REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 110 OF 2009

NANCY NYAWIRA.....1ST PLAINTIFF/APPLICANT

RICHARD WAMBUGU NGIBUINI.....2ND PLAINTIFF/APPLICANT

VERSUS

ARCHER DRAMOND MORGAN LTD..DEFENDANT/RESPONDENT

AND

CHIEF LAND REGISTRAR.....INTERESTED PARTY

RULING

1. What is before me are two Applications: the Notice of Motion dated 8th May, 2015 filed by the Defendant and the Notice of Motion dated 13th June, 2018 filed by the Plaintiffs. In the Notice of Motion dated 8th May, 2015, the Defendant is seeking for the following orders:

> ***a. This Honourable Court be pleased to extend the time to file and serve the Notice of Intention to Appeal and to lodge an Appeal out of time in respect of an intended Appeal from the Ruling of the Honourable Justice J. M. Ngugi dated 15th February, 2012 in the suit hereof.***
>
> ***b. That the Notice of Appeal filed on 20th March, 2014 in the suit hereof be deemed as duly filed within time.***
>
> ***c. That the costs of this Application abide the outcome of the intended Appeal.***

2. The Application is premised on the grounds that the Defendant is aggrieved by a Ruling of this court delivered on 15th February, 2012 in the absence of both parties; that the Defendant was never served with the Notice of the delivery of the said Ruling which is the subject of the intended Appeal and that the Defendant only became aware that the Ruling in the suit had been delivered when his counsel was served by the Plaintiffs' counsel with a Notice of Taxation on 5th June, 2012.

3. According to the Defendant, his efforts to thereafter trace the file to ascertain the outcome of the said Ruling and take necessary action were in vain as the court file went missing for a long time and that it was not until January, 2014 that the Plaintiffs' counsel applied for the construction of the court file.

4. The Defendant's advocate deponed that he only obtained a copy of the Ruling the subject of the intended Appeal from the Plaintiffs' advocate on 5th December, 2013; that by the time he received a copy of the said Ruling, the time for lodging an Appeal had long expired and that he lodged in this court a Notice of Intention to Appeal on 20th March, 2014.

5. The Defendant's counsel finally deponed that the failure to file the Notice of Appeal on time was not intentional but was occasioned by the delay in obtaining the relevant court file and the need to take proper instructions from the Defendant and that the intended Appeal raises substantial and weighty points of law.

6. In reply, the Plaintiffs' advocate deponed that the Application has suffered inordinate and in excusable delay; that for two (2) years, between August, 2010 and 5th June, 2012 when they were served with a Notice of Taxation, the Defendant failed to follow up on the file to know the outcome of the two Applications and that this Application was filed one (1) year after the file was reconstructed by the Plaintiffs.

7. In the Notice of Motion dated 13th June, 2018, the Plaintiffs has sought for the following orders:

a. That the Chief Land Registrar be directed to supply, within a limited period of time, details of the registered owner of the suit property herein namely, L.R No. 27317 (I.R No. 100328/1).

b. That an order of eviction be issued directing the Court Bailiff to evict from the suit property the Defendant and its agents and all persons claiming to have been authorized by the Defendant to occupy the suit property namely; L.R. No. 27317 (I.R. No. 100328/1).

c. That the Deputy Registrar of the Court be directed to sign all necessary instruments of transfer instead of the Defendant so as to vest the suit property namely; L.R. No. 27317 (I.R. No. 100328/1) in favour of the Plaintiff.

d. That costs of this Application be provided for.

8. The Application is supported by the *"Replying Affidavit"* of the 1st Plaintiff who has deponed that this matter proceeded through an arbitration award which was duly confirmed by the court; that there is no automatic right of Appeal from a decision that arises from an arbitral award and that the Notice of Appeal dated 20th March, 2014 was filed on 17th September, 2014 in the Chief Magistrate's Court and not in the High Court.

9. According to the Plaintiffs, in his Award of 16th December, 2009, the arbitrator directed the Defendant to deliver the house known as Unit No. 8 Phase 1 Hillcrest Part on L.R. No. 27317 to the Plaintiffs; that the court upheld the said Award vide the Ruling of 15th February, 2013 and that the Defendant has never transferred the said house to the Plaintiffs.

10. The 1st Plaintiff deponed that he has tried to locate the file in respect to the suit land at the lands offices without success and that the Defendant has conducted itself as a common criminal who obtained huge sums of money from the Plaintiffs through false pretenses.

11. The Defendant responded to the Plaintiffs' Application by filing a Notice of Preliminary Objection dated 7th September, 2018. In the said Notice of Preliminary Objection, the Defendant averred that the Application affects the rights of a third party who is not a party to the suit and that the firm of Gikandi & Co. Advocates is not properly on record for the Plaintiffs.

Submissions:

12. In his submissions, the Plaintiffs' advocate submitted that under Section 39(3) of the Arbitration Act, an Appeal can only lie to the Court of Appeal where the parties by way of an Agreement made provision for such a right in the Arbitration Clause or with the leave of the High Court or the Court of Appeal where the matter raises a point of law of general importance.

13. The Plaintiffs' counsel submitted that Clause 13.4 of the Agreement of Sale provides that the determination of the Arbitrator shall be final and binding upon the parties; that the Defendant has not sought, neither has it been granted, leave to Appeal by either the High Court or the Court of Appeal and that the Court of Appeal does not have the jurisdiction to entertain the intended Appeal by the Defendant.

14. Counsel submitted that while determining whether or not to grant extension of time to file a Notice of Appeal, the court must ensure that the intended Appeal is not hopeless. Counsel submitted that the intended Appeal by the Defendant has no chances of success and that the Application by the Defendant was filed too late in the day.

15. On his part, the Defendant's advocate submitted that the Application dated 8th May, 2015 is premised on the provisions of Section 7 of the Appellate Jurisdiction Act and Rules 42, 75 and 82 of the Court of Appeal Rules; that the principles upon which the court exercises its discretion to extend time are now settled and that the Application should be allowed.

16. The Defendant's counsel submitted that the Defendant has an arguable Appeal with high chances of success; that the subject matter herein is land and that the Defendant should be granted an opportunity to exhaust all avenues of Appeal.

17. The Defendant's advocate submitted that the Application was filed with quick dispatch; that the perceived delay to file the intended Appeal was due to the delivery of the Ruling without notice to the parties; that the file was unavailable and that between 2013 and 2015, there was no Environment and Land Court Judge in the station.

Analysis and findings:

18. This suit was commenced by way of a Plaint dated 20th April, 2009. In the Plaint, the Plaintiffs sought for an order of specific performance compelling the Defendant to transfer to the Plaintiffs all the maisonette *(with servant quarters)* known as Unit No. 8 erected on L.R. No. 27317, Phase 1, Hillcrest Park, off Mombasa Road.

19. On 5th May, 2009, and pursuant to the Sale Agreement between the parties, the Plaintiffs and the Defendant entered into the following consent:

"BY CONSENT:

a. The suit herein be referred to Arbitration by the Chairman, Chartered Institute of Arbitrators (Kenya);

b. The orders issued on 20th April, 2009 be extended pending arbitration;

c. The Arbitral Award be filed in court within sixty (60) days from the date of filing this consent."

20. The matter was subsequently referred to an arbitration pursuant to the said consent. The Arbitrator made his Final Award dated 16th December, 2009 as follows:

"1. The Vendor to perform the specific actions of this contract and deliver to the purchaser possession of Unit No. 8 of Phase 1 Hillcrest Park on L.R. No. 27317, off Mombasa Road and the contract be completed in accordance with the Agreement for Sale.

2. The Respondent to pay the costs of this Arbitration and the cost of the Award."

21. The Award by the Arbitrator was adopted by the court on 15th February, 2012 as follows;

a. Judgment in the suit is entered in terms of the Arbitral Award dated 16th December, 2009;

b. The Arbitral Award dated 16th December, 2009 will be enforced as a decree of this court; and

c. Costs of this Application and the suit are awarded to the Plaintiffs.

22. The Defendant is now seeking for leave to extend time to file and serve the Notice of Intention to Appeal and lodge an Appeal out of time in respect of the Ruling of the court of 15th February, 2012, and for the Notice of Appeal filed on 20th March, 2014 to be deemed as duly filed within time. The Application dated 8th May, 2015 was filed on 10th December, 2015.

23. The law relating to the discretion of the court to extend time to file an Appeal out of time was set out by the Court of Appeal in the case of ***Chemwolo Toroitich vs. Paul Bulut & Anor, Civil Appeal No. Eldoret 262 of 2006*** as follows:

a. That the Appeal or the intended Appeal is not frivolous;

b. That the Application for extension of time has been made without unreasonable delay and;

c. The Respondent will not suffer undue prejudice if the Application is allowed.

24. The Defendant is seeking to Appeal against the Ruling of the Court of 15th February, 2012. In the said Ruling, the court directed that the Arbitral Award of 16th December, 2009 be enforced as a decree of the court. Under Section 39(3) of the Arbitration Act, an Appeal can only lie to the Court of Appeal where the parties by way of an Agreement made provision for such a right in the Arbitration Clause or with the leave of the High Court or the Court of Appeal where the matter raises a point of law of general importance. This provision was reiterated by Court of Appeal in the case of ***Kenyatta International Convention Centre vs. Greenstar Systems Limited (2018) eKLR*** as follows:

"My construction of the above provision is that there are three ways in which a party can access the appellate jurisdiction of this court in a matter arising from an arbitral process. The first is by way of provision of an agreement to that effect in the arbitration clause contained in the agreement pursuant to which the arbitral process is anchored, that a right of appeal to the Court of Appeal exists. Secondly, through leave granted by the High Court under the same provision. Thirdly, through leave granted by the Court of Appeal under the same provision. In the light of the above reasoning, it is common ground that the arbitral clause 28 of the agreement dated the 14thday of October, 2015, which is the arbitration clause that triggered the arbitral process resulting in the Arbitral Award that the High Court declined to set aside, made no provision for an automatic right of appeal to this Court. Likewise, it is also common ground that the applicant herein did not seek and obtain leave of the High Court to appeal to this Court against the High Court's ruling declining to set aside the Arbitral Award.

As already highlighted above, the Court in the Nyutu Agrovet case (Supra) was categorical that this Court's right to intervene in matters arising from an arbitral process is limited to instances where the parties had either entrenched an automatic right of appeal to this Court in the arbitration clause or where necessary leave to that effect has either been granted by the High Court or this Court itself in the exercise of the respective Courts jurisdiction to do so under the provisions of section 39 of the Act."

25. Just like in the above decision, the Defendant has not sought for the leave of this court or the Court of Appeal to Appeal against the decision of the court. Instead, the Defendant is seeking for the extension of time to file his intended Appeal even before seeking the leave of the court to Appeal against its decision. This is contrary to the provisions of Section 39(3) of the Arbitration Act. In the case of ***Peter Nyaga Muvake vs. Joseph Mutunga, Nairobi Civil Appeal No. 86 of 2015***, the Court of Appeal held as follows:

"Without leave to the High Court, the Applicant was not entitled to give Notice of Appeal where, as in this case, leave to Appeal is necessary by dint of Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules, the procurement of leave to Appeal is sona qua to the lodging of the Notice of Appeal. Without leave, there can be no valid Notice of Appeal. And without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked. In short, an Application for stay in an intended Appeal against an order which is appealable only with leave which has not been sought and obtained is dead in water."

26. The failure by the Defendant to seek the leave of this court or the Court of Appeal to Appeal against the decision of the court, and in the

absence of an Arbitration Clause granting the parties an automatic right to appeal to the Court of Appeal renders the Application *"dead in water"*. This court does not therefore have the requisite jurisdiction to deal with the Application as worded.

27. In any event, the filing of the Application for the extension of time to file the Appeal was not done without unreasonable delay. I say so because the Defendant's advocate has admitted that he became aware of the Ruling of the court on 5th December, 2013, and that this file was reconstructed on 21st January, 2014.

28. Considering that the court file was reconstructed on 21st January, 2014, the Defendant has not explained to this court why it had to await for almost two (2) years to file the current Application. Indeed, the Defendant having been aggrieved by the decision of the court should have taken the proactive steps of reconstructing the file immediately it became aware of the Ruling of the court in the year 2013. However, it sat back until when the Plaintiffs filed the Application for the reconstruction of the file in the year 2014, and then took another twenty two (22) months to file the current Application. With such lucksture attitude, the court cannot exercise its discretion in favour of the Defendant.

29. The Plaintiffs have not enjoyed the fruits of their Judgment since the year 2009. Indeed, any further delay in the execution of the Judgment of this court is prejudicial to the Plaintiffs.

30. For those reasons, I dismiss the Defendant's Application dated 8th May, 2015 with costs and allow the Plaintiffs' Notice of Motion dated 13th June, 2018 as follows:

> ***a. That the Chief Land Registrar be and is hereby directed to supply to the Plaintiffs details of the registered owner of the suit property herein namely, L.R No. 27317 (I.R No. 100328/1).***
>
> ***b. That an order of eviction be and is hereby issued directing the Court Bailiff to evict from the suit property the Defendant and its agents and all persons claiming to have been authorized by the Defendant to occupy the suit property namely; L.R. No. 27317 (I.R. No. 100328/1).***
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> ***c. That the Deputy Registrar of the Court be and is hereby directed to sign all necessary instruments of transfer instead of the Defendant so as to vest the suit property namely; L.R. No. 27317 (I.R. No. 100328/1) in favour of the Plaintiff.***
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> ***d. That costs of this Application to be paid by the Defendant.***

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE