



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO 672 OF 2017

FRANCIS MWANGI CHEGE.....1ST PLAINTIFF

HENRY MAINA GACHUGUMA.....2ND PLAINTIFF

FRANCIS NJENGA.....3RD PLAINTIFF

SAMMY KIBUNJA.....4TH PLAINTIFF

JAMES MWANGI MUGURO.....5TH PLAINTIFF

VERSUS

BERNARD WAWERU GITAU.....1ST DEFENDANT

JOSEPH MUGO KANGETHE.....2ND DEFENDANT

LEAH WANGUI KANGETHE.....3RD DEFENDANT

RULING

What is before Court for determination is the Defendants' application dated the 29th June, 2020 brought pursuant to Order 17 Rule 2 (1) and (3) and Order 45 Rule 1 of the Civil Procedure Rules; Article 40 (1) (3) , 159 (2) (d) of the Constitution. The Applicants seek for a review and or setting aside of the Orders issued on 27th February, 2018 as well as the dismissal of the Plaintiffs' suit for want of prosecution. The Application is premised on the grounds on the face of it and the supporting affidavit of BERNARD KANGETHE, JOSEPH MUGO KANGETHE and LEAH WANGUI KANGETHE where they aver that the court issued orders of inhibition dated the 27th February 2018 to be registered against land parcel number Kajiado/ Kitengela/ 2058 and at the date the said order was made, it had been overtaken by events since the said land had already been subdivided into 481 parcels. Further, the said land parcel number ceased to exist on 24th November, 2017. They explain that on 17th January, 2018, the Land Registrar issued titles to land parcel numbers Kajiado/ Kitengela/ 96690; 96974 and 96975 which were resultant subdivisions of Kajiado/ Kitengela/ 2038. Further, the said land parcels had been transferred to their bona fide owners namely NDUATI NGUNGU, TIMOTHY MAINA NDIRITU and JANE NJERI KIAMA. They insist the orders issued on 27th February, 2018 cannot be enforced and is ineffective for practical purposes hence impossible to comply with. They contend that they filed the application without delay. They state that 27 months have lapsed since the court directed the Plaintiffs to set the matter down for hearing but they have failed to take any steps to do so. Further, this delay is inordinate and the continued presence of this suit is highly prejudicial to them.

The Plaintiffs opposed the application and filed a replying affidavit sworn by FRANCIS MWANGI CHEGE where he confirmed that the Court issued an Inhibition Order on 5th February, 2018 to be registered against land parcel number Kajiado/ Kitengela/ 2038 which was served upon the Land Registrar on 8th March, 2018 who informed the Plaintiffs that the same would be entered in the land parcel file. He explains that the Plaintiffs discovered that there were still ongoing construction on the parcels from the suit parcel and on inquiring from the Land Registrar, they were informed the parcel file was missing as well as the order served on the office. Further, the Plaintiffs saw the County Commissioner Kajiado in September, 2019 who ordered the Land Registrar to avail the parcel file, which he did. They insist that at no time did the Land Registrar accept that titles had been issued to the self styled directors or that the suit property had changed hands. They aver that they reported the matter to the Police who after investigations charged the present Defendants/ Applicants in Kajiado CMCC No. 1332 of 2017 with various counts of obtaining registration by false pretenses contrary to section 320 of the Penal Code, the land being the suit property. Further, the Police availed to the Plaintiffs the following documents: Copy of a Letter from DCIO Kajiado Central to the Chief Oletepesi Location concerning illegal activities; Charge Sheet; Copy of Title held by NRHC issued on 4th December, 1990; Transfer of Suit Land to Roysambu Property Agencies Limited signed by 2nd and 3rd Defendants; Search Certificate indicating that the suit parcel herein was infact transferred from New Roysambu Housing Company (NRHC) to an outfit called RPA and title issued to them on 7th April, 2015; Copy of Application for Official Search for the suit land received at the Kajiado Land Registry on 20th June, 2017 indicating the owner is NRHC.

Further, that the Defendants failed to mention that the changes had taken place in respect to the suit land and the Plaintiffs proceeded on the said basis. He insists even in the replying affidavit sworn on 8th May, 2017, the deponent described himself as the director of NRHC. He confirms the Defendants had even filed a Notice of Appeal including a draft Memorandum of Appeal and on the same day filed a motion under certificate of urgency seeking a stay of execution of the aforementioned order pending the hearing and determination of the appeal. Further, they filed their replying affidavit on 12th April, 2018 and the Court file was transferred to the Chief Magistrate's Court for further hearing. He further explains that on 5th March, 2018, the Applicants filed an undated application seeking for the court file to be transferred back to the Honourable Judge for hearing of the motion dated the 23rd February, 2018. Further, the Applicants failed to attend court on 12th April, 2018 despite serving the Respondents. He reiterates that the application is mischievous, misplaced and vexatious. He disputes that the fact that there has been discovery of new matters and evidence which could not be produced earlier as stated by the Defendants. Further, that the mutation form for the alleged subdivision was signed on 27th November, 2017 by the Roysambu Properties Agencies Ltd (RPA) and if this is true, they are strangers to the said company since their suit is premised on the suit properties owned by Roysambu Housing Company Limited. Further, RPA cannot seek for orders in a suit where it is not a party. He further reiterates that the title deeds issued on 17th January, 2018 demonstrate transfer was done while this suit was pending contrary to the doctrine of LIS PENDENS. Further, such transfer is null and void.

Both parties filed their respective submissions to canvass the instant application.

Analysis and Determination

Upon consideration of the instant application including the rivalling affidavits and submissions, the following are the issues for determination:

- Whether the Orders issued on 27th February, 2018 should be reviewed and or set aside.
- Whether this suit should be dismissed for want of prosecution.

As to whether the Orders issued on 27th February, 2018 should be reviewed and or set aside. The Defendants have sought for review of the Orders issued on 27th February, 2018 and in their submissions reiterated their claim as well as relied on Order 45 of the Civil Procedure Rules. They have contended that the Orders issued on 27th February, 2018 can have retrogressive effect and are ineffective for practical purposes. They relied on the decision of **Anita Chelangat O' Donovan & 2 Others V Fredrick Kwame Kuman & 2 Others (2015) eKLR** to support their averments. The Plaintiffs in their submissions reiterated their averments in their replying affidavit.

Section 80 of the Civil Procedure Act provides that:—**“Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”**

While Order 45, rule 1 (1) of the Civil Procedure Rules stipulates thus: ‘ **Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**’

I note the Orders sought to be reviewed concern the Court's Ruling dated the 5th February, 2018 which directed the Land Registrar, Kajiado to register an inhibition order against land parcel number Kajiado/ Kitengela/ 2038 pending the hearing and determination of this suit. The Defendants' being aggrieved by the said Ruling filed a Notice of Appeal dated the 23rd February, 2018 and a Notice of Motion application seeking a Stay of execution of the even date. I note the application has not been prosecuted. From a reading of Order 45 of the Civil Procedure Rules which I have quoted above, a party has an option of either an appeal or review but not for both. Further, from the averments in the respective affidavits, I note the Defendants had initially lodged an Appeal but have not informed the Court of its outcome. From the rivalling affidavits, it has clearly emerged that the Defendants were aware that the suit property had been subdivided but failed to inform court and cannot now claim they have just discovered that the order made is ineffectual. The Defendants relied on the decision of **Anita Chelangat O' Donovan & 2 Others V Fredrick Kwame Kuman & 2 Others (2015) eKLR** where the Court held that since the property in dispute therein had been transferred, orders of injunction had been overtaken by even. I need to distinguish the said decision with the dispute at hand as in this instance, the suit land was subdivided by a different entity when the suit was still pending. Based on the facts before me and in relying on the provisions of Order 45 of the Civil Procedure Rules, I find that the Defendants have failed to meet the threshold for review and will decline to grant the said prayer.

As to whether this suit should be dismissed for want of prosecution.

The Defendants in their submissions reiterated their claim and aver that the Plaintiffs have failed to set down the suit for hearing for 27 months. They relied on the case of **Skyview Properties Limited & Another V Kennedy Amos Njoroge & 3 Others (2017) eKLR** to buttress their averments. The Plaintiffs insist there are circumstances that led to the delay in setting the suit down for hearing.

Order 17, rule 2 of the Civil Procedure Rules provide that:’ **(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit. (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit. (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1. (4) The court may dismiss the suit for non-compliance with any direction given under this Order.**’

From the court records and explanation in the replying affidavit which was not controverted, it is evident that this suit has never been set down for hearing as there have been pending applications. Further, there were investigations being conducted by the Police which touch on the dispute at hand, which culminated in the aforementioned criminal case against the Defendants. In the case of **IVITA –VS- KYUMBU [1984] KLR 441 at 451**, Chesoni J. (as he then was) held as follows;

"The instant case is now 4½ years less two months. It has been left to go to sleep for 14 months and in my opinion where an action has been dormant for twelve months or more the defendants are entitled to apply to the court for its dismissal, and, unless the plaintiff shows sufficient reason for reviving it, the suit may be dismissed. Each case must be decided on its own facts and the matter is one of the discretion of the court, but his court will frown at any inexcusable delay, and it will do everything possible to enforce expedition of trial."

Further, in the case of **Mwangi S. Kimenyi v Attorney General & another [2014] eKLR** it was held that ‘Consequently, upon the analysis of all legal considerations, it is clear the direction the court is taking on this matter. But before I close, I will re-state; the acceptable test is that; 1) When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties. 2) Invariably, what should matter to the court, is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.’

In the current scenario and from the court record, I note even though the suit has not been set down for hearing, the parties had been engaged in various interlocutory applications. Further, there are related criminal proceedings which were commenced against the Defendants in respect to the suit land and there was also a delay by the Land Registrar to register an inhibition against the disputed land. Looking at the materials presented by the respective parties in their rivalling affidavits, I find that the delay in prosecuting the suit is not inexcusable nor inordinate as claimed by the Defendants. In associating myself with the decisions cited above as well as the legal provisions which I have quoted, I find there was no intention by the Plaintiffs to delay the matter and further that there is no substantial risk to fair trial or prejudice that will be suffered if this matter was set down for hearing. I further, note from the Plaintiff, that there are triable issues raised therein which parties should be allowed to ventilate upon. In the circumstance, I will decline to dismiss this suit for want of prosecution.

It is against the foregoing that I find the application dated 29th June, 2020 unmerited and will disallow it. Costs will be in the cause.

Dated, Signed and Delivered virtually at Kajiado this 18th Day of January, 2021.

CHRISTINE OCHIENG

JUDGE