



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO 128 OF 2017

HARRISON KAMORE KAGUTU.....PLAINTIFF/RESPONDENT

VERSUS

HARRISON MURAGURI NDONGA NEPHAT.....DEFENDANT/APPLICANT

RULING

1. The Defendant/Applicant filed the instant Application seeking the following Orders; -

a. Spent.

b. Spent.

c. That this Honorable Court be pleased to reinstate the application dated 11/04/2019 which was dismissed on 19/12/2019 for non-attendance.

d. That the cost of this Application be provided for.

2. The Application is founded on Order 51 Rule 1, Order 9 Rule 9, Order 42 Rule 1, Sections 1B, 3A and 63 (e) Civil Procedure Act.

3. To place the Application in context, a brief summary of the facts is that on 10/05/2018 the Plaintiff/Respondent obtained a Judgement/Decree of adverse possession against the Defendant/Applicant herein for one acre out of land parcel L.R. NO. 15/KIGONGO/1426 with the Deputy Registrar of this Court authorized to execute all documents necessary to facilitate the subdivision and transfer of the one-acre property to the Respondent should the Applicant default. Aggrieved by the said Judgment, the Applicant through M/S V.E Muguku Muriu & Company Advocates filed a Notice of Motion Application dated 11/04/2019 seeking inter alia stay of said Judgment/Decree pending hearing and determination of Nyeri C.A No. 225 of 2018 filed on 03/12/2018.

4. On 25/04/2019, the said Application was considered by this Court and slated for hearing on 09/05/2019. On the hearing day both parties were absent and accordingly the Application was dismissed for non-attendance/want of prosecution.

5. Two months later, the Applicant filed an application dated 11/07/2019 seeking to set aside the dismissal orders of 09/05/2019 and reinstate the Application dated 11/04/2019. The Application was allowed vide Court Ruling delivered on 28/11/2019 on condition that the matter be listed for hearing within 14 days from the date of the Ruling failing which the Application stood dismissed. (See paragraph 8 of the Ruling dated 28/11/2019).

6. It was not until 10/12/2019, 12 days after delivery of the Ruling as ordered by the Court, that the Applicant fixed the Application dated 11/04/2019 for hearing on 19/12/2019. As fate would have it, the matter did not proceed for hearing as the Applicant's Counsel was indisposed whereas the Respondent's Counsel having been appointed to conduct the matter, sought more time to oppose the Application. The matter was adjourned to 14/01/2020.

7. According to the record, on 14/01/2020 two applications were to be heard i.e Applications dated 11/04/2019 and 23/10/2019 (which inter alia sought leave for the Respondent's Advocates to come on record) but directions were taken in respect of the Respondent's application dated 23/10/2019. On 16/01/2020, parties were in Court again for hearing of the Application dated 23/10/2019 which was partly compromised by consent of both parties. A further hearing date for 03/03/2020 was taken in Court in presence of both Counsels.

8. On 03/03/2020, the Respondent's Counsel was present in Court and ready to proceed with both Applications whereas the Applicant's Advocate was absent, the Applicant was present in person. The Respondent applied for and Court dismissed the Application dated

11/04/2019 with costs to the Respondent.

9. On 07/08/2020, five months after the dismissal orders were issued, the Applicant filed a fresh Application dated 28/07/2020 seeking to reinstate the dismissed Application dated 11/04/2019. The Application was fixed for hearing on 14/10/2020. On the said date, the Applicant's Counsel was absent and the Respondent's Counsel was in Court and another hearing date was taken for 28/10/2020 as it appears the new advocates were not yet on record then.

10. On 28/10/2020, by consent of both parties, the Notice of Motion Application dated 28/07/2020 was withdrawn with costs to the Respondents and immediately the Applicant's Counsel indicated that they have filed the instant application dated 26/10/2020.

11. The instant Application is premised on grounds that are reiterated in the Supporting Affidavit sworn on 26/10/2020 by Harrison Muruguri Ndonge Nephath who deponed that the Application dated 11/04/2019 was scheduled for hearing on 19/12/2019 and in the absence of the Applicant's Advocates, it was dismissed for non-attendance though the Applicant was present in person.

12. The Applicant adds that upon the said dismissal, he tried to reach his Advocates in vain before proceeding to instruct another firm, Messrs Ngaywa & Kibet Advocates to act for him. That the firm of Messrs Ngaywa & Kibet Advocates upon perusing the Court file, advised the Applicant that he ought to seek leave of the Court or obtain consent of the parties for the said Advocates to come on record. The Applicant further deponed that on 05/08/2020 Ngaywa & Kibet Advocates filed a consent with the previous firm of Muguku Advocates to act for the Applicant. That thereafter the Applicant appointed the current firm to take over the conduct of the matter from Ngaywa & Kibet Advocates and a consent was executed on 14/10/2020 to that effect.

13. The Applicant is of the view that failure to attend Court on 19/12/2020 was purely inadvertent and inexcusable and that mistakes of his previous Advocates ought not be visited on him thus prays that the Application be allowed.

14. The Application is vehemently opposed vide a Replying Affidavit sworn on 24/11/2020 by Harrison Kamore Kagutu. He avers that the Applicant has made a plethora of Applications in a bid to reinstate the Application dated 11/04/2019 hence an abuse of Court process and that after the first reinstatement in 2019 the Applicant went to slumber until he was served by the Respondent's Application for execution of Judgement/decree.

15. Directions were taken and parties filed their respective submissions dated 07/01/2021 and 26/01/2021 respectively.

16. The Applicant urges the Court in exercising judicial authority under Article 159(2) of the Constitution and Section 3 of the Environment and Land Act and in the interest of justice to allow the Application as the Applicant has been a diligent litigator despite mistakes of his Counsel. Reference was made to the Applicant's Appeal at the Court of Appeal sitting at Nyeri which in his view, has high chance of success and relying on Court of Appeal decision in **Wilson Cheboi Yego –vs- Samuel Kipsang [2019]eKLR** and **Patrick Mwaura Gichuiya –vs- Mary Muirigo Wainaina [2020]eKLR** prayed that the Application be allowed.

17. On behalf of the Respondent, a background events leading to the instant Application was given and accused the Applicant for being guilty of laches and without any plausible explanation for the over six months' delay before lodging this Application urged the Court to dismiss the Application.

18. The Respondent submitted that it is not enough for the Applicant to blame his former Advocates for inaction whereas he has not sufficiently demonstrated any step he took to remedy the situation without delay and thus not deserving of the protection sought under Article 159(2) of the Constitution and cited the holding of Kiage J.A in **Nicholas Arap Korir –vs- IEBC & 6 Others (2013)eKLR**.

19. The Respondent concluded by beseeching the Court to exercise its discretion judiciously in his favor to allow him enjoy the fruits of his Judgment hence dismiss the Application with costs.

20. This is a straightforward application that raises one main issue in my view which is whether this Court should be pleased to reinstate the Application dated 11/04/2019.

21. The Applicant in his submissions has quoted **Article 159 (2) of the Constitution** and **Section 3 of the Environment and Land Act**. There is no such Act known in our Laws. For the benefit of doubt, section 3 of the Environment and Land Court Act provides overriding objectives also known oxygen principles and one of them is that parties and their duly authorized representatives, as the case may be, shall assist the Court to further the overriding objective and participate in the proceedings of the Court.

22. Similarly, one of the tenets of Article 159(2) requires Courts in exercising judicial authority to ensure that justice shall be administered to all parties and same shall not be delayed. The Court of Appeal in **Hunker Trading Company Limited –vs- Elf Oil Kenya Ltd [2010]eKLR** observed that; -

“...“O2 principle” which must of necessity turn on the facts of each case is double faced and for litigants to thrive under its shadow they must place themselves on the “right side”. In the circumstances of this matter, the applicant is clearly on the “wrong side” and for this reason the principle must work against it...”

23. The above position is buttressed by the holding of Hon. Kiage J.A in the Respondent's authority in the Court of Appeal decision in **Nicholas arap Korir –v- IEBC & 6 Others (2013) eKLR**. Where the Learned Appellate Judge said;

“I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command Courts to seek

to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all Courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that Courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned”

24. The Applicant cited the Court of Appeal decisions in **Wilson Cheboi Yego –vs- Samuel Kipsang [2019] eKLR** and this Honorable Court’s ruling in **Patrick Mwaura Gichuiya –vs- Mary Muirigo Wainaina [2020] eKLR** which I have read and distinguished with facts of the present case. In that case, the reinstatement was sought **ONCE** in respect of a dismissed Appeal and that was after the Applicant’s Counsel satisfied the conditions to warrant such orders as provided under Rule 102(1) of the Court of Appeal Rules. Moreover, the reasons for non-attendance on the hearing date were well explained unlike the instant case. This is a third attempt to reinstate an application for stay of execution of a Judgment pending hearing of an Appeal whose current status is unknown.

25. The Court finds that there is no plausible explanation given so far by the Applicant for the delay in filing and prosecution of the Application other than blaming the Advocates who had conduct of the matter. The present application has been vehemently opposed by the Respondent who is yet to enjoy the fruits of his Judgment over two and half years on.

26. The conduct of the Applicant herein is a classic example of a litigant who has mastered the art of derailing proceedings and indeed fruits of the Judgment delivered in the Respondent’s favour way back in May 2018. The earlier narration of the background of this matter and highlights of the timelines is clear indication of this observation.

27. The guiding principle in the exercise of this jurisdiction was laid down in **Mbogo & Another –vs- Shah EALR 1908** whereby it was stated that the Court’s discretion to set aside an order in the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a litigant who deliberately seeks to obstruct or delay the course of justice. [*emphasis mine*].

28. Ultimately it is the conclusion of the Court no good reasons have been advanced by the Applicant for the Court to exercise discretion in his favour.

29. The application is unmeritorious. It is dismissed with costs to the Respondent.

30. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 25TH DAY OF FEBRUARY 2021.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff/Respondent: Absent

Ms. Chege for the Defendant/Applicant

Court Assistants: Kuyiki & Njeri