REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 46 OF 2017

ANDREW SHIMBIRO.....PLAINTIFF

VERSUS

SAMMY TALAM.....DEFENDANT

RULING

1. The application dated **24/2/2020** and filed in court on **25/2/2020** has been bought under **Section 80** of the **Civil Procedure Act** and **Order 45 Rule 1** of the **Civil Procedure Rules**. The applicant/plaintiff seeks the following orders:-

(1) …spent

(2) …spent

(3) That after the *inter partes* hearing, this court do vary and review its order given on 8/11/2017.

(4) That costs of this application be paid by the defendant.

2. The application is supported by the affidavits of the plaintiff sworn on **24/2/2020** and **9/12/2020** respectively. The grounds upon which the application is made are as is apparent from the face of the affidavits and the base of the application and which incorporate a bit of the history of the dispute, as follows: that two judgments exist against the respondent, that is **Kitale CMCC No. 11 of 2007** and **Kitale ELC No. 83 of 2009** regarding the same suit land with the respondent being the judgment debtor in both cases; that the respondent has never complied with those judgments; that upon the applicant's attempt to execute in the year **2008**, the court file in **Kitale CMCC No. 111 of 2007** could not be traced and it was later traced in **2017** from the Nakuru Archives; that consequent to the disappearance of that file the applicant had filed the instant suit; that before the instant suit could be set down for hearing the applicant, to avert a multiplicity of suits and in good faith, sought to stay its hearing in the year **2017** so that he could proceed with the found file , that is **Kitale CMCC No. 111 of 2007;** that both counsel in the suit agreed that **Kitale CMCC 111 of 2007** should be withdrawn; that an order was recorded by this court on **8/11/2017** that costs be agreed between parties; that a gentleman's agreement was entered into by both counsel that the respondent would not pursue the applicant for costs; that the respondent, despite having failed to surrender the suit land (which he has allegedly occupied since **2007**) as per the decree of **2008**, subsequently lodged a bill of costs dated **12/4/2019** scheduled to be taxed on **25/2/2020**; that the costs are higher than the value of the suit land, rendering the applicant's quest for justice quite an expensive venture yet he was not responsible for the misplacing of the court file; that the mistake of the registry should not be visited upon him and that he should not therefore be condemned to pay costs, more so for the reason that the suit was withdrawn before hearing.

3. I have perused the court record and I have found no affidavit in response to the application

Submissions

4. The applicant filed his written submissions on **29/1/2021**. The respondent filed his submissions on **4/2/2021**. I have considered both sets of submissions.

5. The applicant's submissions closely follow what he has written in his supporting affidavits.

6. The respondent's submissions raise a number of issues, namely that the claim in the instant suit had been opposed and the respondent had already incurred expenses over it and as per the law he is entitled to costs; that the order made on **8/11/2017** was a consent order which according to the decisions in **Samuel Mbugua Ikumbu vs Barclays Bank of Kenya Ltd [2015] eKLR, Flora Wasike Vs Destimo Wamboko [1982-1988] 1 KAR 625, Board of Trustees National Social Security Fund vs Michael Mwalo 2015 eKLR** as well as **John**

Waruinge Kamau vs Phoenix Aviation Ltd [2015] eKLR, having been recorded free of coercion, fraud, secrecy and without any error should be binding on all parties. He also averred that the applicant has previously sought negotiations over the issue and he has filed the instant application as an afterthought. Further the respondent decries the apparent inordinate delay in the lodging of the application.

Determination

7. The issues for determination herein are therefore as follows:

(a) Should the order made on 8/11/2017 be reviewed or set aside?

(b) Who should bear the costs of the instant application?

8. The issues are discussed as herein below:-

(a) *Should the Order made on 8/11/2017 be reviewed or set aside*?

9. The order recorded on **8/11/2017** at **10:30** am reads as follows:

"By consent of the parties:

1. The suit herein be withdrawn;

2. Costs to the defendant to be agreed on or taxed."

10. The order was dictated by Mr. Chebii and Mr. Ambutsi stated as follows in apparent approbation thereof:

"That is the proper consent."

11. The court then recorded the consent order.

12. It does not require this court a microscopic examination to decipher that the order recorded by the parties was a consent order and therefore the normal principles for setting aside a consent order should apply. Mr. Chebii has cited at least **4** decisions, which I uphold, that support those principles.

13. In **Brooke Bond Liebig (T) Limited vs. Mallya [1975] E.A**. the Court of Appeal stated as follows:

"The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani v. Kassam (1952), 19 E.A.C.A. 131, where the following passage from Seton of Judgments and Orders, 7th Edn., Vol. I, p. 124 was approved:

"Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court...or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."

14. I therefore believe that no good ground in the form of fraud, collusion or agreement contrary to the court's policy has been placed before court to enable the setting aside of the consent order.

15. The second issue raised by Mr. Chebii and in which I think he is right is that unless a court of law otherwise in its discretion orders, a party is entitled to costs. I must add that a party is entitled to costs whether the suit has been opposed or not and the provisions of the Advocates Remuneration Order on the various species of costs for defended and undefended matters, matters that went to hearing or matters that were nipped in the bud before hearing by upholding of *in limine* objections or by consents, are relevant to the present argument. Therefore the mere fact that the suit was not heard does not aid the applicant. The best the applicant can do in the circumstances is to await the decision of the taxing master who should ordinarily take note of all the goings on in respect of the present dispute and award costs as justice and equity may demand in the case.

16. Finally, the delay in lodging the application must be addressed. The order sought to be reviewed was entered into on **8/11/2017** and the instant application was lodged on **24/2/2020**. Mr. Chebii submits, and I think he is also right on this issue, that a delay of approximately two years and four months amounts to inordinate delay for which this court should not in any event exercise its discretion in favour of the applicant.

17. In the case of **Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited [2014] eKLR** the Court of Appeal of Kenya observed as follows:

"In dealing with laches, Halsbury's Laws of England, 4th ed. Vol. 16(2) at ξ910 has this to say;

"A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation equity aids the vigilant , not the indolent' or 'delay defeats equities'. A Court of equity refuses its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay ('laches')."

18. Further down in the same case the court stated:

"Lord Selbourne L.C. delivering the opinion of the Privy Council in The Lindsay Petroleum Co v Hurd (1874) L.R. 5 P.C. 221 said at page 240:

"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

19. Much as the parties were supposed to enter into negotiations by the terms of the order, the express part of that order had already granted the respondent accrued rights to costs for which he had the legitimate expectation to execute on. In this court's view the delay of two years and four months is inordinate and this court will not condone it. The application is barred by the doctrine of laches from the remedy sought.

20. Before I pen off I must express dissatisfaction with the fact that a decree holder can interminably wring his hands and lament to this court of the judgment debtor's unwillingness to vacate the suit land as ordered by court while the appropriate execution mechanisms including eviction remain unutilized. It is either he has not gotten full advice on the issue, or that he is reluctant to execute for reasons best known to himself. I will leave the issue at that.

(b) Who should bear the costs of the instant application?

21. The upshot of the foregoing is that the applicant's application dated **24/2/2020** has no merit and the same is hereby dismissed with no orders as to costs.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 11th day of February, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.