017 and stood over the petition generally.

16. The Petitioners were not concerned with the fact that they were not in compliance with the orders of 5th May 2021; what bothered them was only part of the order of 22nd June 2021, which was to the effect that the orders of 28th September 2017 had been vacated. Upto now the petitioners have not complied with the directions of this court made on 5th May 2021, yet they invoke equity and seek to be protected by the exercise of this court's discretion. It is settled that a party who comes to equity must do so with clear hands.

17. The applicants are unwilling to comply with the directions of this court, yet they seek for orders from the court. This court will not exercise its discretion in favour of a party who is deliberately unwilling to comply with its directions. In any event, the orders of 28th September 2017 had lapsed on 20th April 2018 and therefore as at 22nd June 2021, the same were neither in force nor capable of being extended. For four years since the Applicants obtained the said orders, they have not been able to prosecute their petition, therefore having those orders is no longer about justice anymore. The orders were made on 22nd June 2021, yet the applicants who blamed internet hiccups and power shortage came to court almost two months later, which in my considered view was an inordinate delay in the circumstances of this case and in view of the reasons given by the Applicants for failure to attend court. In the premises, I am not satisfied that the applicants are deserving of the orders sought.

18. The upshot of the above is that the application dated 19th August 2021 lacks merit and the same is dismissed with costs.

19. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 19TH DAY OF JANUARY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Ms. Oduo holding brief for Mr. Achindo for the Respondent

Ms. Matu for the 2nd Respondent

No appearance for the 3rd Respondent

No appearance for the Plaintiff

Ms. Josephine Misigo – Court Assistant