



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CONSTITUTIONAL PETITION NO.E002 OF 2020

IN THE MATTER OF MARIMANTI MAGISTRATES COURT CRIMINAL CASE NUMBER 540 OF 2020

AND

IN THE MATTER OF ARTICLES 2(1),3(1),10,19,20,21,22,23,25,2748,50157,165(6)

AND 245 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF VIOLATION OF ARTICLES 50(2) (c) AND 40 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT, CAP 284 LAWS OF KENYA

BETWEEN

WILLIAM MUUTUURA KAIRIBIA.....1ST PETITIONER

FELIX GITONGA NTIGA MUTUURA.....2ND PETITIONER

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

SENIOR PRINCIPAL MAGISTRATE, MARIMANTI.....3RD RESPONDENT

THE COUNTY LAND REGISTRAR THARAKA NITHI COUNTY.....4TH RESPONDENT

THE COUNTY SURVEYOR THARAKA NITHI COUNTY.....5TH RESPONDENT

COUNTY GOVERNMENT OF THARAKA NITHI.....6TH RESPONDENT

THE DIRECTOR OF SURVEYS.....7TH RESPONDENT

ELIJAH MUTHURI MURIUNGLI.....8TH RESPONDENT

DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER...9TH RESPONDENT

RULING

1. Before me is a Notice of Motion dated 9th March 2021. It is brought pursuant to Article 40 of the Constitution; the applicant is mainly seeking the following orders: -

a. That pending the hearing and determination of this application, this Honorable court be pleased to reinstate conservatory orders dated and issued on 30.11.2020

b. That pending the hearing and determination of this petition, this Honorable court be pleased to reinstate conservatory orders dated and issued on 30.11.2020

c. That this honorable court grants any other relief or orders as it may deem just and expedient.

d. That the costs of this Application be borne by the Respondents.

2. The application is premised on the grounds on the face of the application. It is further supported by supporting affidavit of Felix Gitonga Nthiga Mutuura dated 9th March 2021, and further affidavit dated 25th May 2021.

3. The 1st to 7th and 9th Respondents did not file any Replying affidavits but instead intimated that they would support the case and submissions of the 8th Respondent.

Facts of the case

4. The petitioners/Applicant filed this suit and the application dated 25.11.2020 under certificate of urgency and the court granted interim orders of injunction on 30.11. 2020. The applicant was ordered to serve the Respondents forthwith. On the 16.12.2020 when the matter came up for inter parties hearing the petitioners had not served the 3rd, 4th, 5th, 7th and 9th respondents. The court extended the interim orders and ordered that the respondents be served within 7 days and the same was not complied with.

5. On 30th November 2020, 16th December 2020, 1st February 2021 and 15th February 2021, this court issued orders for service of the petition, orders and application dated 25.11.2020 herein. The petitioners did not comply until the court vacated the said orders.

6. The matter was again fixed for hearing on 1.2. 2021 and by then the petitioners had not served the Respondents and the interim orders were again extended to 15.2.2021 when the matter was fixed for hearing. On the said date the petitioners admitted to not having served the said 3rd, 4th, 5th, 7th and 9th Respondents. The 8th Respondent applied for vacation of the said orders, which the court vacated instantly.

Issues for determination

i. Whether failure to serve the 3rd, 4th, 5th, 7th and 9th respondent was an excusable mistake.

ii. Whether the court can exercise its discretion in favor of the petitioners

iii. Whether the application has been overtaken by events|

ANALYSIS AND DETERMINATION

7. I have considered the application as well as the relevant affidavits sworn in support and in opposition to the application. I have also considered the arguments advanced by the parties. I hold the following view of the matter.

8. The application seek condonation. The courts discretion is sought by applicant. The condonation and discretion are sought by the petitioner in form of reinstatement of vacated orders. The same is opposed by the Respondents.

9. The court gave orders for service on 30.11.2020, 16.12.2020, 1.2.2021 and 15.2.2021 before the petitioner's injunctive orders were vacated.

10. Whether failure to serve the 3rd, 4th, 5th, 7th and 9th respondent was an excusable mistake

11. In the case of Koinange Investments & Development Ltd v Robert Nelson Ngether (2014)eKLR the court held that service of documents is an important component in the administration of justice and a common aspect in litigation.

12. Failure to serve the respondent goes against the overriding objectives for just, expeditious, proportionate and affordable resolution of civil disputes under Section 1A of the Civil Procedure Act. The reason given for not effecting service four times within the duration from 30.11.2020 to 15.2.2021 is not plausible.

13. In Dilpack Kenya Limited v William Muthama Kitonyi (2018)eKLR states 'What then is the explanation for the default in this matter?' 'The only reason given by the applicant for not taking action within the prescribed time is that of inadvertence. However the nature of the inadvertence is not explained at all. In Itute and Anor vs Isumail Mwakavi Mwendwa Civil Application No.Nai 166 of 1997, Omolo, JA held that whereas advocates' bona fide error is a special reason for extension of time within which to appeal, the nature and quality of the mistake must be considered. It is therefore clear that whereas inadvertence may be ground for extension of time, the nature and quality of the

inadvertence must be disclosed for consideration by the court. It therefore does not suffice to simply state that the failure to comply with the prescribed timelines was due to inadvertence, as the applicant did in this case.

14. Invoking the Oxygen principle enshrined under Section 1A,1B,3A AND 3B of the Civil procedure Act and with a view to attaining fairness so that the parties are in equal footing as much as possible come the trial.

15. In the case of Hunker Trading company Limited vs ELF oil Kenya Limited Civil application No.Nai 6 of 2010 held inter alia that:

.....the applicant cannot be allowed to invoke the O2 principle and the same time abuse it at will .All provisions and rules in the relevant Acts must be O2 compliant because they exists for no other purpose .The oxygen principle poses a great challenge to the courts in both the exercise of powers conferred on them by the two acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the courts view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the end of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day.

16. Therefore, the failure to serve the above respondents cannot be termed as a mistake of counsel. Order 40 Rule 6 naturally, and as already stated, was intended to ensure that the indolent and static litigants are kept in check.

17. The respondents contended that the failure to serve the order within 3 days rendered it null and void by dint of order 40 rule 6 of the civil procedure rules. In addition, they contended that the orders were vacated by the court on that ground. In my view, the applicant failed to serve despite being granted several opportunities to do so by the court. No explanation or sufficient explanation was given for the failure to effect service.

Whether the court can exercise its discretion in favor of the petitioners

18. The court has unfettered discretion to reinstate the interim orders to allow the application and ensure that the substratum of the case is not defeated.

19. In the **First American Bank of Kenya Ltd vs Gulab P.Shah and 2 others Nairobi HCCC NO. 2255 OF 2000 (2002) 1 EA 65** the court set out the factors to be considered in deciding whether or not to exercise discretion and grant such an application and these are;

i. The explanation if any for the delay:

ii. The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice.

iii. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favor of the applicant.

20. Order 40 Rule 4 of the Civil procedure rules,2010 provides that an order of injunction can only be granted once for not more than 14 days. It can only be extended once and for a period not exceeding 14 days. The order granted has to be served within 3 days. It goes without saying that the applicant failed to discharge his duties to serve the orders as required by the Law. It follows that under order 40 Rule 6 if the suit pursuant to which the order for injunction was issued is not determined within 12 months, the order lapses. As already stated, the court extended the interim orders severally and directed the applicant to serve. However, the applicant failed to serve, despite being granted several opportunities to do so I do not think this court can exercise its discretion in favour of the applicant, especially where no plausible explanation has been offered.

Whether the application has been overtaken by events

21. The 8th respondent has argued that the application had been overtaken by events.

In Barclays Bank of Kenya Limited v Henry Ndung'u Kinuthia and another (2018)

Where it was held that the importance of order 40 Rule 6 of the Civil procedure rules in furthering the overriding objective was underscored by high court in David Wambua Ngii V Abed Silas Alembi and 6 others (2014) e KLR and Nguruman Limited v Jan Bonde Nielsen and 2 others (2014) Eklr

Where it was held that the rule was intended to cure mischief where a party delays in disposal of the suit and continues to enjoy the injunction.

22. The applicant states that failing to comply with the court orders of 1st February 2021 was not intentional and that the process server served all parties mentioned in the pleadings but did not serve the Attorney General as per the said court order. The applicant further contends that the process server proceeded to the 8th Respondent advocate to effect service of the petitioner submissions only to be advised that the advocate was away.

23. Court orders are never issued in vain. The delay in service of the respondents is not reasonable. In the instant case there should be consequences for failure to serve the orders however in the interest of justice. I will not reinstate the orders as the discretion of the court does

not favor the reinstatement.

24. In the Notice of motion dated 9.3.2021 is dismissed with cost.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH DAY OF OCTOBER, 2021 IN THE PRESENCE OF:

CA: Ndegwa

Ms. Kijaru h/b for Kabathi for Applicant/Petitioners

N/A for the 6th Respondent

N/A for 8th Respondent

N/A for AG for 1st, 2nd, 3rd, 4th, 5th & 9th Respondents

C. K. YANO,

JUDGE.