



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. E005 OF 2021

ANN KECHI MUBICHI (Legal representative of the estate of Patrick

Mubichi M'Amburugua (Deceased)APPELLANT

VERSUS

JOSHUA KIOME MWORIARESPONDENT

RULING

A. 1st Application

1. The ruling relates to two applications dated 10.2.2022 and 3.2.2022. The application dated 10.2.2022 seeks for the review and setting aside of the order made on 25.10.2021 dismissing the appeal. The application is supported by an affidavit sworn on 10.2.2022 by Ann K Mubichi. The reasons given are that the notice to show cause was never served upon the appellant's advocates, there is an error apparent on the face of the record and the appellants shall be prejudiced if the application is not allowed. In the affidavit of support, the appellant avers his former advocates on record failed to notify him after the appeal was lodged on 19.10.2020 and there was no affidavit of service of the notice to show cause why the appeal should not be dismissed.

2. The application is opposed through grounds of opposition dated 21.2.2022 and a replying affidavit sworn on 4.3.2022 by Joshua Kiome Mworua. The grounds are that;- the suit was dismissed for being res judicata in view of HCC No. 127 of 1998 and HCC No. 172/2014; the subject matter is land purchased from the appellants deceased husband who declined to transfer the land leading to HCC 127/98 later on transferred to lower court as CMCC No. 437/2005 where after a consent judgment was recorded; the appellant filed CMCC No. 172/14 and HCC Misc. Application No. 83/1999 which were later on consolidated but were eventually dismissed for non- prosecution; following the consent, LR No. Kiirua/Naari/2186 was transferred to him and a title deed issued. There has been non-attendance before court in all occasions. The record of appeal was never filed as directed and litigation must come to an end hence the application lacks merit.

B. 2nd Application

3. In the application dated 3.2.2022 the court is asked to grant inhibition and temporary orders of injunction pending the hearing and determination of the appeal. The application was supported by an affidavit sworn on the even date by Ann K. Mubichi. The grounds are that the initial title deed got lost, the original owner passed on 1.6.2017; mutation from resurvised and was found to be forged; transfers were made without following probate and administration law, vacant possession has not been granted, no ground survey and beaconing has occurred; the property is now in the name of the respondent who is likely to dispose it off to third parties and hence there was need to preserve the substratum of the appeal.

4. The application was opposed by the respondent through grounds of opposition dated 21.2.2022 on the basis that there was no substratum on which the appeal could stand courtesy of the dismissal of orders dated 25.10.2021.

C. Written Submissions

5. With leave of court parties opted to canvass application through written submissions dated 10.3.2022 and 21.3.2022 respectively.

6. The appellant submitted that the court has wide discretion under Section 80 of the Civil Procedure Act as read together with order 45 Rule 1 Civil Procedure Rules since an error apparent on the face of the record exists, given the notice to show cause dated 12.10.2021 was not served and a return of service filed. Reliance was placed on *Richard Ncharpi Leiyagu vs IEBC & 2 others (2013) eKLR*.

7. Counsel submitted further the respondent had introduced extraneous and irrelevant facts into the matter to try and dissuade the court in exercising its discretion and the appellant should not be punished out of missteps of her former advocates on record as held in *Patriotic Guard vs James Kipchirchir Sambu (2018) eKLR*.

8. As regards the notice of motion dated 3.2.2022, the court was urged to find the prayer for temporary injunction and inhibition deserving guided by the reasoning in ***Patrick Kalava Kulamba & another vs Philip Kamosu & Rhoda Ndanu Philip (2016) eKLR citing with approval Patricia Njeri and 3 others vs National Museum of Kenya (2004) eKLR*** on the principles of granting injunction pending appeal under Order 42 Rule 6 Civil Procedure Rules in line with ***Venture (Capital) & credit Ltd vs Consolidated Bank of Kenya Ltd (2006) vs Madhupaper International Kerr (1985) KLR 840, JK Industries vs KCB (1982-88) KLR 1088, Butt vs Rent Restriction Tribunal (1983) KLR 417, Mrao Ltd vs First American Bank of Kenya Ltd & 2 others (2003) eKLR.***

9. As regards injunction counsel for the appellant submitted there were compelling reasons for granting the injunction given the circumstances surrounding the transfer from a dead owner where a mutation form was lodged almost two years after his death, without surrendering the original title to enable its registration and on a consent judgment in a suit which had been consolidated but not yet heard on merits. He urged the court to find that the appeal raised weighty issues.

10. On the part of the respondent it was submitted that the application dated 3.2.2022 was filed on 3.2.2022 when the substratum which is the appeal ceased to exist after it was dismissed on 25.10.2022 and as such was not anchored on any substantive pleading since it cannot exist on its own. As such counsel argued that the appellant ought to have obtained the orders to reinstate the appeal and proffer the application thereafter.

11. Regarding the orders sought in the application dated 10.2.2022, the respondent submitted the appellant had not met the threshold for the court to exercise its discretion in her favour based on the historical backdrop set out in the replying affidavit on a dispute which has simmered in court for 24 years which has been energy sapping.

12. Counsel for the respondent submitted the history of the case depicted an appellant who had used all avenues to procrastinate the matter including in the instant appeal where she failed to file the record of appeal which is a clear attestation of lethargy on her side mischievously said to be a mistake of her advocate. Reliance was placed on ***Edney Adaka Ismail vs Equity Bank Ltd Milimani Case No. 727 of 2012*** that not every mistake by counsel should be a ground for setting aside, ***Savings and Loans Ltd vs Susan Wanjiru Muritu Niarobi HCC No. 397 of 2002*** on the proposition that a case belongs to a litigant and not her advocate who has a duty to prosecute the suit and should always constantly check on the progress of her case hence past conduct has to be considered in the exercise of discretion to set aside an order for such a litigant; ***Naivasha High court civil appeal no. 30 of 2020 Multiple Hauliers vs Enock Bilindi Musundi and 2 others*** on the proposition that in exercise of discretion the court must consider the damage sought to be forestalled vis a vis the prejudice to be visited on the opposing party, including the age of the case, timelines and true intentions as held also in ***Habo Agencies Ltd vs Wilfred Odhiambo Musingo (2015) eKLR.***

13. In sum the respondent submitted guided by the cited authorities that the dispute herein has been in court for 24 years, the appellant has been consistent in filing interlocutory applications and obtaining interim orders then lose interest in prosecuting the case and to grant orders sought would see the balance of interest of the parties skewed as against the respondent.

D. Issues for Determination

14. The issues for determination in this matter are:

- (i) *If the applications herein are properly before the court*
- (ii) *If the appellant is entitled to the setting aside of the orders made on 25.10.2021*
- (iii) *If the appellant has made a case for the grant of temporary orders of injunction and inhibition pending the hearing of the appeal.*

E. Court Record

15. Through a memorandum of appeal dated 16.10.2020 the appellant moved this court on 19.10.2020 which proceeded to call for the lower court record on 23.10.2020. The record was eventually received on 28.4.2021. On 27.5.2021 the court admitted their appeal for hearing and directed that the record of appeal to be filed within 60 days with a hearing for the main appeal listed for 12.10.2021.

16. On 12.10.2021 the respondent appeared and made a request that if there was no record of appeal filed the court should proceed to summarily reject the appeal. The court directed that a notice to show cause do issue to the appellant for 25.10.2021. Looking at the record it was clear the firm of Kaumbi & Co Advocates accepted service on 20.9.2021 of the notice for the hearing of the appeal for 10.9.2021 and directions that the appeal had been admitted for hearing and that the record of appeal be filed prior to the hearing date.

17. As at the time the appeal came up for hearing there is no dispute the appellant knew that the record of appeal for the record of appeal to be filed. Between the filing of the appeal in 19.10.2020 and 12.10.2022. The appellant has deliberately failed to explain why there was no actions at all to comply with clear court orders aforementioned and subsequently why there was no attendance of the date had been effected by the court hearing on 10.9.2021.

18. The applicant has not told the court the last communication and or visit made to her advocates then on record to check on the progress of her appeal and perhaps instruct her advocate to comply with the court orders.

19. The appeal belonged to the appellant. The court did its work and called for the lower court file and appropriately communicated the orders to the appellant through the known advocate on record at the time.

20. As at 3rd February 2022 the advocates on record for the appellants were Ms. Kaumbi & co advocates. There was no notice of change filed as at that date from the firm of Mwirigi Kaburu and Co. advocate so as to have capacity to file and serve the application dated 3.2.2022.

21. Since the appeal had been dismissed for non-prosecution and noncompliance, there was need to seek leave to come on record for the appellant without such leave as at 3.2.2022, my finding is that the application was improperly before court and therefore stand struck out with costs.

22. Coming to the application dated 10.2.2022, in an attempt to cure the issue of legal representation the appellant at paragraph 5 of the supporting affidavit annexed and marked AKM 2 (a) (b) and (c) a notice of appointment, the consent between advocates and the notice of motion dated 3.2.2022. At paragraph 6 thereof, she states she realized the dismissal had occurred when the court gave directions about her application dated 3.2.2022.

23. In essence therefore it means the appellant had not been in touch with her erstwhile advocates for a while since giving them instructions to lodge the appeal otherwise she would have been aware of the orders made on 28.4.2021 and 27.5.2021 which were in her interest in order to fast-track the hearing of the appeal.

24. The duty and responsibility to have expeditious disposal of matters under Article 159 of the Constitution section 1A, 1B & 3A Civil Procedure Act and Sections 3 and 13 of the ELC Act rests with the litigant and her advocates on record.

25. The court has the ultimate duty to see to it that the court process is not abused and or derailed for no reason at all. Parties must never pack their cases and abandon them for no good reasons.

26. The court has no business to superintend the advocate client relationship between the appellant and her advocates then on record. At paragraph 3 of the supporting affidavit the appellant deposes after the filing the appeal she was told ordinarily that it was the registry that was to communicate the court dates after the admission of the appeal and that she went back to await the communication.

27. The court record indicates such communication was made. The appellant has not told the court whether she made any follow up with her lawyer on record since 19.10.2020. Her conduct therefore leaves a lot to be desired especially given the history of this matter.

28. The appellant heaps blame on her erstwhile advocates then on record. She has not produced any single affidavits from the said law firm why they did not comply with court orders to file the record of appeal within 60 days as ordered and or attend the hearing on 25.10.2021. The aforesaid advocates accepted service on 20.9.2021 but stated that they were not on record for the appellant. This means that the relationship between them and the applicant perhaps was not cordial. Be that as it may the aforesaid advocates did not file any application to cease acting for the appellant.

29. Before this court the appellant has attempted to avoid the court process by purporting to replace her advocates on record without following the law. Annexure marked AKM "3" is a consent dated 26.1.2022 trying to bring on board the firm of Mwirigi Kaburu & co. advocates in place of Kaumbi and co. advocates for the appellant.

30. There has been no application for leave to come on record by the firm of Mwirigi Kaburu advocates filed prior to 27.1.2022. To date none has been filed and or a request made for the consent dated 26.1.2022 to be formally made as an order of court and leave granted for the said law firm to come on record given the blame is laid squarely on the former law firm for mishandling the appeal.

31. If the appellant was able to procure the said consent, one would also have expected the former law firm to explain out why the record of appeal was not filed as ordered.

32. In this application the appellant wants the court to vacate the orders made on 25.10.2021 and grant her temporary injunction and inhibition orders yet she is silent on clear orders made on 27.5.2021, which have not been complied with. Even if the court were to find any merits in the two applications what becomes of the earlier orders which touch on the very substratum of the appeal?

33. The law is that failure to file a record of appeal as stipulated has consequences and the end result is dismissal of the appeal for noncompliance.

34. The appellant has not attempted by affidavit or otherwise to explain why it took her over four months to establish her appeal had been dismissed on what she now calls an error apparent on the face of the record. She has remained silent on the previous court and non-attendance during the hearing.

35. The court out of its own discretion and despite request for dismissal for noncompliance and non-attendance gave the appellant a benefit of doubt. Instead of appreciating such a gesture and offering a plausible explanation, the appellant has instead in the two applications failed to own up her inaction, indolence and attempts to delay the wheels of justice.

36. Given the foregoing and in the interests of justice, I make the following orders:

(1) The application dated 3.2.2022 and 10.2.2022 are hereby struck out with costs for being filed by advocates improperly before the court.

(2) The orders made on 25.10.2021 are hereby set aside.

- (3) Leave is hereby extended for the appellant to file and serve the record of appeal within 7 days from the date hereof.
- (4) Throw costs of Kshs. 15,000 to be paid to the respondent within 7 days from the date hereof.
- (5) The firm of Mwirigi Kaburu & Co Advocates to regularize their appearance within 3 days from the date hereof.
- (6) Appeal be listed for hearing within 6 months otherwise it shall stand dismissed.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS

THIS 27TH DAY OF APRIL, 2022

In presence of:

Mwirigi Kaburu for applicant

Ken Muriuki for respondent

HON. C.K. NZILI

ELC JUDGE