Kananu v Arujah & 4 others (Environment & Land Case 16 of 2018) [2023] KEELC 17362 (KLR) (10 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17362 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND CASE 16 OF 2018

CK NZILI, J

MAY 10, 2023

BETWEEN

JANET KANANU ..... PLAINTIFF

AND

JOHN THURANIRA ARUJAH ..... 1ST DEFENDANT

SHEILA GACHERI THURANIRA ..... 2ND DEFENDANT

DUNCAN KITHINJI THURANIRA ..... 3RD DEFENDANT

MUREITHI ARUJAH ..... 4TH DEFENDANT

MARTIN KINOTI ARUJAH ..... 5TH DEFENDANT

RULING

1. This ruling relates to two applications. The first one is dated May 8, 2023. The court is asked to reinstate the 2nd applicant dated February 28, 2023 because counsel for the applicant was taken ill on the inter parties hearing on March 15, 2023 and by the time he logged in virtually, the court had already dealt with the matter.

2. The application therefore says that she should not suffer out of mistakes of counsel otherwise there will be a miscarriage of justice.

3. The applicant is opposed on the ground that there has been an inordinate delay, the applicant is guilty of laches, no medical report has been attached and it is not in the interest of justice to allow the application.

4. Coming to the second application, the applicant wants this court to re-open the proceedings, stay the delivery of the judgment and allow her to adduce fresh evidence in support of her case.

5. On the other hand, the respondents have opposed the application on the basis that it lacks merit, was filed late, and is a delaying tactic. Further, the respondents averred that there would be prejudice to them.

6. The power to review, set aside, stay proceedings and to re-open proceedings is discretionary in nature and exercisable judiciously and not whimsically bearing in mind that access to justice, fair hearing and the duty of the court under Sections 3 & 19 of the *Environment and Land Court Act* as read together with Sections 1A, 1B and 3A of the *Civil Procedure Act* and Article 159 of the *Constitution* to render justice expeditiously in a fair proportionate and cost-effective manner.

7. In *Global Tours & Travel Limited*; Nairobi HC Winding Up Cause No 43 of 2000, the court said it must be in the interest of justice to stay proceedings where the *prima facie* merits are demonstrated, while at the same time considering the optimum utilization of judicial time and resources and lastly on whether the application has been brought timeously.

8. In *Christopher Ndolo Mutuku & another vs CFC Stanbic Bank* (2015) eKLR the court observed that what matters is the overall impression the court makes out of the total sum of the circumstances of each case which arouse a compulsion that the proceedings should be stayed in the interest of justice. The court said that there must be just and sufficient cause for a stay.

9. As regards the adduction of fresh evidence, the court in *Kibos Sugar & Allied Industries Ltd & 4 others vs Benson Ambuti & 2 others* C A No 153 of 2019 court held that it had to give effect to the overriding objections of doing justice and in an attempt to strike a balance between the need for concluded litigation to be determinate of disputes and the desirability that judicial process should achieve the right results.

10. In *Hassan Hashi Shirwa vs Swalahudin Mohamed Ahmed* (2011) eKLR the court set the parameters to determine whether the adduction of new evidence includes the relevance of the evidence, prejudice to the opposite party and the overall objective of expeditious disposal of cases. The latter must also be safeguarded and balanced against that of the plaintiff. There must be equal treatment of parties before the law. The onus was on the applicant to demonstrate sufficient and justifiable reasons why she should be given a second bite of the cherry by re-opening the suit to introduce the new evidence.

11. In my considered view and as held in *Mohamed Abdi Mohamud vs Ahmed Abdullahi Mohamed & 3 others* (2018) eKLR, the intended evidence will not in any way impact the suit before the court. It is not made by a qualified land surveyor. It is also based on google maps. Parties had enough time to put in additional documents before the hearing commenced. The application has been made after an inordinate delay. No explanation has been given why the applicant has come too late on the eve of the judgment. The alleged new evidence and its relevance to her case were within the knowledge of the plaintiff had she exercised diligence. The applicant did not mention it when she took the witness stand. It was not sought to be introduced soonest as it was made available to her. The other witnesses she wishes to call were always available to her since the inception of the suit.

12. The record of the court will show that the applicant has not been cooperating with her advocates on record to the extent that they have threatened to cease acting twice till eventually withdrawing on the hearing date of her case. The sword of justice cuts both ways. The rights of the defendants to an expeditious disposal of the suit must also be safeguarded. The input of a land surveyor and the land registrar was always foreseeable to the parties herein. To try to introduce such evidence would impact accrued rights by the defendants to defend this suit. The court has to comply with Order 21 of the Civil Procedure Rules and meet the statutory deadlines on the delivery of the judgment.

13. Therefore, I see no merits in the two applications and are hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 10TH DAY OF MAY 2023

In presence of

C A John Paul

Muthomi for plaintiff

Kariuki for defendant

HON C K NZILI

ELC JUDGE