



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS

ELC. CASE NO. 27 OF 2009

FRANCIS MAINGI K. NDUMBU.....PLAINTIFF

VERSUS

JOSEPH MUNYASYA MATOLO.....DEFENDANT

(ORIGINAL SUIT)

JOSEPH MUNYASYA MATOLO.....PLAINTIFF/RESPONDENT

VERSUS

FRANCIS MAINGI K. NDUMBU.....1ST DEFENDANT/APPLICANT

PETER WAMBUA KIETI.....2ND DEFENDANT/APPLICANT

ANNASTACIA KATUMBI.....3RD DEFENDANT/APPLICANT

MBATHA KALOKI.....4TH DEFENDANT/APPLICANT

MARY MBITHE.....5TH DEFENDANT/APPLICANT

RULING

1. Vide a Notice of Motion dated 16th November, 2020, the Defendants/Applicants (*in the Counter-claim*) have sought for the following orders:

a. That the Honourable Court be pleased to set aside the orders made on 11th November, 2020 dismissing the Defendants/Applicants' Application dated 18th July, 2019 for none attendance and want of prosecution.

b. That the Defendants/Applicants' Application dated 18th July, 2019 be reinstated and heard on merit.

c. That the cost of this Application be in the cause.

2. The Application was supported by the Affidavit of the counsel for the Defendants who deponed that the Defendants filed an Application dated 18th July, 2019 seeking to set aside the Judgment dated 23rd November, 2017 and the Decree issued on 31st January, 2019 together with all the consequential orders and for the matter to be heard afresh.

3. Counsel deponed that the matter came up for mention on 7th October, 2020 on which date the court granted time to the Defendants to file submissions with corresponding leave to the Plaintiff to file theirs after service; that the court directed the matter to be mentioned on 11th November, 2020 to confirm filing of submissions and that on the said date, he experienced hardships in logging into the Teams System for virtual hearing.

4. The Defendants' advocate deponed that all attempts to join the link from 9:00am to 11:00am were met with the remarks; "When the meeting starts we will let people know you are waiting in the lobby" and that by the time the matter was called up, there was no

representation on the part of the Defendants.

5. Counsel deponed that the Defendants were condemned unheard which is against the principles of natural justice through no fault of their own; that substantive orders were issued whereas the matter was only coming up for mention to confirm the filing of submissions; that the Defendants have at all times been keen on the prosecution of the Application and that it was in the interest of justice that the Application be allowed and the court do proceed to determine on merit the Application dated 18th July, 2019.

6. The Application was opposed vide a Replying Affidavit by the Plaintiff's counsel who deponed that the Defendants filed an Application dated 18th July, 2019 seeking, *inter alia*, for orders to set aside the Judgment dated 23rd November, 2009 and the Decree issued on 31st January, 2019; that the Defendants had fourteen (14) days in which to file and serve their submissions as from 8th October, 2019 and that as at 7th October, 2020, they had not filed their submissions.

7. Counsel deponed that on 7th October, 2020 the Honourable Court granted the Defendants fourteen (14) days to file and serve their submissions and set the matter for mention on 11th November, 2020 to ensure compliance of the courts orders and that on 14th November, 2020, the Defendants had still not filed and served their submissions.

8. Counsel deponed that the court noted that the Applicants had not complied with its orders and dismissed the Defendants' Application dated 18th July, 2019 for want of prosecution; that the Defendants' advocate was not present on 11th November, 2020 when the matter was called out and yet several advocates managed to log into the Teams System and that there was no breakdown or network issue with the system.

9. The Plaintiff's counsel deponed that the Defendants' counsel chose not to appear in court because he had not complied with the court orders issued on 7th October, 2020; that the Plaintiff will suffer prejudice if the orders sought were granted because he had a right to enjoy the fruits of the Judgment obtained in his favour on 23rd November, 2017 and that the Application herein was incompetent and an abuse of the court process and ought to be dismissed with costs.

10. The Application was canvassed by way of written submissions. Counsel for the Defendants submitted that failure to appear and address the court was occasioned by an error on the digital platform; that the Application dated 18th July, 2019 raised very fundamental issues on the right of litigants to be heard and that denying the Applicants the chance to prosecute the said Application would amount to locking out the Applicants from the seat of justice without according them a fair hearing.

11. Counsel for the Plaintiff submitted that this court had the discretion to set aside the orders issued on 11th November, 2020; that there were no good reasons advanced by the Applicants to set aside those orders and that doing so would amount to obstruction and delay of the course of justice. Counsel relied on the case of *Gideon Sitele Konchella vs. Daima Bank Ltd [2013]* where it was held;

“I agree with the Defendants that the Plaintiff has been indolent and has not shown good faith in conduct of his case. This court cannot exercise its unfettered discretion in favour of a litigant who wants to steal a march on his opponent or wants to obstruct or delay the course of justice. Indeed, as far as the Defendants are concerned, justice to be further delayed is justice denied.”

12. Counsel submitted that Sections 1A of the Civil Procedure Act stipulates that the overriding objective of the Act and the Rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act and that the Application was meant to delay the expeditious conclusion of the matter which was finalized on 23rd November, 2017.

Analysis and findings:

13. Having considered the pleadings, the only issue that arises is whether this court should set aside the orders made on 11th November, 2020 dismissing the Defendants' Application dated 18th July, 2019 for none attendance and want of prosecution.

14. This suit was commenced by way of a Plaint where the Plaintiff prayed for Judgment against the Defendant for an order of permanent injunction restraining the Defendant from interfering with all that parcel of land known as Matungulu/Kyaume/2515. The Defendant in the original suit filed a Counter-claim against several Defendants, including the Plaintiff in the original suit.

15. The court dismissed the Plaint and allowed the Counter-claim on 23rd November, 2017. The Defendants in the Counter-claim filed a Notice of Appeal against the decision of this court. Meanwhile, they filed an Application dated 18th July, 2019 to stay the Judgment of the court. This court dismissed the said Application for want of prosecution. The instant Application seeks to set aside the orders dismissing the Application for stay of execution.

16. The record shows that when the Application dated 18th July, 2019 came up for inter-partes hearing on 8th October, 2019, the court directed the Applicants to file their Further Affidavit together with submissions within fourteen (14) days. The Respondent was required to file his submissions within fourteen (14) days of been served with the submissions. The Application was fixed in the registry for hearing on 7th October, 2020.

17. On 7th October, 2020, which is one (1) year after the directions on the filing of the submissions were given, the Applicants' advocate informed the court they had not filed their submissions. On the said date, the court granted the Applicants a further period of seven (7) days to file and serve their submissions. The court fixed the Application for mention on 11th November, 2020 to confirm compliance with the directions.

18. On 11th November, 2020, neither the Applicants nor their advocate were on the online platform. Indeed, on that date, the Applicants had not complied with the directions of the court. At the behest of the Respondent's advocate, the court dismissed the Application for want of prosecution.

19. Although the Applicants' advocate has deponed that he was unable to log in on the virtual platform, all the parties that had their matters fixed for mention and hearing on that day managed to log in. Furthermore, the Applicants' counsel has not informed the court why he did not comply with the directions of the court in filing of the submissions for more than one (1) year.

20. It has been held in numerous decisions that courts will not tolerate excessive, prolonged, inordinate and gross delays. There is always a need by all parties to abide by timelines set by the court and to promote expeditious disposal of cases. Lord Denning, in *Allen V. Sir Alfred McAlpine and Son, (1968) 1 ALL ER 543 at p. 547* explained the fundamental reason behind this in the excerpt below;

“The delay of justice is a denial of justice...To no one will we deny or delay right or justice. All through the years men have protested at the law's delay and counted it as grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time (Hamlet, Act 3, Sc. 1). Dickens tells how it exhausts finances, patience, courage, hope (Bleak House, c.1). To put right this wrong, we will in this court do all in our power to enforce expedition.”

21. The Supreme Court in *Teachers Service Commission vs. Simon P. Kamau & 19 others (2015) eKLR* reminds us that;

“66] Article 159(2)(b) of the Constitution cautions Courts against permitting injustice through delays, in the following terms:

‘In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a)

(b) justice shall not be delayed.’

[67] Thus, the standpoint of the Constitution is that, delayed justice amounts to injustice: and the Courts, which are the dedicated mechanism for the delivery of justice, have an obligation to see to a steady pace of litigation, terminating within a reasonable time-frame. This is the context in which Article 259(8) of the Constitution is to be seen; it thus prescribes:

‘If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as an occasion arises.’

22. In determining civil rights and obligations, a person is entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. A “*speedy hearing*” means conducting a trial within a reasonable time. For the realization of this right, all parties, including the court, have a responsibility to ensure that proceedings are carried out expeditiously.

23. Where a party is guilty of inordinate and inexcusable delay, giving rise to a substantial risk that a fair trial would not be possible, or will cause serious prejudice to the other party, the court is entitled to dismiss the proceedings. That is what this court did when the Applicants, even after being given two opportunities, failed to file written submissions.

24. Considering that no good reason has been given why the Applicants did not file submissions as directed by the court, the court will not exercise its discretion in favour of the Applicants. Having not filed submissions as directed by the court twice, the Applicants had not exhibited seriousness in the prosecution of the Application dated 18th July, 2019.

25. For those reasons, I dismiss the Application dated 16th November, 2020 with costs.

DATED, DELIVERED AND SIGNED VIRTUALLY IN MACHAKOS THIS 24TH DAY OF SEPTEMBER, 2021

O.A. ANGOTE

JUDGE