REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCC. NO. 97 OF 2000

LESIIT J.

JULIUS MARETE.....PLAINTIFF

VERSUS

PASTOR MECHACK KOOME.....1ST DEFENDANT
MERU TOWN SDA CHURCH.....2ND DEFENDANT

JUDGEMENT

The Application is a Chamber Summons dated 28th September, 2011. It is brought under Section 3A and 19 of the Civil Procedure Act, Order VI Rule 13(1)(d), XLI Rule 4(1) & (2) of the Civil Procedure Rules and all enabling provisions of the law seeking following orders:-

(1) That this application be and is hereby certified as urgent and service thereof be dispensed with in the first instance and the same be heard exparte.

(2) That there be a stay of execution of the judgment/preliminary decree dated 7th December 2009 and extended on 26th June 2010 pending the hearing and final determination of this application.

(3) That this Honourable Court be pleased to and hereby declares all the proceedings, judgments and Preliminary Decree dated 7th December 2009 and delivered on 19th February 2010 a nullity and strike out the entire suit and proceedings

(4) That the alternative and without prejudice to prayer 3 herein the Defendants be and are hereby granted leave to appeal out of time against the said judgment and decree.

(5) That costs be borne by the plaintiff/respondent.

The application is premised on the following grounds:

(a) That this suit is improperly before court as no application was ever made to transfer the same from its original CMCC No. 83 of 2000, from the Chief Magistrate's Court, Meru.

(b) That the court was misguided and proceeded on purported amendments which were irregular as there was no application and order to amend the pleadings.

(c) That the Legal Requirements were not followed by the Respondent for instituting and transferring its suit to this honourable cout.

(d) That the entire suit is an abuse of the process of the court.

(e) That the applicants are apprehensive that they will suffere substantial loss which can not be compensated by way of damages if the orders sought are not granted.

(f) That the applicants are apprehensive that the said preliminary decree will not serve any substantial justice as the same parties executing had already been ordered on 1st March 2007 to deal with this matter and all of them failed to agree and take a common stand.

(g) That the said Decree is incapable of execution without bias as the court has already laid conditions upon which the executing parties will operate on which restricts them from being independent.

(h) That the applicant's failure to appeal in time was due to inadvertent misstate and lack of proper directions from their previous counsel.

(i) That the respondents will not be prejudiced if the orders prayed for are granted.

(j) That the entire suit is fatally defective and cannot stand the test of time of time.

(k) That the 1st and 2nd applicants are un-necessarily antagonized in a dispute that should not involve them at all.

Mr. Onsembe represented the applicants in this application. Counsel relied on the grounds on the face of the application and on the affidavit in support of the case.

Mr. C. Kariuki urged the application on behalf of the respondent. He too relied on the Replying Affidavit and further Affidavits by the Respondent.

I have carefully considered the application. The applicants seek orders to have the judgment and decree of this court dated 7th December 2009 deceased a nullity and in the alternative they are seeking that the applicants be granted leave to appeal against the judgment and decree of this court of 7th December 2009 out of time. I have considered the rival agreement by the applicants' and the defendant's advocates. The judgment sought to be nullified was delivered by my brother Hon. Ouko J. after hearing the parties in this case. In that judgment the learned judge issued a preliminary decree after inter alia considering recommendations by the District Land Registrar, District Planning Officer, and the District Surveyor. The preliminary decree, is stated was issued pursuant to section 159 of the Registered Land Act. It is to the effect that the District Land Registrar, the District Surveyor and the District Planning Officer of the area where the two plots in question are situated, in the company of the parties and/or their counsel conduct further surveyor of the two plots, with the view of fixing the boundary of the said plots and taking into account the existing structures and the original acreage of the original plot.

The preliminary decree of the court has not been executed and/or complied with. The judge had ordered that the survey should be done within one month from the date of judgment. The period given lapsed before the visit was made. The plaintiff's advocate appeared before the court and applied for the extension of the time given for the scene visit, and the court granted the application and extended the period by another 90 days. Despite that extension to visit the scene none has been made. With the extension, the visit should have been made by mid October 2011.

The Applicants have not demonstrated any reason why the judgment of this court should be set aside.

The reasons advanced in support of the application do not support the application. Mr. Onsembe argued that the decree was not executable as the parties who were the owners of the property were not parties to the suit and that an intended amendment of the plaint to enjoin these parties was never prosecuted. He also urged that the counter claim was not addressed.

Mr. Kariuki's position was that the application was an abuse of the court process; that the issues raised only came up at the execution stage and that if the court cannot set aside proceedings ten years after the case was heard and determined. With respect to the applicants' advocate if the applicants were desirous to have the judgment set aside the proper cause was either to make an application for the review of the judgment or to appeal against the decision. The applicants did neither. The case was heard interpartes. The court then entered the Judgement herein. The Applicants were heard extensively. There is no law invoked which allows for a judgment entered after a full trial to be set aside in the manner suggested by the Applicants.

That application to set aside the judgment cannot lie.

The applicant is seeking leave to file an appeal out of time. Mr. Kariuki relied on the case of **Gatugi Murira Vs Onsmus Gitobu M'Nkanata CA Nrb 371 Of 2007**

In that case Hon. Nyamu JA cited the case of **Wasike vs Swala 1984 KLR *592*** where the court held:

"(a) That there is merit in the appeal.

b) That the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and

c) That the delay has not been inordinate."

The learned judge made the following observation which I find fitting to the instant case:-

"**As stated above I am conscious of the need of the court to have regard to the requirements of the overriding objective when exercising its powers under this Court's Rules and the provisions of the Appellate Jurisdiction Act so as to give effect to the overriding objective. Accordingly in the circumstances described above, I cannot possibly give effect to the o2 principle by granting the application because the delay of one year one month is patently inordinate. In my view it goes counter to the o2 in that it would cause further delay and enhance costs. Delay and cost constitute the main scourge of the civil justice system and I consider that we have a responsibility to address the two in each case. The o2 principle has also in my view given me a wider latitude and for this reason enablesme to take into account that the judgment that gave rise to the challenged execution was given nearly 17 years ago. In my interpretation of the o2 principle it does also embrace what has often been described as the need to bring litigation to an end. Achieving finality in disposing of cases or appeals is an important cog in the wheel of justice and in my view constitutes one of the principal aims of the o2 principle."**

The Applicants had to show that they have an appeal on the merits and further that the delay in making the application is not inordinate. The applicant has not demonstrated any appeal on the merits. Indeed what this court sought to do is establish the boundaries between the plots the subject matter of this suit by ordering a visit to the locus in quo with government officers charged with the powers and duties to ascertain and fix boundaries. As stated it was a preliminary decree. I fail to understand what merit the Applicants would have to appeal against the judgment of the court. The court's decision seeks to facilitate the parties to fix their boundary and settle the matter. That is the only way the boundaries can be fixed. The parties were then to make the next step that would then hopefully bring the matter to rest.

This being a preliminary decree and being satisfied it serves the interests of both parties and does not

prejudice any one the application is dismissed for lack of merit.

DATED SIGNED AND DELIVERED THIS 3RD DAY OF NOVEMBER, 2011

LESIIT, J
JUDGE.