



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**MISCELLANEOUS CIVIL APPLICATION NO. 38 OF 2013**

KIPLANGAT MAINA.....APPLICANT

VERSUS

JONATHAN MAINA.....1ST RESPONDENT

DAVID MAINA.....2ND RESPONDENT

**RULING**

**KIPLANGAT MAINA**, the Applicant herein, took out the Motion dated 19th August 2013 in which he sought for the following orders:

1. **THAT** this application be certified as urgent and that it be heard *ex-parte* in the first instance.
2. **THAT** pending the hearing and determination of this application, there be a stay of execution of the ruling of the Principal Magistrate's Court dated 10th June, 2013
3. **THAT** in the alternative this Honourable Court do issue a temporary injunction to restrain the respondents from subdividing the parcel number Kericho/Manarett S.S/102.
4. **THAT** the Applicant be granted leave to appeal out of time
5. **THAT** the costs of this Application be provided for.

The Applicant filed two affidavits in support of the Motion. Jonathan Maina and David Maina who were named as the 1st and 2nd Respondents filed grounds of opposition and the replying affidavit of Jonathan Maina to resist the Motion. When the Motion came up for interparties hearing, learned counsels made oral submissions.

I have considered the oral submissions of learned counsels from both sides. I have further taken into account the grounds set out on the face of the motion and the grounds of opposition. I have also taken into account the facts deponed in the rival affidavits.

In the motion, the applicant is basically seeking for two principal orders: **First** is for leave to file an appeal out of time against the ruling of Kericho Principal Magistrate's Court delivered on 10th June 2013 vide Kericho C.M.C.Misc. no.15 of 1984. **Secondly**, an order for stay of execution of the aforesaid order pending the hearing and determination of the motion. The applicant has also asked for an alternative order of injunction to restrain the respondents from subdividing the parcel of land known as **L.R.No. Kericho/Manarett S.S/102**. It is the Applicant's argument that unless the order is given he will suffer substantial loss in that the process of subdivision will be complete before the Motion and the intended appeal is heard and determined. The applicant avers that he was not notified of the ruling by his previous

advocate until he was informed by the District Surveyor on 15th August 2013.

The applicant argues that he intends to appeal against the decision but the time fixed to appeal has lapsed. It is also argued that unless the order for stay is given the intended appeal will be rendered nugatory to his utter detriment. The Respondents on the other hand have urged this court to dismiss the motion claiming the same is *res judicata* and is an abuse of the court process.

The Respondents further accused the applicant of laches. They averred that the application is meant to delay the conclusion of the dispute which has been pending in court for many years. What provoked the filing of this motion is the ruling of Honourable Ndururi learned Principal Magistrate delivered on 10th June 2013 in which the learned Principal Magistrate found that there was a decree in favour of the Respondents which had not been satisfied. It is the decree issued on 7th May 1986 vide Kericho R.M.C Misc. Application no. 15 of 1984. The document availed shows that on the aforesaid date, Hon. T.K.A Mibei, the then Resident Magistrate adopted as its decision the decision of the panel of elders, Ndanai dated 16th April 1985. The complaint before the panel of elders was between the same parties herein. The resultant decree was in the following terms:

- 1. That a subdivision be done on L.R No. Kericho/Manaret/102 into 3 portions of 20,15 and 15 acres respectively.**
- 2. The 20 acres be transferred to Kiplangat Maina.**
- 3. 15 acres each be transferred to Jonathan Maina and David Maina respectively.**
- 4. Kiplangat Maina to execute the relevant documents to effect transfer and in default the court to execute in his place.**

It would appear the Applicant herein failed to abide by the orders thus prompting the Respondents to seek the intervention of the Principal Magistrate's court. Honourable Ndururi further opined that the Applicants (Respondents herein) had basically gone to seek for orders to enable them execute the decree. The learned Principal Magistrate issued *inter alia* orders directing the executive officer to sign the relevant documents in place of the Applicant herein if he refused to obey the court orders directing him to sign the relevant documents.

The record shows that the Applicant herein was dissatisfied with the decision of the panel of the elders which was adopted as the order of the Resident Magistrate's court, Kericho vide Kericho R.M.C.Misc. App. No.15 of 1984 therefore he filed an appeal vide Kericho H.C.C.A no. 28 of 1998. The aforesaid appeal was dismissed for want of prosecution on 26th July 2001 upon the application of the Respondents herein. It is important to note that the Respondents application for the dismissal of the aforesaid appeal, was argued interparties and subsequently allowed. There is no evidence that the Applicant has appealed against the order which dismissed his appeal. What remained when the appeal was dismissed, was the adoptive decision of Honourable T.K.A Mibei, Resident Magistrate vide Kericho P.M.C.Misc.App.No.15 of 1984. The execution process was substantively dealt with by Honourable Ndururi through his decision of 10th June 2013. The Applicant is now before this court seeking for leave to appeal out of time against the decision of Honourable Ndururi. I have already stated that the decision of Honourable Ndururi was geared towards effecting the execution of the decree which arose from the Judgment of the panel of elders. I agree with the submissions of Mr. Mutai, learned advocate for the Respondents that the application amounts to an abuse of the court process because, it is inconceivable for this court to grant the applicant leave to appeal out of time in view of the fact that the decision sought to be impugned is that which was meant to assist in executing a decree which has not been challenged. The Applicant's appeal was dismissed and he has not sought to appeal against the dismissal order. The way was opened for the Respondents to execute the decree when the appeal was dismissed and the Applicant cannot be allowed to put hurdles on that path. Litigation must come to an end.

I find no merit in the prayer seeking for leave to appeal out of time. Of course the other orders sought i.e the order for stay and injunction were dependent on the prayer for leave to appeal out of time. If the applicant had succeeded, I would have given him the orders for stay and or the orders injunction. Since the substratum of those orders has collapsed, I decline to grant the orders.

In the end, I find the Motion dated 19th August 2013 to be without merit. It is dismissed with costs to the Respondents.

**Dated, signed and delivered this 27th day of September 2013**

**J.K.SERGON**

**JUDGE**

**In open court in the presence of**

Mr. Mutai holding brief for Applicant

Mr. J.K.Mutai for Respondents

Mr. Koech- court clerk