REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC NO 51 OF 2018

(FORMERLY MISC CIVIL 34 OF 2018)

IN THE MATTER OF NOTICE OF AUTHORITY TO THE CHIEF KIRIMA LOCATION AND THE NYANDARUA NORTH DISTRICT SUB COUNTY LAND ADJUDICATION AND SETTLEMENT OFFICER DATED THE 8TH DAY OF MAY, 2018 AND THE 7TH DAY OF JUNE 2018 RESPECTIVELY TO PREPARE MUTATION FORMS FOR SURVEYING AND SUB DIVIDING PLOTS NO. 564 KIRIMA SETTLEMENT SCHEME IN NYANDARUA COUNTY BETWEEN LUCY MUTHONI MBOGO AND PAUL MWICIGI MBUGUA ON THE ONE PART AND NDUATI NJOROGE ON THE OTHER PART BY THE MINISTRY OF LANDS AND PHYSICAL PLANNING.

BETWEEN

PAUL MWICIGI MBUGUA.....1st PLAINTIFF/APPLICANT

LUCY MUTHONI MBOGO.....2nd PLAINTIFF/APPLICANT

VERSUS

THE HON ATTORNEY GENERAL.....1st RESPONDENT

MINISTRY OF LANDS AND PHYSICAL PLANNING.....2nd RESPONDENT

COUNTY GOVERNMENT OF NYANDARUA.....3rd RESPONDENT

NYANDARUA NORTH SUB COUNTY DISTRICT LAND

ADJUDICATION AND SETTLEMENT OFFICER.....4th RESPONDENT

DIRECTOR OF LAND ADJUDICATION AND

SETTLEMENT OFFICER.....5th RESPONDENT

THE CHIEF KIRIMA LOCATION.....6th RESPONDENT

NDUATI NJOROGE.....7th RESPONDENT

RULING

1. Upon obtaining leave to commence judicial review proceedings against the Respondents herein, the Applicants, Vide an Application dated the 12th October 2018, brought under the provisions of Article 165(1) and (7) of Constitution, sought for orders in the nature of Certiorari and Prohibition with regard to two notices issued by the Ministry of Lands and Physical Planning dated the 8th May 2018 and the 7th June 2018 respectively to the Nyandarua North District Sub County Land Adjudication and Settlement officer and the Chief Kirima location respectively, authorizing them to prepare mutation forms for purposes of surveying and sub dividing plots No. 564 Kirima settlement scheme between the Applicants as the administrators of the estate of Peter Mbugua Mwicigi and Nduati Njoroge the 7th Respondent. The Applicants therefore sought for the intervention of the court to prevent miscarriage of justice.

2. Directions were taken that the application dated 12th October 2018 proceeds by way of written submissions wherein after parties would highlight on the same on the 1st April 2019.

3. On the said date, there was no appearance for the 1st to 6th Respondents as well as the Applicant. Counsel for the 7th Respondent informed the court that he had not been served with the amended application as well as the Applicant's submissions as ordered by the court, despite the matter having been slated for highlighting. Further that the Applicants had filed their supplementary affidavit without leave which they had then served upon the 7th Respondent on the 29th March 2019. That the affidavit was even titled differently from the application before court. They sought for the said Affidavit to be struck out.

4. Counsel submitted that they had filed their Grounds of opposition on the 29th March 2019 and sought that the Applicants be granted leave of 14 days to file and serve while they be given a corresponding leave of 14 days to put in their Replying Affidavit.

5. The court noted that the last time the Applicants had been granted leave to file and serve their submissions to their Application dated the 12th October 2018 within 21 days, directions which were not complied with. That the said application should have been dismissed for want of prosecution but owing to submissions by counsel for the 7th Respondent, the Applicants were granted another chance to file and serve their submissions within 14 days wherein corresponding leave was also granted to the Respondents to file and serve their response within 14 days upon service. The matter was thus slated for highlighting of the submissions to the application dated 12th October 2018 on the 14th May 2019 on which day there was neither appearance for the 1st – 6th Respondents nor for the for the Applicants

6. Counsel for the 7th Respondent informed the court that he had been served the previous evening, the 13th May 2019, with the Applicant's submissions which had also been filed on the same date. He prayed that the Application be dismissed with costs to the 7th Respondent for reasons that:

i. On 5th March 2019 the court had directed the Applicant to effect service of the application dated 12th October 2018, however the same had never been served upon them wherein there was an affidavit on record to show that the Respondents had been served. There is non-compliance of the court's orders.

ii. That the application that had been served upon them was the one dated 2nd November 2018 to which they had responded. The Applicants had not sought leave to change dates on the Application served upon them so that it could synchronize with the one on the court's record.

iii. That further, although the submissions had been filed out of time yet there was no appearance in court to seek that the same be deemed as duly filed. That the submissions are improperly on record and in respect of an application that had never been served upon the Respondents.

7. Counsel further submitted that since Counsel for the Applicant had on two occasions failed to attend court, that the application be dismissed for nonattendance and/or for non-prosecution.

8. The Application dated the 12th October 2018 was dismissed for want of attendance and prosecution with costs to the 7th Respondent.

9. Following the said dismissal, the Applicants herein filed an application dated the 17th June 2019 under certificate of urgency seeking to have the orders of dismissal with costs to the 7th respondent on the application dated the 12th October 2018, for want of prosecution and/or attendance to be set aside and the court do proceed to deliver the ruling on the same or to give fresh directions for the sake of doing justice with regard to the issues in conflict between the parties.

10. The application was prosecuted through oral submissions on the 20th June 2018 wherein all parties were present and where Counsel for the Applicants submitted that the Application dated the 17th June 2019 only affected the 7th Respondent. Wherein the State Counsel on behalf of the 1st - 6th Respondent's response was that although it had been stated that the application did not affect his clients, yet it would have been prudent for service to have been effected on them to enable them decide on whether or not they would participate in the proceedings.

11. Counsel for the Applicants proceeded to submit on their application that they sought the orders of dismissal dated 14th May 2016 be set aside. It was their submission that on the date when they matter had been scheduled for hearing, Counsel had instructed a colleague practicing in Nyahururu to attend court on behalf of the Applicant but unfortunately the said Counsel, Mr. Muchangi did not attend court despite agreeing to do so. The application was supported by the sworn affidavit of the 1st Applicant which was detailed and contained a letter dated 16th May 2019 addressed to the Advocate who was to appear and copied to the court and the Advocate for the Defendant. That the fact that Counsel did not attend court, was sufficient cause and good reason to restore the application against the 7th Respondent.

12. That the legal reasons for setting aside the said orders were well known. The concern of the court was to do justice. The reason why there was no appearance was excusable. He urged the court to indulge the Applicant and legal representative because the 7th Respondent could be compensated with costs.

13. That the courts' policy was to accord justice to all parties provided they appeared before court and presented issues correctly and within good time and without withholding any information. The Applicants' application was tenable and had been brought within good time. The 7th Respondent would not be prejudiced if the application was restored.

14. In addition, the 7th Respondent was a necessary party and by him being away, it would not help the court do substantive justice with regard to the issues in question. That even if he was not enjoined, the court on its own notion would order that he be enjoined so that orders are not issued in vain.

15. Counsel relied on the ruling delivered by Justice L. Waithaka in Nakuru ELC No. 61 of 2013; wherein the Hon judge had ordered parties who were not enjoined in a suit to be enjoined so that Justice could be accorded to them. Counsel also referred to their annexure marked as PMM 2 requesting that the 7th Respondent seeks legal redress in court.

16. Counsel sought that the court looks at the totality of the material presented to it and to allow their application. That the Applicants were willing to compensate the 7th Respondent.

17. That the replying affidavit by the 7th Respondent provided irrelevant matters that did not address the orders that had been issued by the court in dismissing the matter. That it was neither here nor there. That further it presented speculation and argumentative material that were not of any probative value to assist the court to do justice.

18. In response and in opposition of the Application, Counsel for the 7th Respondent's response was that they filed their replying affidavit sworn on 1st July 2019. That there had been no response to it by way of supplementary affidavit on part of the Applicants and therefore they were in disagreements to aspersions by Counsel that the same contained irrelevant information, was speculative or argumentative.

19. That when orders of dismissal were issued on 24th March 2019, the Applicants had 28 days to file their application for setting aside since they had became aware of the dismissal orders on 16th May 2019. There had been no explanation why the Applicants did not file their application within the prescribed time frame provided by the Civil Procedure Act.

20. That by bringing their application after the expiry of 35 days without leave, the Applicants were not serious and the application could be termed as an afterthought and an abuse of the process of the court. That the dismissal orders took effect on 11th June 2019 and there was nothing to be resuscitated or revived by way of setting the said orders aside. That the Applicants' application was brought under the wrong provision of the law being Order 10 Rule 11 of the Civil Procedure Rules which provision dealt with the setting aside of judgments.

21. That although the reason for failing to appear in court was for reasons that the instructed Counsel who was to appear on behalf of counsel failed to do so yet there was no sworn affidavit to that effect by either parties.

22. The letter that was attached and annexed to the Application as annexure PMM1 was a gimmick and whimsical letter written to attract sympathy and made up to dupe everyone to believe that there had been such instructions in the first instance. That the same had no value and ought to be disregarded as it accused the other advocate in his absence and without him being accorded an opportunity to be heard.

23. That Counsel for Applicant had flouted orders issued by the court and his conduct mitigated against the court's exercise of judicial discretion in favor of the Applicants. That procedural timelines could not be overlooked in favour of substantive justice. That since the present application was not to enjoin the 7th Respondent, the authority cited by the Applicant was irrelevant. Counsel submitted that since Equity doesn't aid the indolent, the present application ought to be dismissed with costs to the 7th Respondent.

24. The State Counsel on behalf of the 1st -6th Respondents submitted that the lack of service of the present application to the office of the Hon. Attorney General was a great inconvenience to that office. That they were parties to the suit and any orders issued were likely to affect them. He submitted that the application was opposed, because it also sought to reinstate another application which had been dismissed wherein the Hon. Attorney General had filed grounds of opposition.

25. That the Application the Applicants sought to reinstate had been clothed in the clothes of a Judicial Review although the same did not have the image of a Judicial Review proceedings because it raised issues which were not within the Judicial Review proceedings.

26. That the issue of ownership could not be argued in the Judicial Review proceedings. That the application being alleged to be reinstated had no life and the same ought to remain dismissed.

27. In rejoinder, Counsel for the Applicants submitted that the Hon. Attorney General had no locus to address the court. That he had not been served and neither had he filed any papers. The court's orders were specific having been addressed to the 7th Respondent alone. That the application for Judicial Review which was against all other Respondents was intact and had not been prosecuted or concluded.

28. That the Hon. Attorney General was confusing and mixing up the mind of the court. The submissions by the Attorney General although premature, it was good enough that the court had accorded him a chance as an officer of the court. That their submissions should be ignored or rejected for the time being.

29. That as for the 7th Respondent's submission, Counsel submitted that the court cannot impose conditions on itself. That the concern of the court was to do justice and to look at the entire peculiar and unique circumstances presented before it.

30. That it was not the amount of evidence that mattered but the quality. That what was before court was an application and not an appeal that ought to have been be brought within 28 days. That the court to take judicial notice that around the time of the dismissal and filing of their application their firm was in chaos and suffering a calamity for the loss of their secretary.

Analyses and determination

31. I have considered the proceedings on the court's record as well as the submission by Counsel for and against the application to reinstate the suit for hearing and determination. It is worth noting that the Hon the Attorney General has not filed any papers to the application.

31. I have also considered the chronology of the events that led to the present situation. I must point out at this stage that as it can be seen from the court's record is that on 5th March 2019, by consent, directions were taken that the application dated 12th October 2018 proceeds by way of written submissions wherein after parties would highlight on the same on the 1st April 2019.

32. On the said date, not only was there was no appearance for the 1st to 6th Respondents as well as the Applicant, the 7th Respondent not been served with either the amended application or the Applicant's submissions.

33. Further, that the Applicants had filed instead a supplementary affidavit without leave. Counsel for the 7th Respondent sought that the Applicants be granted leave of 14 days to file and serve while they be given a corresponding leave of 14 days to put in their Replying Affidavit.

34. The court noted that since the Applicant had neither complied with the orders of 1st April 2019 nor appeared in court to prosecute their matter, that application dated the 12th October 2018 ought to be dismissed for want of prosecution, but gave the Applicants another chance to redeem themselves and slated the matter for highlighting of the written submissions on the 14th May 2019.

35. Came this day, the situation repeated itself in that there was neither appearance for both the 1st – 6th Respondents and for the Applicants yet again, where counsel for the 7th Respondent complained that the Applicant had yet again not complied with the order of the court having filed his submissions out of time and without leave. He thus sought for dismissal of the application which the court obliged him.

36. From the chronology of events it is clear that the Applicant herein was given sufficient time to comply with court orders and appear to prosecute their application as directed but elected not to. All though the 7th Defendants had been keen in prosecuting the matter.

37. Indeed the Applicants' Application was dismissed pursuant to the provisions of Order 12 Rule 1 of the Civil Procedure Rules, when they failed to respond to and or prosecute their application dated the 12th October 2018.

38. The issue for determination by this court is:

i. Whether the Applicants have established a case to enable this court set aside the orders issued on the 14th May 2019 dismissing the Applicants' Application.

39. At this point I need not look at the merits of the application dated the 12th October 2018, but rather to consider whether the Applicants have satisfied the court that the suit herein should be reinstated.

40. I have carefully perused and considered the submissions by Counsel herein, a court's discretion to set aside an order, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error, but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

41. I have considered the reasons presented before me by the Applicants' Counsel regarding the failure to attend court and prosecute their Application. I have also considered the affidavits filed in support of their application and considered whether the failure to attend court by both the Applicants' and their Counsel constituted an inadvertent excusable mistake or whether it was meant to deliberately delay the cause of justice. I have further considered whether the filing of the application for setting aside orders made on the 17th June 2019, almost 1 month after the said order was made, constituted inordinate delay.

42. In the case of **Belinda Murai & Others – Vs – Amos Wainaina [1978] KLR 278** per **Madan JA** (as he then), cited with approval in the case of **Richard Ncharpi Leiyagu – Vs – IEBC and 2 Others, Nyeri CA 18 of 2013**, where he described what constitutes a mistake in the following terms:

> *"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."*

43. His Lordship went further to state that:

> *"It is well known that courts of law themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of legal point of view which courts of appeal sometimes overrule…"*

44. In the case of **Phillip Chemwolo & Another – Vs – Augustine Kubede [1982-88] KAR 103 AT 1040, Apalloo J** (as he then was) and cited with approval in the **Nyeri CA 18 of 2013** (supra), as follows:

> *"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."*

45. In this case, the Applicants acted with alacrity upon discovery of the mistake and sought to correct the mistake by filing the application with speed thereby securing a hearing date under certificate of urgency.

46. The overriding objective for the courts in dispensing justice must be to ensure expeditious, fair, and just proportionate and economic disposal of cases.

47. Accordingly, I allow the Applicants' application herein and set aside the order made on the 14th May 2019.

i. The Office of the Hon Attorney General should be served with all the pleadings within 14 days for the date of the ruling.

ii. Leave is granted to the Hon the Attorney General to file and serve their response as well as their written submissions within 14 days of service.

iii. That cost of this application abide by the outcome of the suit.

Dated and delivered at Nyahururu this 5th day of November 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE