REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 34 OF 2012

(FORMERLY NAIROBI PETITION NO. 250 OF 2012)

MILKA MUTHONI WAGOCO..... PETITIONER

(Suing as the Administrator of the Estate of the late WAGOCO KABINGA)

VERSUS

THE COUNTY COUNCIL OF KIRINYAGA.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

PETER MBWE KIBIRITI.....3RD RESPONDENT

RULING

Background

By a Notice of Motion brought under *Order 9 Rule 9, Order 10 Rule 11, Order 51 Rule CPR Section 1A, 1B & 3A CPA* dated 6.12. 2019, the 1st Defendant/Applicant sought the following orders; -

1. ***Spent.***

2. ***THAT this Honourable Court be pleased to grant the firm of Wanyonyi & Muhia Advocates leave to come on record for the 1st Respondent.***

3. ***THAT a stay of execution of the judgement entered on 16.6 2017 be granted pending the hearing and final determination of this application.***

4. ***THAT this Honourable Court be pleased to set aside the judgment entered on 16.6.2017 be granted pending the hearing and final determination of this application.***

5. ***THAT the 1st Respondent/Applicant be granted leave to file its defence out of time in the suit in terms of the draft answer to petition annexed hereto.***

6. ***THAT costs of this application be provided for.***

Ground upon which the Application Is Premised

(1) THAT the execution process has commenced against the 1st Respondent as there is a certificate of order against the Government dated 17.1.2018 from which the 1st Respondent stands to suffer great loss.

(2) THAT the County Government of Kirinyaga is the successor of the 1st Respondent herein following the introduction of the devolved system of Government.

(3) THAT the Applicant herein was not aware of the suit as the County Government of Kirinyaga was never served with the petition or any court documents with regard to this suit.

(4) THAT the firm of Messrs Gitonga D.N. & Co. Advocates came on record for the 1st Respondent without instructions or knowledge of the 1st Respondent and failed to inform the 1st Respondent or keep them updated.

(5) THAT the said advocates failed to respond to the petition and did so without the knowledge of the 1st Respondent.

(6) THAT the Applicant herein was not given a chance to set out its case regarding the suit.

(7) THAT the Applicant herein confirms that the 3rd Respondent is the owner of the suit property and will only prove the same if it granted an audience in this suit.

(8) THAT the Applicant's reply to the petition raises valid triable and bonafide issues.

(9) THAT the Petitioner will not suffer any prejudice that cannot be remedied by an award of costs if the judgment is set aside to allow for the Applicant herein to defend its claim to the suit property.

(10) THAT the 1st Respondent is greatly prejudiced by the actions of Messrs Gitonga D.N. & Co. Advocates and stands to suffer irreparable loss if the judgment is not set aside.

(11) THAT the actions of the aforementioned Advocates should not be visited upon the 1st Respondent.

(12) THAT no prejudice shall be suffered by the petitioner if the orders sought are granted.

(13) THAT it is imperative that the Applicant herein cannot be condemned unheard.

(14) THAT the Applicant has brought this application timeously.

(15) THAT it is the interest of justice and overriding objectives of the law that the application herein be allowed as prayed.

Applicants summary of Facts

The 3rd Respondent/Applicant filed an affidavit in support of the application through her County Attorney one CAROLYNE KINYUA and deposed as follows: -

(1) THAT I am the County Attorney and Legal Advisor in the County Government of Kirinyaga the successor of the 1st Respondent herein and being conversant with this matter I am therefore competent to swear this affidavit.

(2) THAT the 1st Respondent herein has instructed the firm of Messrs Wanyonyi & Muhia Advocates to come on record on its behalf in place of Messrs Gitonga D.N. Gitonga & Co. Advocates.

(3) THAT the 1st Respondent has established that the firm of Messrs Gitonga D.N. & Co. Advocates came on record on its behalf without instructions and therefore failed, refused and/or neglected to file an Answer to petition thus greatly prejudicing the 1st Respondent's right to be heard and ventilate its petition.

(4) THAT the said actions by Messrs Gitonga D.N. & Co. Advocates compromised the rights of the 1st Respondent to be heard as envisaged under *Article 50 of the Constitution* on the right to a fair hearing.

(5) THAT we have been informed by our Advocates on record that the Respondents herein that judgment was delivered on 16.6.2017 where the petitioner was declared the rightful owner of the parcel of land No. KIRINYAGA/GATHIGIRIRI/51 and the 1st Respondent ordered to give the petitioner vacant possession of the said parcel of land.

(6) THAT we have been informed by our Advocates on record that the Respondents herein were further ordered to pay damages to the petitioner assessed at Kshs.2,500,000/= as well as costs of the petition but the Petitioner is only executing against the 1st Respondent.

(7) THAT we have been informed by our advocates on record that following the said judgment and decree the Petitioner has begun the execution process against the Respondents by procuring warrants of attachments as well as filing a Judicial Review suit seeking to compel the 1st Respondent herein to pay damages and costs of the suit as awarded.

(8) THAT the County Government of Kirinyaga being the successor of the 1st Respondent was not aware of the proceedings in the petition since it was never served with any documents.

(9) THAT the 1st Respondent has always been the legitimate owner of the suit property and it is only mete and just that it is allowed to prove it.

(10) THAT it is imperative that stay of proceedings of execution of the judgment delivered by this Honourable Court on 16.6.2017 be granted to allow the 1st Respondent set out its case in relation to the ownership of the suit premises.

(11) THAT the petitioner will not suffer any prejudice if the judgement is set aside to allow the applicant to defend its claim to the suit property.

(12) THAT the Applicant has brought this application timeously.

(13) THAT this Honourable Court has inherent jurisdiction *ex-debito justitiae* to order stay of execution pending appeal.

(14) THAT I swear this affidavit in support of the application seeking stay of execution pending the hearing and final determination of this application as well as setting aside of the judgment.

(15) THAT what is stated herein above is true and within my knowledge and information.

Respondent's summary of Facts

The Respondent filed a replying affidavit in opposition to the application and deposed as follows:-

(1) THAT I am the Petitioner herein and, therefore competent to swear this affidavit.

(2) THAT I crave the court's leave to refer to the pleadings and proceedings herein.

(3) THATI have read and understood the 1st Respondent/Applicant's Notice of Motion dated 6.12.2019, and the supporting affidavit of M/s Caroline Kinyua sworn on 6.12.2019. Hereinafter, it is referred to as the said affidavit.

(4) THAT M/s Caroline Kinyua has sworn false affidavit in support of the application.

(5) THAT the said application is a part of the plan of the Applicant and the 3rd Respondent to defeat the decree which was issued herein on 16.6.2017.

(6) THAT there's a double pronged approach to that project.

(7) THAT the 3rd Respondent has filed against the Applicant, Kerugoya ELC Suit No. 36 of 2019, **Peter Mbwe Kibiriti -vs- The B.O.M, Kabare Girls Secondary School and 6 Others.** Annexed hereto marked MMW – 1 is a copy of the Originating Summons.

(8) THAT the Applicant filed its application herein after it was sued by the 3rd Respondent.

(9) THAT it is worthy of note that both the 3rd Respondent and the Applicant are parties to this suit and that neither of them appealed against the judgment which was delivered on 16.6.2017.

(10) THAT indeed, the 3rd Respondent said Kerugoya ELC Suit No. 36 of 2019, **Peter Mbwe Kibiriti -vs- The B.O.M, Kabare Girls Secondary School and 6 Others** is rightly based in the view that he has no claim against me and has one against the Applicant.

(11) THAT this petition was filed by me after I withdrew Embu HCC No. 29 of 2007; **Milka Muthoni Wagoco -vs- Peter Mbwe Kibiriti & Kirinyaga County Council.** Annexed hereto marked MMW- 2 is a bundle of certified proceedings and a ruling which show that the firm of Gitonga D.N. & Co. Advocates was acting for Kirinyaga County Council, the predecessor of the Applicant.

(12) THAT I am advised by my said Advocate, Messrs Kamau Kuria & Company Advocates, and I verily believe the same to be true that: -

(a) The said Notice of Motion is misconceived as the petition was heard inter-partes and the remedy, if any, of the Applicant was to appeal to the Court of Appeal.

(b) As held by the Court of Appeal in **Telcom Kenya Limited - vs- John Ochanda (Suing on his behalf and on behalf of 996 Former Employees of Telcom Kenya Limited) (2014) e KLR** where there is finality as to the proceedings, merits and decision in a matter, a court becomes *functus officio* so that any issues of grievance can only be dealt with by escalation to another Court of Appeal.

(c) The doctrine of finality of litigation has been discussed by a five-Judge Bench in **Court of Appeal Civil Application No. 307 of 2003 Rai -vs- Rai** in which **Justice Bosire** stated the law as follows; -

"*This application appears to challenge the doctrine of finality. This is a doctrine which enables the court to say litigation must end at a certain point regardless of what parties think of the decision which has been handed down.*

It is adoctrine of principle based on public interest,…….

The principle of finality requires that litigation should come to an end".

(d) This Honourable Court is *functus officio* having delivered its judgment on 16.6.2017, and no appeal having been filed.

(e) The Applicant is estopped from claiming that it was not represented by the firm of Gitonga D.N. & Co. Advocates who applied for time to file responses to the petition and were granted having appeared for the applicant; in its judgment, this courts said of the representation of the Applicant: -

> *"The 1st and 3rd Respondents did not file any affidavits in opposition to the petition notwithstanding the fact that this court granted them more sufficient time to do so. Indeed on 28.4.2016, counsel for the 3rd Respondent Mr. Ndegwa sought and was granted 14 days to file a response to the petition adding that in default, he will have waived his right to do so.*

……By 15thMarch, 2017, when the petition was heard by way of viva voce evidence, neither the 1st or 3rd Respondents had filed any responses to the petition nor did they attend court though duly served.

My record does not show that the 2nd Respondent filed any response to the petition.

As indicated earlier, this petition was originally filed in Nairobi on 8.6.2012 and perhaps due to wear and tear, any response by 2nd Respondent may have fallen out and I will therefore be guided by the submissions filed by the petitioner's counsel on 5.4.2017 in which it is submitted that the 2nd Respondent did file grounds of opposition on 19.7.2012 contending that the petitioner is engaged in forum shopping by filing multiple suits over the same suit property and that the 2nd Respondent through the District Land Registrar is ready to adhere to any orders issued in respect of the caution lodged on the suit property. The record also shows that on 13.5.2015, the 3rd Respondent filed a Notice of Preliminary Objection on the main ground that this petition is instituted in contravention of Section 7 of the Limitation of Actions Act Chapter 22 Laws of Kenya. That preliminary objection was never prosecuted and was in fact withdrawn on 8.2.2016.

As directed on 27.10.2015,this petition was canvassed through viva voce evidence.

The hearing proceeded on 15.3.2017 when though served with hearing notices, none of the Respondents nor their counsels appeared".

(f) The Applicant is guilty of approbating and reprobating; in the Embu Court, it admits that the firm of Gitonga D.N. & Co. Advocates which dealt with the same subject matter it represented them but when it did so in this suit, it claims not to have authorized them to represent them.

(g) The Applicant is bound by the ostensible authority/representation given by it to through Gitonga D.N. & Co. Advocates that they are its advocates in this suit.

(h) The law on setting aside of judgment is set out in two decisions of the Court of Appeal, namely **Mbogo and Another -vs- Shah (1968) EA 93** and **Pithon Maina -vs- Mugiria (1982 to 1988) I KAR 171)**

(i) According to the two decisions, a court will not set aside a judgment where the Applicant is a person who has deliberately sought to obstruct or delay the course of justice and further that in exercising its discretion to set or not to set aside judgment, a court considers what happened before judgment was entered and what happened after and further it considers the relative merits of the cases of parties; the court considers what has gone on before and after judgement was entered and the relative merits of the parties cases and when this is done in this case, it becomes clear that there was no any time in history that the Applicant owned the suit property and that the application is designed to cause injustice and perpetuate falsehoods which has informed its actions for a long time;

(j) Even if, which is denied, the judgment on 16.6.2017 was an ex-parte judgment, the application is for dismissal for the reasons given in **Mbogo and Another -vs- Shah (1968) EA 93** as aptly stated that:

> *"Where the Respondent sought to enforce the judgment against the company it applied to the High Court under order 9 of the Civil Procedure (Revised) Rules 1948 to set it aside and to grant it leave to defend in the name of the appellants. The Learned Judge who heard the application was the same Judge who had entered judgment. He did not doubt the right of the company as an interested party to bring the application nor did he doubt his power to grant it if he chose to do so. He refused it, however, on the ground as I understand his judgment, that while the court would exercise its jurisdiction to avoid injustice, or hardship resulting from inadvertence or error it would not assist a person who deliberately sought to obstruct or delay the course of justice which, in his view the company had done in the present case".*

(k) The Applicant, according to the court record, is a party who has sought to delay or obstruct the course of justice over a long period;

(L) The Applicant's conduct offends the conscience of this court in that

> "*A claimant in equity is bound to prosecute his claim without undue delay. <u>This is in pursuance of the principle which has underlain the statutes of limitation equity aids the vigilant, not the indolent or delay defeat equality.</u>*"

A court of Equity refuses its aid to stale demands, where the claimant ha slept upon his rights and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay (Laches).

(64) **Lord Selbourne L.C.** delivering the opinion of the Privy Council in the **<u>Lindsay Petroleum Co. -vs- Hurd (1874) L.R. 5 P.C. 221</u>** said at **page 240:**

> "*Now the doctrine of Laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either.*

According to the 3rd Respondent, it is purported to exchange this land Kabare/Kiritine/637 with my parcel of land Kirinyaga/Gathigiriri/151; it thus obtained the 3rd Respondent's parcel of land by false pretenses.

(m) The Applicant, upon being party to a fraudulent contract, assumed the risk of being injured. If it did not own the land; the *Roman Maxim Volenti not fit injuria* applies; of this relates Law Dictionary states as follows: -

> "*A person is not wronged by that which he or she consents. The principle that a person who knowingly and voluntarily risks danger cannot recover for any resulting injury.*

(n) The Applicant is guilty of Laches; In **<u>Benjoh Amalgamated Limited and Another -vs- Kenya Commercial Bank (2014) e KLR,</u>** the Court of Appeal had this to the mentioned principle of Equity;…..*because the party has, by this conduct, done that which might fairly be regarded as equivalent to waiver of it or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be filed upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so as relates to the remedy.*

The Applicants in this case came to court for review after 14 years. That is a long period of time. All along they were alive to the issues relating to the review. It seems doubtful whether they would have applied to this court for review if the 2010 Constitution had not established the Supreme Court before which they deserved to ventilate their grievance. In short, the grounds on which they seek review are not dissimilar to those they intended to pursue in the superior court which were all along known to them and what has transpired in the interim period is artificial as it bears on the balance of justice"

(o) Under the court of Appeal Rules, the Applicant had 14 days within which to file a Notice of Appeal from 16.6.2017.

(p) If which is denied, the Applicant did not have knowledge of the fact that judgement was delivered against is on 16.6.2017, it got that knowledge from my advocates' letter served on it on 13.9.2018.

(q) The Applicant has filed a fraudulent application.

(13) THAT the decree was served on the firm of Gitonga D.N. &Co. Advocates on 19.9.2019.

(14) THAT a demand for payment was served on the Applicant on 13.9.2018 – one and half years ago – and the Applicant did not take any action.

(15) THAT its current advocates became aware of the delivery of judgement in May 2019, when they filed notice of change of Advocate and did not advice that an application to set aside the judgement be made.

(16) THAT through the said advocates, the Applicant has participated in the Kerugoya ELC Judicial Review No. 4 of 2019; **<u>Republic -vs- The County Secretary, Kirinyaga County & Others.</u>**Annexed hereto marked MMW – 3 is a bundle of pleadings filed in that suit.

(17) THAT the hearing has been concluded and a ruling reserved.

(18) THAT the Applicant is guilty of non-disclosure of the facts set out above as M/s Caroline Kinyua does not refer to the post decree proceedings.

(19) THAT Ms Caroline Kinyua does not disclose the fact that Messrs Wanyonyi & Muhia Advocates have been acting for them since May 2019.

(20) THAT Ms Caroline Kinyua lies when she says that it is Messrs Wanyonyi & Muhia Advocates who have informed them of the proceedings in this suit whilst the Applicant has been aware of the contents of the letter dated 13.9.2018.

(21) THAT I admit paragraphs 1 and 2 of the said affidavit.

(22) THAT I deny paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 15 of the said affidavit.

(23) THAT as my affidavit sworn on 8.6.2012, shows the Applicant has presented a fraudulent case to this Honourable Court.

(24) THAT to my said affidavit I annexed, inter alia, a copy of the abstract of title in respect of Kirinyaga/Gathigiri/151 and a certificate of confirmation which showed I inherited the same from my late husband.

(25) THAT I swear this affidavit in opposition to the said application.

(26) THAT what is stated hereinabove is true to the best of my knowledge information and believe same wherein otherwise stated.

Legal Analysis and Decision

I have considered the affidavit evidence both in support and in opposition to the application. I have also considered the submissions by the rival parties. The law applicable for setting aside ex-parte judgment and/or orders is found under ***Order 10 Rule 11 CPR*** which states as follows:-

> ***"10 (11)*** *Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."*

The Superior Courts have pronounced itself in numerous decisions on the interpretation of the law regarding setting aside of irregular judgment and/or orders. In the case of **Patel -vs- E.A Cargo Handling Services Ltd. (1974) EA 75,** Sir **William Duffus Pheld** as follows;-

> *"The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."*

There is also a decision of the late Sheridan J. in the case of **Sebei District Administration -vs- Gasyali (1968) E.A 300** where he adopted the words of Ainley J. (as he then was) in the same court in **Jamnadas -vs- Sodha -vs- Gordandas Hemraj (1951) 7 ULR II** where he held:-

> *"The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonable be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court."*

Again in the case of **Shah -vs- Mbogo & Another (1967) EA 116** at **page 123, Harris J.** considered the purpose of the discretionary power to set aside and ex-parte judgment as follows: -

> *"I have carefully considered, in relation to the present application, the principles governing the exercise of the courts discretion to set aside a judgment obtained ex-parte. The discretion is intended so to be exercised to avoid injustice or hardship resulting from and accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice ……"*

What can be discerned from the above decisions is that the principles guiding the exercise of the discretion to set aside vary and/or review and ex-parte judgment are numerous but the following are fundamental:

(i) The nature of the claim or action.

(ii) The reasons for the delay in taking the procedural step to either enter appearance or file defence.

(iii) The merits of the defence.

(iv) Whether the plaintiff/Respondent can be compensated by an award of costs.

The Applicant herein is the County Government of Kirinyaga who is the successor of the County Council of Kirinyaga, the 1st Respondent in this petition.

According to Caroline Kinyua who is the County Attorney of the County Government of Kirinyaga, they were not served with the petition summons to enter appearance or any court documents in respect of this petition. She deposed that they only came to be aware of this case after they were served with a certificate of order at the execution stage. Though the Respondent denied the Applicants contention, they have not supplied any empirical evidence that they were served with the petition, summons or any court documents prior to serving the certificate order.

It is not in dispute that the County Government of Kirinyaga succeeded the County Council of Kirinyaga (1st Respondent) under Section 33 of the sixth schedule of the constitution which provides for succession of institutions upon promulgation.

There is no evidence that the firm of Gitonga D.N. & Co. Advocates were instructed by the County Council of Kirinyaga (defunct) the explanation by Caroline Kinyua, the Applicants County Attorney that the said firm of Gitonga D.N. & Co. Advocates were not instructed by the defunct County Council of Kirinyaga to act for them in this case. Those averments have not been controverted by empirical evidence. I find the explanation for failure to enter appearance and file a reply to this petition reasonable and excusable.

The claim in this petition is a parcel of land which is an emotive issue. The Applicant has annexed a draft replying affidavit to the petition herein.

In paragraph 3, 4 & 5 of the proposed replying affidavit to the Petition herein the Applicant deposed as follows;

> *"(3) THAT the Applicant entered into an agreement with the defunct County Council to compulsory acquire his land parcel No. Kabare/Kiritine/637 for public purposes and in exchange allocate to him land parcel No. Kirinyaga/Gathigiriri/151*
>
> *(4) THAT the late WAGOCO KABINGA was allocated land parcel No. KIRINYAGA/GATHIGIRIRI/151 after the defunct County Council acquired his land located in Sagana.*
>
> *(5) THAT the late WAGOCO KABINGA failed to surrender his former land Kabare/Kiritine/637 as per the agreement with the defunct County Council."*

The defence to the petition is that the Petitioner's claim for the suit land parcel No. KIRINYAGA/GATHIGIRIRI/151 is based on fraud, deceit and misrepresentation of facts as the said piece of land had already been acquired by way of compulsory acquisition by the County Government of Kirinyaga. These averments in my view are prima facie triable issues that require going for trial.

The sum total of my analysis is that the application dated 6.12.2019 merits the exercise of this court's discretion.

Suffice to say that the authorities cited by counsel for the Respondent are irrelevant as they go into the merits of the case while the application is seeking the exercise of the court's discretion to set aside the ex-parte judgment. In the final analysis I allow the said application in the following terms:

> ***(1) The Applicant to file their replying affidavit to this Petition within 7 days from today.***
>
> ***(2) The Applicant to pay the Respondent thrown away costs of this application assessed at Kshs.10,000/= within 30 days from today.***

Ruling READ, DELIVERED physically and SIGNED in open Court at Kerugoya this ***23rd day of July, 2021.***

……

E.C. CHERONO

ELC JUDGE

In the presence of:

1. *Mr. Munyiri*
2. *Mr. Asiimwe holding brief for Beaco*
3. *Kabuta – Court clerk.*