



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC MISC CASE NO. 9 OF 2020

DAVID DACHI AKUKU.....APPLICANT

VERSUS

JANE AKETCH ONDORO.....RESPONDENT

RULING

1. By a Notice of motion dated 24th July 2020 and filed in court on 29th July 2020 pursuant to Sections 1A, 95 and 79G (Provisions) of the Civil Procedure Act (Cap 21 Laws of Kenya) as read with Order 51 Rule 1, Order 46 Rule 6 and Order 9 Rule 9 and 10 of the Civil Procedure Rules, 2010 and Section 68 (1) of the Land Registration Act 2016 (2012) (The application), the applicant **DAVID DACHI AKUKU** through G.S. Okoth and Company Advocates, is seeking orders infra:-

a) Spent

b) The Honourable court be pleased to make an order allowing the applicant to change the advocate acting for him in original Oyugis SPM CC No. 83 of 2015 and appoint another advocate.

c) The Honourable Court be pleased to extend the time for filing an appeal against the Judgment and decree passed in Civil case No. 83 of 2015 at SPM court's at Oyugis and thereby give leave to the applicant to appeal out of time.

d) The Honourable court do thereafter having given leave to appeal, make an order for stay of execution of the decree passed in Oyugis SPM Civil case No. 83 of 2015 to take effect as soon as the appeal is filed.

e) The Honourable court do issue an order of INHIBITION directed at sub-county Land Registry inhibiting the registration of any transaction on title of parcel No. CENTRAL KASIPUL/KACHIEN/2015 measuring 0.13 of a hectare until a further order of this court is served on him.

f) The cost of his application be costs in the cause.

2. The application is based on grounds (a) to (f) set out on it's face as well as the applicant's seven (7) paragraphed supporting affidavit sworn on the even date and documents marked as "DDA-1" to DDA-4" and annexed thereto. Briefly, the applicant complains that Judgment in Oyugis Chief Magistrate's court Civil Suit No. 83 of 2015 where he was the defendant, was delivered on 12th November 2018 in favour of the respondent, **JANE AKETCH ONDORO**. That his advocate on record then, M/s H.O. Mimba did not appeal there from but instead filed a fresh suit namely, Migori ELC case No. 141 of 2018 (O.S), 26th November 2018 as shown in the Judgment and originating summons marked as "DDA1" and DDA -2" attached to the said affidavit.

3. The applicant further complains inter alia, that the time for lodging appeal against the Judgment in accordance with **section 79 G (supra)** has long elapsed. That the grounds of appeal show that the appeal is merited and that he should be granted the orders sought in the application.

4. In her thirteen (13) paragraphed replying affidavit sworn on 14th December 2020, the respondent through Messrs Nyauke and Company Advocates, opposed the application and termed the same not brought in good faith, a complete afterthought, intended to dodge eminent execution, it is frivolous, vexatious and a serious abuse of the court process. She deposed inter alia, that following the delivery of Judgment in Oyugis Chiefs Magistrate Court Civil suit No. 141 of 2018, the applicant knew or ought to have known of an option of appeal therefrom but instead filed Migori ELC case No. 141 of 2018 (O.S) as shown in document marked as JAO1".

5. The respondent further deposed that an application for stay of execution filed on 30th May 2019 on grounds that he had filed the said suit by way of originating summons was later dismissed as it did not meet the criteria in **Order 42 Rule 6 of the Civil Procedure Rules, 2010** (The Rules herein) as disclosed in annexure "JAO-2". That the applicant remained indolent throughout until the decree was executed and he

was committed to Civil jail, but partially settled the claim in terms of a deposit of **Kshs. 45,000/=** to secure his release as shown in the receipt marked as “JAO-3” annexed to the affidavit.

6. The application was urged by way of written submission pursuant to court orders of 15th December 2020; see **Order 51 Rule 16 of the Rules and Practice Direction number 33 of the Environment and Land Court Practice Directions, 2014.**

7. The applicant’s learned counsel filed submissions dated 18th February 2021 whereby he withdrew prayer regarding costs of the application, urged this court to order that costs herein to abide the result of the intended appeal and that the other prayers in application be allowed. To fortify the submissions, counsel clinged on **section 19 (1) of the Environment and Land Court 2015 (2012)**, and the provisions of the law under which the application is mounted, the case of **Abdinoor Shurie =vs= Halima Bundid (2020) eKLR and section 69 of the Land Registration Act, (supra).**

8. Learned counsel for the respondent filed submissions dated 9th February 2021 on 22nd February 2021 citing **section 1B (d) of the Civil Procedure Act (supra)**, gave a brief statement of facts of the matter and identified twin issues for determination namely whether the applicant’s reasons to appeal out of time are sufficient and whether the application is merited. Counsel analysed the issues, contended that the application is not merited, relied on **section 79 G, (supra)** the Court of Appeal decision in **Pullin Harakchand Shah =vs= Southern Credit Banking Corporation Ltd (2016) eKLR, High Court decision in Dilpack Kenya Ltd =vs= William Kitonyi (2018) eKLR** and that this court be guided by the famous maxim “**Equity aids the vigilant and not the indolent**” in dismissing the application.

9. I have carefully considered the application in it’s entirety, the replying affidavit and the rival submissions inclusive of all the authorities cited therein. Twin issues emerge therefrom for determination. Thus, I am persuaded by the issues framed in the respondent’s submissions and embrace them herein accordingly.

10. At the outset it is noted that at paragraph 8 of his submissions, learned counsel for the applicant submitted by withdrawing prayer that costs of the application be in the cause. The same is noted in paragraph 7 hereinabove.

11. **Order 9 rules 9 to 11 of the Rules (supra)** stipulate change of counsel after delivery of Judgment and procedure thereof. I take them into account in this application.

12. Judgment in the Chief Magistrate’s Civil suit was delivered as shown in the document marked “DDA-1” and the applicant’s counsel filed a fresh suit as discerned in the documents marked as “DD2” and “JAO-1” herein. On that score, did the applicant file an appeal within the timelines set out in **section 79 G. (supra)** and Order 50 Rules 4 and 8 of the Rules?

13. It is trite law that four weeks’ delay to enter appearance judged against the facts of the case and the surrounding circumstances would be an extreme penalty and would be wrong and unjust. That mistakes made by a counsel should not make a party suffer thereby; see the Court of Appeal decision in **Philip Chemwolo and another =vs= Augustine Kubende (1982-88) KAR 103.**

14. The applicant blames the delay to mount this application on his former counsel. In **Hamam Singh and others =vs= Mistri (1971) EA 123**, Spry VP held that mistakes of a legal adviser may amount to sufficient cause but not inordinate delay on his part.

15. It is also settled law that an application for extension of time where the applicant fails to give reasons for the delay is not tenable and should be dismissed: see the **Supreme Court of Kenya decision in Naomi Wangechi Gitonga and 3 others =vs= IEBC and 17 others. Civil Application number 41 of 2014 (2018) eKLR.**

16. Additionally, I prescribe to the reasoning that the length of the delay, the reasons thereof, chances of success of the intended appeal and the prejudice to be suffered by the respondent, if the application is granted, be borne in mind in deciding whether to grant an extension of time or not; see **Pullin Shah case (supra).**

17. It is noted that the instant application was commenced one (1) year, eight months and 12 days after the delivery of Judgment by the trial court. **Article 10 (2) (b) of the Constitution of Kenya,2010** anchors the principles of equity which include; **Equity aids the vigilant and not the indolent (supra) and delay defeats equity all which shall be protected and promoted**

18. It is further noted that an earlier application for stay before the trial court, was disallowed as per the ruling marked as “JAO 2” annexed to the respondent’s replying affidavit. Furthermore, the applicant paid a sum of **Kshs. 45,000/=** to the respondent’s counsel on account of settlement of the matter as disclosed in a copy of the receipt marked as “JAO-1” and annexed to the replying affidavit.

19. In addition, the cardinal principle is that litigation has to come to an end; see **Halsbury’s Laws of England 4th Edition Volume 22 at page 273.**

20. This court is aware of it’s discretion under **section 95, Order 50 Rule 6 and sections 68 and 69 (supra).** However, the said discretion must be exercised judicially to meet the ends of justice without due regard to technicalities of procedure as envisioned in **sections 1A,1B,3 3A of the Civil Procedure Act (supra)**, sections 3 and 19 (1) of the Environment and Land Court Act, 2015 (2012) and more fundamentally, under **Articles 50 (1) and 159 (2) (b) (d) and (e) of the Constitution of Kenya (supra).**

21. In light of the foregoing, has the application met the threshold in **Pullin Shah case (supra)**, among other leading authorities? Nay, is the succinct answer thereto. So, I agree with the respondent’s counsel, inter alia, that the application has not been brought in good faith and it is an abuse of the court process.

22. A fortiori, I find no merit in the application dated 24th July, 2020 and filed in court on 29th July 2020. I proceed to disallow the same with costs to the respondent.

DELIVERED, DATED and SIGNED at MIGORI this 3RD day of MARCH, 2021

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. S. Nyauke learned counsel for the respondent

Tom Maurice - Court assistant