



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC LAND CASE NO. 18 OF 2021(OS)

KARIN ANNE CHALLIS (Suing through the

Attorney ISAAC NTONGAI SAMWEL.....PLAINTIFF/APPLICANT

-VERSUS-

THE ATTORNEY GENERAL.....1ST DEFENDANT RESPONDENT

CHIEF LAND REGISTRAR.....2ND DEFENDANT/ RESPONDENT

DIRECTOR OF SURVEYS.....3RD DEFENDANT/ RESPONDENT

REMO LENZI.....4TH DEFENDANT/ RESPONDENT

SEVEN ISLAND WATAMU LIMITED.....5TH DEFENDANT/RESPONDENT

RULING

This ruling is in respect of an ex parte Application by the Applicant seeking the following orders: -

1. That the Honourable Court be pleased to grant the ex-parte applicant leave to commence/file civil suit out of time.

2. That costs of this application be provided for.

The Application is supported by the annexed affidavit of ISSAC SAMUEL NTONGAI sworn on the 25th August 2021 which enumerates the background to the application.

It is the Applicant's case that the Commissioner of Lands granted the Applicant a lease CR No. 34486/1 on the 26th June, 2001 at Mombasa subject to payment of an annual rent and other special conditions specified thereon for the term of 99years from the 1st July 1998 of ALL THAT surveyed residential property known as Plot No. 104 situate in Watamu Township of Malindi Municipality containing by measurement nought decimal One Eight Nought Seven (0.1807) of a hectare or thereabouts.

That the property's dimensions' abutments and boundaries are delineated on the plan annexed to the said Grant and more particularly on Land Survey Plan No. 235713 approved by the 2nd Defendant/Respondent and deposited in the survey Records office at Nairobi.

The Applicant stated that on or about January 2002 she had substantially developed her leasehold property, made all provisions to source and supply water, laid access road, erected a boundary wall around the whole plot and completed the laying of a building foundation thereupon.

The Applicant further deponed that on or about the month of September 2002, it occurred to the Applicant that some persons then unknown to her namely (i) SWALER A. ATHMAN (ii) ABDINASIR A. MOHAMED and (iii) ABDILAH A. NASIR, had illegally and fraudulently become apparent freehold or absolute proprietors of a piece of land purportedly described in a document titled "Title Deed" in respect of a land comprised in Title Number: KILIFI JIMBA 125 (hereinafter referred to as "the illegal title") purportedly issued and or given to the said (i) SWALEH A. ATHMAN (ii) ABDINASIR A. MOHAMED and (iii) ABDILAH A. NASIR, by the Land Registrar Kilifi Land Registry on the 6th October 2000. The title was then transferred to Abbas Lali Ahmed on 28th January 2003.

The Applicant's case is the delay in filing the case was due to the many cases which were filed in respect Judicial Review and similar cases were stayed and never determined, Counsel alluded to the following reasons:

a) Other cases of similar nature touching on and disputing the land comprised in Title Number: Kilifi/Jimba/1125 were or had been filed; namely:

(i) HCCC No. 75 of 2007: Postal Corporation -vs- Swaleh Athman & 3 others.

(ii) HCCC 101 of 2008: Swaleh Athman and 2 others.

(iii) HCCC Miscellaneous Application No. 108 of 2004 (JR)

(iv) HCCC No. 43 of 2005: Dr. Sarah Jelengat Siele -vs- (1) the Attorney General, (2) Remo Lenzi and (3) Seven Islands Watamu Limited.

(v) Cases (ii) and (iii) above were consolidated on 8th July 2011 and proceeded for hearing: with the Trustee of Postal Corporation of Kenya Staff Pension Scheme Fund filing an application to be enjoined as a party to the suit.

(vi) in a ruling delivered on 8th July 2011, the said Judge directed that all Judicial Review Applications related to the property Title Number: Kilifi/Jimba/1125 and Jimba Registration Section be heard in Mombasa, but the hearing shall remain in abeyance pending determination of the Civil Suits. This status quo still persists.

(vii) The Plaintiffs Miscellaneous Application No. 108 of 2004 being a Judicial Review Application, in nature, therefore stalled in hearing and determination of for this suit after several attempts to trace the file in Mombasa land registry turned fruitless

(viii) HCC No. 43 of 2005, then part-heard; was to proceed independently as it was not affected by the above stated ruling of abeyance. The same was on 8th day of February 2018 finally determined by the Judgment of the Court of Appeal sitting in Mombasa.

(ix) (x) A Judgment was delivered therein, (HCCC NO. 43 OF 2005) by the Honourable Mr. Justice O. A. Angote on 13th May 2016; which judgment was appealed against in the Court of Appeal in Mombasa in Civil Appeal No. 67 of 2016 and a Judgment of the Court of Appeal was delivered at Mombasa on 8th February 2018 setting aside the judgment of the learned Honourable Mr. Justice O. A. Angote in its entirety substituting the same with Orders:

** A declaration that the Appellant has a valid title over Plot No.*

** 103 Watamu*

** Rectification of Kilifi/Jimba/1125 by the cancellation of the*

** portion relating to Plot No. 103 subsumed thereunder*

** Re-establishment of the beacons in respect of Plot 103*

Counsel submitted that the facts in **HCCC No. 43 of 2005** are analogous if not very similar, relevant and have a bearing to the facts of the Applicant's Plot LR No.104 Watamu the subject of this case.

Counsel further submitted that the Applicant is desirous of pursuing its rights and interest in the suit property Plot LR No. 104 Watamu in a normal suit, which rights and interests have been subdued and or encroached upon by the illegal and fraudulent creation of the freehold proprietorship.

Ms Chepkwony submitted that the delay in filing this suit was not in any way calculated and/or meant to delay or abuse the court process and the same duly explained and the orders being sought in the intended suit cannot be granted in a Judicial Review. Further that the delay was pursuant to an existing **Judicial Review Case No. 108 of 2004** still pending in court and ruling which stayed prosecution of the judicial review and the recent decision by Court of Appeal in the **Civil Appeal Number No. 67 of 2016** touching on the same title in dispute.

Counsel urged the court to exercise judicial discretion to allow the application and relied on the cases of Joseph Tinga Janga V Kenya Marine & Fisheries Research Institute (2014) Eklr; Lucy Bosire V Kehancha Div. Land Dispute Tribunal & 2 Others; CMC Holdings Limited Vs Nzioki 2004) IKLR 173; Pan African Paper Mills Limited Vs Silvester Nyarango Obwocha (2018) Eklr and Agip (Kenya) Limited V Highlands Tyres Limited (2001) KLR 630.

ANALYSIS AND DETERMINATION

The court has discretionary powers to extended time for filing suits and this discretion should be exercised judiciously and within the law. As was held in the case of **Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eKLR**, the Court of Appeal in determining an application to file and serve a record of appeal out of the stated:

“The order whether or not to grant extension of time or leave to file and serve a record of appeal out of time is discretionary. Such discretion is exercised judiciously with a view to doing justice. Each case depends on its own merits. For the court to exercise its discretion in favour of an Applicant, the latter must demonstrate to the court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the Applicant must give plausible explanation to the satisfaction of the court why it occurred and what steps the Applicant took to ensure that it came to court as soon as was practicable.

In the normal vicissitudes of life, deadline will be missed even by those who are knowledgeable and zealous. The courts are not blind to the fact when this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to court to seek extension of time or leave to file out of time.”

The above case dealt with leave to file a record of appeal out of time which essentially means filing a case out of time and the issue of judicial discretion.

An applicant must explain the reason for delay in filing the case to the satisfaction of the court and not flimsy reasons. Litigation must come to an end and parties should not be allowed to slumber and later bring stale claims.

It should also be noted that there is nothing final about granting of leave as the Defendant will also have an opportunity to challenge the facts and law during the trial as was held in the case of *Mary Wambui Kabuqa Vs Kenya Bus Services Ltd, Civil Appeal No.195 of 1995*, that: -

“it must be remembered that even when the Judge grants leave, there is nothing final about it. It is merely provisional. The Defendant will have every opportunity of challenging facts and the law afterwards at the trial. The Judge who tries this case is the one who must rule finally whether the Plaintiff has satisfied the conditions of overcoming the time bar. He is not in the least bound by the provisional view expressed by the Judge in Chambers who gave leave”

I have considered the application, the supporting affidavit and the explanation given for the delay and find that it is sufficient to warrant the court to grant leave to file a suit out of time. The Applicant is therefore granted 14 days leave to file the suit failure to which the leave lapses.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 17TH DAY OF FEBRUARY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.