



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL APPEAL 71 OF 2006

REPUBLIC APPLICANT

=VERSUS=

1. THE MARAKWET DISTRICT LAND DISPUTES TRIBUNAL
2. MARAKWET DISTRICT COMMISSIONER
3. MARAKWET DISTRICT LANDSETTLEMENT OFFICER
4. THE MINISTER OF LANDS & SETTLEMENT RESPONDENTS

AND

1. KIBIWOTT CHEMWEI
2. JOSEPH KIBIWOT CHEMWEI
3. JACOB KIBIWOT
4. SMITH KAINO
5. CGEOJUTEBG CGEKABGA INTERESTED PARTIES

AND

1. JAMES CHERUIYOT CHEPTOO
2. WILLIAM KIPTAURS CHEBOI
3. PAULO KOMEN CHESEREK
4. ELISHA KIMAIYO CHEROP EX-PARTE APPLICANTS

R U L I N G

The Ex parte Applicants applied for and obtained leave to apply for Mandamus Certiorari and

prohibition on 31/03/2006. That leave operated as a stay of proceedings of the Marakwet District Land Disputes Tribunal. The Substantive Notice of Motion dated 3rd April, 2006 was filed in Court on 19th April, 2006. The application was fixed to be heard on 6th March, 2007 after having been adjourned on 02/05/2006; 20/06/2006 for non service of hearing Notice on certain parties for the 20th June 2006 and because on 02/05/2006 the Interested parties had not filed a Replying Affidavit. On 6th March, 2007, the matter could not proceed to hearing because it had been directed by the Honourable the Chief Justice of the Republic of Kenya that all Judicial Review applications be heard in the High Court at Nairobi only.

The Ex-parte Applicants did not take the matter to High Court Nairobi for hearing as per the said direction. The said direction was relaxed and abandoned on 19/01/2008 and again the Exparte Applicants still did nothing towards setting the application down for hearing and so the Interested parties did on the 5th December 2008 file their Notice of Motion dated 2/12/2008 praying that the Suit herein be dismissed for want of prosecution and for costs of the application and the Suit. That application is stated to be brought under section 3A of the Civil Procedure Act, Order xvi Rule 5, of the Civil Procedure Rules and all the enabling Provisions of the law. **Mr. Richard K. Cheruiyot**, learned Counsel for the Interested parties who are the Applicants has filed a sworn affidavit in support of the application wherein he depones that the matter was last in Court on 6/3/2007 which is 21 months as at 2nd December, 2008 when he swore the affidavit and the ex parte Applicants had not done anything to progress the matter. He adds that such delay is inordinate and manifestly excessive and it has greatly prejudiced the Interested Party. He concludes that as litigation must come to an end, it is in the interest of justice that the Suit herein be dismissed for want of prosecution.

That application is opposed. In such opposition there are filed two sworn affidavits one by **James Cheruiyot Cheptoo** who describes himself as one of the Ex parte applicants and the other by **Joseph C.K. Cheptarus** learned Counsel for the Exparte Applicants. The former swears that, inter alia, he and all the other Exparte Applicants have been always ready to have the matter heard and determined on merits and that the matter is a very sensitive land matter involving two clans. That part of the delay was caused by the directive that all matters of this nature be heard by the High Court sitting in Nairobi and later by their own Counsel not telling them the position. He prays that mistakes of Counsel be not visited on the Ex parte Applicants and that the matter be heard on its merits. In the latter affidavit, Counsel repeats what is stated by his client and adds that he has always been under pressure from the Ex parte Applicants to have the matter heard and disposed off and that in any case the Interested parties breached the Order of stay issued by this Court on 3/3/2006 and have been using the suit land and bragging that they have pushed the Ex parte Applicants to the wall. He concludes that the Ex parte Applicants are not to blame for the delay and if there be any mistake by Counsel, then that should not be visited on the Ex parte Applicants.

At the hearing **Mr. Cheruiyot** for the interested parties submitted that the Ex parte Applicants had truly lost interest in this case and so the same should be dismissed.

Advocate for the Ex parte Applicants **Mr. Cheptarus** submitted that it had not been shown that there had been any delay which had prejudiced the interested parties as they were in occupation of suit land. To buttress his case he placed reliance of the authorities of:

1. **Ivita –vs- Kyumbu Civil Suit No. 340/1971**
2. **Trust Bank Ltd -vs- Amolo Company Ltd Civil Appeal No. 215/2000**
3. **Maina -vs- Muriuki , Civil case No. 1079/1980**

It is not disputed that the Ex parte Applicants have not taken any action towards progressing this case since it was last in Court on 6/3/2007. They were awoken from their deep slumber by the Interested parties' Application of the 2/12/2008. The excuse given for the delay ceased to be an acceptable reason upon the relaxation of the directive sometime in January 2008. Even between January 2008 and 2/12/2008 when the application under consideration was filed, they did nothing. What becomes

intriguing is that the Ex parte Applicants state categorically that the Interested parties moved into the Suit land, started working it against a Court Order yet the Ex-parte Applicants did nothing to stop them. And they have an advocate on record who swears that he was indeed informed of the breach of the lawful Court Order that he himself helped obtain and yet he did nothing to protect the dignity of the Court that made that Order. He is an Officer of the same Court, no less. These are not the actions of a prudent Advocate. If the directive was not relaxed would the applications have waited indefinitely as no movement was made towards the High Court in Nairobi? These cannot be described as the actions of a party or advocate still interested in pursuing their case or client's case as is appropriate.

The law is clear on what to do with cases such as the present one. It has been held time and again that it is the duty of the Plaintiff to bring his suit to an early trial. If the delay is inordinate and inexcusable then the suit must be dismissed as a fair trial of the same may not be had in those circumstances and this would cause prejudice to the defendant.

See Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696. There are sound words in the persuasive authority of **Fitz Patrick –vs- Batger & Co. Ltd (1967) 2 All ER 659** that I feel must be heard by all and particularly by Counsel for the Ex parte Applicants here **“It is the duty of the Plaintiff’s adviser to get on with the case. Public policy demands that the business of the Courts should be conducted with expedition.”**

Having said that, I note from the annexures in the Court file that this is a contentious land case that begun during 1998 long before the same was brought to Court. It appears to have brewed a lot of hostility between the parties herein and their supporter - respective clansmen. That is why I think the same deserves a quick disposal to calm the hostilities. This is one case which, notwithstanding the delay and the snail speed of the advocate for the Ex parte Applicants, ought to be heard on its merits. It is true that there has been delay. The conduct of Counsel is inexcusable but I will hesitate to visit that on the Ex parte Applicants. Guided by the words of Lord Denning in **Allen –vs- Sir Alfred MCApine & Sons Ltd (1968) 1 All ER 543** that “ **the overriding consideration is whether or not justice can be done despite the delay**” and although there is not an acceptable credible excuse for the delay, rather than punish the Ex parte Applicants for the delay by their advocates, I will order and I hereby do, that the Notice of Motion dated 3rd April, 2006 be set down for hearing within sixty (60) days of today's date in default of which the same shall stand automatically dismissed.

There will be orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 13th DAY OF MAY, 2009.

P.N. MWILU,

JUDGE.

In the Presence of

Court Clerk - Paul Ekitela

Advocates for the Ex parte Applicants - Mr. Kitur H/B for Cheptarus

Advocates for the Interested Parties - N/A