REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

MISC. ELC CASE NO. E009 OF 2021

MONATA MATIKO CHONCHORIO.....APPLICANT

VERSUS

JOHN MARWA CHABARO.....RESPONDENT

RULING

A. INTRODUCTION

1. By Notice of Motion dated 5th March,2021 the Applicant sought for the following orders: -

a. Spent.

b. That this court be pleased to grant leave to the Applicant to file an appeal out of time against the decree issued in CMC Migori ELC No. 55 of 2018 dated 29th July 2020.

c. That this court be pleased to grant an order of stay of execution against the said decree and grant conservatory orders of injunction preserving the suit title number L.R. No. NYABASI/ BOMERANI/ 307 and restrain the Respondent or through his agents from harvesting, selling or destroying the Eucalyptus forest grown on the 2 ½ Acres portion pending the hearing and determination of the application.

d. That this court be pleased to grant an order of stay of execution against the said decree and grant conservatory orders of injunction preserving the suit title number L.R. No. NYABASI/ BOMERANI/ 307 and restrain the Respondent or through his agents from harvesting, selling or destroying the Eucalyptus forest grown on the 2 ½ Acres portion pending the hearing and determination of the intended appeal.

2. The application is based on the grounds thereof and the Supporting Affidavit dated 05.03.2021 and a Supplementary Affidavit dated 20.04.2021. The applicant avers that he validly bought a portion of the suit land from the Respondent and took possession of the 2½ acres. That he developed the said portion and planted Eucalyptus forest which is now mature for harvest. That the Respondent acquired the capacity to sub-divide and transfer the land to him after obtaining letters of administration on 22nd November 2012. That he filed a claim in Migori CMC ELC No. 55 of 2018 and the Respondent filed a defence and counterclaim. That the trial court on 29.07.2020 dismissed both the plaint and the counterclaim for being statute barred. That he applied for a review of the said decree/judgement which was subsequently declined hence giving rise to this appeal. The Applicant is apprehensive that the Respondent shall commence harvesting of the trees if conservatory orders are not granted pending the hearing and determination of the intended appeal.

3. The application was opposed. The Respondent filed Grounds of Opposition dated 19.03.2021 in response to the Application dated 05.03.2021. It is the Respondent's assertion that the impugned Order/ Decree is not appealable as of right under Order 43 Rule 1 of the Civil Procedure Rules; that the applicant applied for a review of the order which was denied and he cannot come back to seek to appeal. The Respondent asserts that the application is a fishing expedition and the delay of nine (9) is inordinate.

4. I have read and considered the rival submissions by both the Applicant and the Respondent in this case and the various authorities cited in support of their respective cases and I have taken the same into account in arriving at my decision.

B. ANALYSIS AND DETERMINATION

5. The issue for determination which arise therefrom are: -

a) Whether leave can be granted to appeal out of time.

b) Whether an order for stay of execution can issue against the decree and judgment dated 29th July 2019.

c) Whether Conservatory Orders can issue.

A. Whether leave can be granted to appeal out of time.

6. Section 79G of the Civil Procedure Act provides that appeals originating from the subordinate court should be filed within thirty (30) days from the date of the decree or order appealed against. Section 95 of the said Act gives the court discretion to extend the time as it deems fit even if the time originally fixed has expired.

7. The principles to be considered in exercising the court's discretion on whether or not to enlarge time to file appeal were set out in the case of **Leo Sila Mutiso vs Rose Hellen Wangeri Mwangi Civil Appeal 255/ 1997**, the court, in considering the exercise of discretion to extend time, held as follows: -

> **"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay. Secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted."**

8. These principles were also reiterated in **First American Bank of Kenya Ltd -vs- Gulab P. Shah & Others HCC 2255/2000 [2002] IEA 65** as follows: -

1) The explanation if any, for the delay;

2) The merits of the contemplated action, whether the appeal is arguable;

3) Whether or not the respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.

9. I will therefore proceed to address each of the limbs outlined in the above mentioned cases and establish whether the Applicant has satisfactorily met each of the said principles. **On the length of the delay and the explanation if any**. The present Application was filed on the 5th of March, 2021 after the trial court delivered its ruling for the Review Application on the 3rd of March, 2021. The Applicant has also given an explanation of the 9-month delay since the delivery of the final orders in the main suit was on the 29th July, 2020. This in my view does not amount to inordinate delay taking into account also that this was the period within which the current Covid 19 Pandemic was prevalent and normal day to day activities was disrupted. Thus, I find that the Application was filed without undue delay.

10. Chances of success of the intended Appeal. I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case at this stage. Having that in mind, I wish to state that from the Draft Memorandum of Appeal, one of the issues the Applicant intends to raise is the issue of the suit being dismissed for being statute barred.

11. This court has taken the trouble to call for the lower court file to peruse the judgment delivered on 29th July 2019. Ordinarily, this should be the responsibility of the applicant to furnish this court the same.

12. Be as it may, the trial court observed in part as follows: -

> **"the agreement between the plaintiff and the defendant is dated 15.06.2004. the suit was filed on the 12.03.2018 before it was amended on the 7.11.2018. the period between the date of the contract and the filing of the suit is over 13 years. it is therefore my finding upon consideration of the facts and the applicable law, that the plaintiff suit filed on 12.03.2018 was statutorily barred as of 15.06.2010……**
>
> **the finding of limitation of actions in my view is suffice to conclude the plaintiff's case in favour of the defendant and I find that it will be an academic exercise to delve into the other issues including whether the agreement dated 15.06.2004 was valid or not.**
>
> **Tied to this is whether the defendant's counter-claim is also time barred. in his own evidence, the defendant stated that the plaintiff encroached the parcel and planted trees in the year 2004. His counter-claim was filed on the 20.04.2018, a period of 14 years after the plaintiff allegedly entered the land. The defendant ought to have commenced his suit within the time prescribed under section 7 of the Limitation of Actions Act. It follows that by the time the counter-claim was filed, the same was statute barred. Having found on the issue of limitation of actions, the only logical conclusion is that both the plaintiff's suit and the defendant's counter-claim fail. The same are dismissed. Each party will bear their own costs.**

13. From the above, it is therefore clear that the trial magistrate relied on the provisions of Sections 4 (i) (c) and section 7 of the Limitation of Actions Cap 22 in holding that the plaintiff's suit and the defendant's counter-claim were time barred, respectively.

14. It is not in dispute that the plaintiff's suit and the Defendant's suit were dismissed for being time barred as provided by The Limitation of

Actions Act. The court did not therefore have jurisdiction to entertain the same. The next question is therefore whether an Appeal lies as a matter of right owing to the nature of the order and the reasons stated.

15. The plaintiff's suit was hinged on a contract that was signed on 15th June, 2004. As per Section 4 of the Statute of Limitations Act, the cause of action arose therefrom. The suit ought to have been filed on or before brought after the lapse of 6 six years as statutorily required. The same was instituted 13 years later. The proper thing to do before instituting such a stale claim would have been to seek leave to file the suit out of time.

16. Jurisdiction of a court is conferred by a Statute or the constitution and it is no doubt that the issue limitation of time goes to the root of the jurisdiction of a court. The law speaks for itself, thus, an appeal, whether successful or not, cannot be used to confer jurisdiction to a court where there was none.

17. In the case of ***Gathoni –vs- Kenya co-operative Cremires Ltd (1982) KLR 104 Potter***, JA stated the rationale of the Law of Limitation as follows: -

> **"The law of limitation of actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest."**

18. Further, In **Anaclet Kalia Musau v Attorney General & 2 Others [2020] eKLR, Civil Appeal 111 of 2017,** the Court of Appeal in determining a jurisdictional issue which was never raised by the parties to the suit stated as follows:

> **"The solitary issue in this appeal is, whether the suit before the High Court was statutorily time barred. To demonstrate that time limitation is a jurisdictional question and that if a matter is statute-barred a court has no jurisdiction to entertain it, we cite the decision of the Supreme Court in the case of Nasra Ibrahim Ibren V. Independent Electoral and Boundaries Commission & 2 others, Supreme Court Petition No. 19 of 2018, where that court stressed the fact that jurisdiction is everything and that a court may even raise a jurisdictional issue suo motu. It said:**
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> **"40 A jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by Odunga J in Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367 stated thus:**
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> **"25. What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded…" (Emphasis supplied)**
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> **We fortify that view by quoting yet another passage from the East African Court of Appeal in the matter of Iga V. Makerere University (1972) E.A 62, where it was stated that;**
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> **"The limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time-barred, the court cannot grant the remedy or relief……. The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint, and no grounds of exemption are shown in the plaint, the plaint must be rejected." (Our emphasis). The learned Judge in this appeal, no doubt did not err when she determined whether, by operation of the law, she had to down tools for want of jurisdiction."**

19. The Applicant seeks to anchor his Application on Article 159 of the Constitution of Kenya in addition to other statutes. I am also persuaded by the dictum of Kiage, JA in **Nicholas Kiptoo Arap Korir Salat -vs- IEBC & 6 others [2013] eKLR** where he stated;

> **"… 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 a 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…"**

20. In his Application, the Applicant has relied/ introduced the concept of Constructive Trust and it is his argument that the same is not subject to the 6 years statute period. I wish to state that the said doctrine does not arise in the present case. The entire plaintiff's case is pegged on the Contract for the sale of land dated 15.06.2004. He cannot now be seen relying on the concept of Constructive Trust and alleging that the suit land is being held by the Respondent in trust. I hereby find that the issue of constructive trust does not therefore arise in the present suit.

21. In the Upshot therefore, I find that the orders sought by the Applicant; for leave to file the Appeal out of time are untenable under the law and for that reason Prayer no. 2 in the Notice of Motion dated 5.03.2021 is dismissed.

B. Whether an Order for stay of execution can issue against the decree and judgment dated 29th July, 2019

22. Order 42 Rule 6 (2) sets out the grounds of issuing an Order for Stay of Execution: -

> (2) No order for stay of execution shall be made under sub- rule (1) unless—
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> (a) the court is satisfied that substantial loss may result to the applicant unless the order is
>
> made and that the application has been made without unreasonable delay; and
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> (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

23. The Judgment and Decree which the Applicant seeks to Appeal is for the dismissal of the suit; for being time barred. In my view, these Orders as made by the trial court, are negative orders; neither the Applicant not the Respondent was required to do or to refrain from doing anything.

24. I wish to rely on the Court of Appeal decision in **Ndungu Kinyanjui vs Kibichoi Kugeria Services & Another [2007] eKLR** relied on its earlier decision **in David Thiong'o T/A Welcome General Stores vs Market Fancy Emporium [2007] eKLR** and held as follows: -

> "This Court has repeatedly stated in previous decisions, among them, David Thiong'o T/A Welcome General Stores vs Market Fancy Emporium, Civil Application No. NAI. 47 OF 2007…. that in an application under Rule 5(2) (b) for stay of execution, where the court whose order is sought to b stayed, has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum, there would be nothing arising out of that decision for this court to enforce or to restrain by injunction… the decision of 9th February, 2007 in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. Accordingly, no order of stay can properly issue relating to it."

25. Further, I wish to state that the effect of the Judgement and Decree dated 29.7.2019 was to maintain the status quo prior to filing of the suit by both parties, that is, the plaint and the counter-claim. The Plaintiff's suit seeking specific performance and a declaration that the defendant holds the land in trust for his benefit as well as the Defendant's counter-claim seeking to evict the plaintiff and an Injunction to restrain him from occupying L.R No. NYABASI/ BOMERANI/ 307 were both dismissed. It is therefore unacceptable for the Respondent herein to act on the strength of the said Judgment and move to evict and or harvest the Eucalyptus forest grown by the Applicant on the said portion of the suit parcel. Both parties need to regularize their position accordingly.

C. Whether Conservatory Orders can issue

26. The Applicant also seeks Conservatory Orders against the Respondent to preserve the suit property and to restrain the Respondents from harvesting, selling or destroying the Eucalyptus forest grown on the portion of the suit property.

27. In addressing the concept of Conservatory Orders the Supreme Court of the Republic of Kenya in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Other (2014) eKLR** held that:

> **"'Conservatory orders' bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success' in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes." (Emphasis supplied)**

28. The land in dispute in the present case does not bear any public law connotation, issues of public interest or constitutional values do not arise at all. It is a private property with the dispute herein being between the Applicant and the Respondent. As such therefore, I do find that Conservatory Orders as sought by the Applicant cannot be granted and I therefore dismiss prayer no. 3 to the extent of the conservatory orders as sought.

29. In the upshot, I accordingly find that the Application dated 05.03.2021 is not merited and is therefore dismissed with costs to the Respondent. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MIGORI ON 3RD DAY OF NOVEMBER, 2021

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of:-

Mr. Kisera for the Applicant present

Mr. Mboya holding brief for Abisai for the Respondent

Tom Court Assistant