



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC APPEAL CASE NO. E 008 OF 2021

MAGOIGA MAROA NYAKOBWE.....APPLICANT

VERSUS

JOHN CHACHA MAROA.....RESPONDENT

RULING

1. By a Notice of motion dated 1st March 2021 duly filed in court on 2nd March 2021 under section 3A and 79 G of the Civil Procedure Act Chapter 21 Laws of Kenya (The application herein), Messrs J.O Soire and Company Advocates for the applicant, Magoiga Maroa Nyakobwe, is seeking twin orders:-

a. Spent

b. That the Appellant be granted leave to appeal against the Ruling in Kehancha **ELC CASE NO. 38 OF 2018** dated 14/01/2021.

c. That costs of the application do abide the outcome of the intended Appeal.

2. The application is beaoned on grounds (a) to (e) which include; that the issues involved in the suit concern land and it is the applicant's desire that the suit in the subordinate court be heard and disposed of on merit alongside that there is no inordinate delay in filing this application. The application is further beaoned on the applicant's supporting affidavit of nine (9) paragraphs sworn on even date and a photocopy of a ruling in Kehancha Magistrate's Court Environment and Land case No. 38 of 2018 marked as "MMN1" and annexed thereto.

3. Briefly, the applicant claims that the trial court dismissed his case by the ruling (MMN1). That he was aggrieved with the said ruling and his counsel instructed him to secure a copy of the ruling before he could lodge an appeal. That he has now availed the same to the counsel but the time allowed for filing of appeal, has expired. That if the order sought herein is not granted, he is bound to suffer irreparable loss as he would have been condemned unheard and that the dispute involves land.

4. In a twenty-two (22) paragraphed replying affidavit sworn on 30th April, 2021 by the 1st respondent, John Chacha and filed herein on 11th May 2021 by Messrs Abisai and Company Advocates, the 1st respondent and the 2nd respondent namely James Chacha, opposed the application and prayed for it's dismissal with costs. He deposed, inter alia, that they instituted the suit vide Kisii HCCC No. 501 of 2012 and in the year 2017, it was dismissed for want of prosecution. That the suit was reinstated and thereafter transferred to Kehancha Law Courts where it came up for hearing on 13th June 2019 but the same was dismissed with costs.

5. The 1st respondent further deposed that the application was initiated over one year since the dismissal thus, the delay is inordinate and inexcusable under the law. That the applicant has never been interested in pursuit of the matter. That the application is an afterthought and is berefit of merit as the intended appeal shall only serve to prolong the tedious litigation process. That the application is incompetent as there is no draft memorandum of appeal attached to it to discern any triable issues therein.

6. The application was heard by way of written submissions further to order 51 rule 16 of the Civil Procedure Rules ,2010 and this court's orders and directions given on 10th June 2021 which read in part:-

“ Notice of motion dated 1st March 2021 be argued by written submissions.....”

7. In the foregone, learned counsel for the applicant filed a three (3) paged submission dated 15th June 2021 on 22nd June 2021. Therein, counsel referred to the orders sought in the application, the suit in a nutshell and urged this court to grant the application as prayed for reasons that 16 days' delay is excusable and that the court to exercise it's discretion by granting the orders sought and that the suit involved

land which is quite emotive.

8. On the other hand, learned counsel for the respondent filed four (4) paged submissions dated 15th July 2021 on 16th July 2021 providing brief facts of the case including its genesis and dismissal on 14th January 2021. Counsel identified issues for determination namely whether the application is merited and what orders to issue herein. In the analysis of the issues, counsel termed the orders sought in the application undeserved since the suit has been pending over eight (8) years without prosecution and that the carefree attitude of the applicant is likely to cause serious backlog in the judicial system. Reliance was made on **Fitzpatrick vs= Batger and company Ltd (1967) 2 ALLER at 657 and Catherine Wanjiku Nduati =v= Joanne Bakery and another (1999) e KLR**, amongst other authorities.

9. I have carefully considered the entire application, the replying affidavit alongside the rival submissions inclusive of all authorities cited in the respondents' submission. On that account, is the application meritorious?

10. I bear in mind sections 3A and 79 G (supra) as regards the inherent power and the time for filing appeals from subordinate courts respectively. This court's appellate jurisdiction flows from sections 13 and 16 of the Environment and Land Court Act, 2015 (2011).

11. In **Samwel Kamau Macharia and another vs= Kenya Commercial Bank Ltd and 2 others (2012) e KLR**, the Supreme Court of the Republic of Kenya stated in part;

“ A court's jurisdiction flows from either the constitution or legislation or both.....”

12. The main stay of the instant matter is land which is an extremely important aspect of the lives of ordinary people in society; see the observation in **Mwangi and another =v= Mwangi (1986) KLR 328** which is hereby endorsed.

13. The respondent contended that the instant application is commenced with inordinate delay. **Article 10 (2) (b) of the Constitution of Kenya, 2010 (The Constitution herein)** provides for equity, among other principles of governance. Indeed, the principles of equity include; delay defeats equity and equity aids the vigilant and not the indolent.

14. Order 50 Rules 6 and 8 of the Civil Procedure Rules, 2010 stipulates the court's power to enlarge time and computation of days respectively. The applicant asserted that he intends to file an appeal against the trial court's ruling rendered only about fifteen (15) days prior to the filing of this application. That he be given a chance to ventilate his case and having the application heard on merits.

16. Conversely, the respondent submitted, inter alia, that the applicant has been accorded several opportunities to prosecute the suit which has been pending for over eight (8) years. That such an attitude on the part of the applicant is bound to cause backlog in the judicial system.

16. The right to fair hearing is enshrined in **Article 50 (1) of the Constitution**. The right permeates the entire justice system as recognized in **Philip Keipto Chemwolo and another-vs-Augustine Kubende (1986) eKLR** and **James Kanyiita Nderitu and another-vs-Marios Philotas Ghikas and another (2016) eKLR**, among other authoritative pronouncements.

17. Besides, justice shall not be delayed as stipulated in **Article 159 (2) (b) of the Constitution**. Therefore, delay for even a day will result in dismissal if not explained by an applicant as held by the Court of Appeal in the case of **Raphael Musila Mutiso and 3-others-vs-Joseph Ndava Nthuka (2019) eKLR**. Moreover, in the case of **Macharia Mwangi Maina and 87 others-vs-Davidson Mwangi Kagiri (2014) KLR**, the Court of Appeal also noted to the effect that no person shall benefit from his or her own wrongdoing. In the present scenario, the applicant has failed to give plausible and satisfactory explanation for the delay in mounting the application in the suit which was originated way back in the year 2012.

18. The upshot is that the application dated 1st March 2021 and duly lodged in this court on 2nd March 2021 is unmeritorious. I proceed to dismiss the same with costs to the respondent.

19. It is so ordered,

DELIVERED, DATED AND SIGNED AT HOMA BAY VIA EMAIL AS THE PARTIES WERE DULY NOTIFIED, THIS 28TH DAY OF SEPTEMBER 2021

G.M.A. ONGONDO

JUDGE