



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. E095 OF 2021

AMINA ABDI ALL.....APPELLANT

VERSUS

SAHARA ABDI SAIDRESPONDENT

(Being an appeal from the Ruling of Hon. Samwel M. Mungai (C.M.) delivered on 10th August, 2021, in Isiolo C.M. E.L.C. No. 1 of 2018)

RULING

1. The applicant through a notice of motion dated **20th August, 2021** brought **Under Article 159 (2) (d) of the Constitution of Kenya 2010, Section 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules** seeks stay of **CMCC ELC No. 1 of 2018** of **Isiolo** pending hearing and determination of No. **ELC Meru Appeal E095 of 2021**.
2. The grounds upon which the application is premised are that the trial court on **8/6/2021** caused the applicant to close her case prematurely without being given an opportunity to call a crucial witness namely the County Surveyor.
3. The second ground is that the applicant was not given an opportunity to cross-examine defence witnesses hence was denied a fair hearing.
4. Thirdly it is submitted the applicant sought and was denied an opportunity to re-open the case after an application **dated 15/6/2021** was dismissed on **10/8/2021**. The lower court case therefore pends judgment and the applicant argues she stands to suffer grave injustice, loss and damage unless the court stays the suit and hears her appeal which in her opinion raises arguable points and has high chances of success.
5. The application is supported by affidavits sworn **on 20/8/2021 and 29th September 2021** respectively. The applicant filed written submission dated 29th September, 2021 and relies on the case of **National Bank of Kenya Ltd. –vs- Anaj Warehousing Limited (2015) eKLR** on the proposition that the documents filed by an advocate without current practicing certificate are not invalid; **Republic –vs- Resident Magistrate’s Court at Kiambu exparte Geoffrey Kariuki Njuguna & 9 Others (2016) eKLR** on the proposition that the court ought to look at the overriding principles of equity, new constitutional ethos, policy objectives and public consideration and find the applicant should not suffer out of mistakes of her counsel; **Abdala Ali Bajaber –vs- Mangale Dzombo Ngoka & Another (2012) eKLR** on the proposition that mistake of counsel should not be visited upon innocent parties whom they represent; **Harrison Wanjohi Wambugu –vs- Felista Wairimu Chege & Another (2013) eKLR and Belinda Murai & Another –vs- Amos Wainaina (1978) LLR 2782** on the proposition that doors of justice should not be closed because of lawyer’s mistakes which should be pardonable in the interest of justice; **Christopher Orina Kenyariri T/A Kenyariri & Associates Advocates –vs- Salama Beach Hotel Limited & 3 Others (2017) eKLR** on the proposition that, where procedural infraction cause no injustice or prejudice to a person justice ought not to be sacrificed at the alter of strict adherence to law; **Ezekiel Mule Musembi –vs- H. Young & Company (E.A) Limited (2019) eKLR quoting Re Global Tours and Travel Ltd.** on the parameters to be exercised in the granting of stay of proceedings namely an arguable appeal, nugatory aspects and undue delay.
6. On the other hand the respondent opposed the motion through a replying affidavit sworn on **21st September 2021** and written submission’s filed on **7th October 2021**. The respondent submits the applicant has not met the conditions for grant of stay of proceedings as set out in **Re Global Tours & Travel Ltd (Supra) and Christopher Ndolo Mutuku –vs- (CFC Stanbic Ltd (2015) eKLR** for there is no arguable appeal, or substantial loss as held in **RWW –vs- EKW (2019) eKLR James Wangalwa & Another –vs- Agness Naliaka Cheseto (2012) eKLR**.
7. Further the respondent submits there has been inordinate delay in making the application and that the applicant has not demonstrated willingness to provide any security should the application be allowed as held in **Husmukh Shah –vs- Narin Harira & Another (2015) eKLR**.
8. Concerning the issue of invalidity of court documents the respondent relies on **Kenya Power and Lighting Company –vs- Chris Mahinda**

9. The court has gone through the lower court proceedings attached as “AAA 1” to the supplementary affidavit. It is not in dispute the suit was fixed for hearing on **18th December 2018** by the applicant. On **19/1/2019** there was an appearance during which the respondent raised the issue of non-compliance with Order 11 and a mention date was given for **16/4/2019** to confirm compliance. Parties were ordered to comply by **30/4/2019**. A hearing date for **11/6/2019** was fixed. By consent of parties another hearing date of **27th August, 2019** was taken during which the court record shows the matter commenced. There was no indication before hearing started that the plaintiff/applicant had a missing report to rely upon. In re-examination the applicant was categorical she did not have ownership documents to the suit land – Plot 14 but the gazette notice showed it belonged to one Mohammed Abdi.

10. Further evidence tendered indicated the person in occupation of the suit land was the respondent. After re-examination the applicant sought for adjournment to call the County Clerk and County Surveyor to clarify the contradictions. The trial court obliged and issued summons for hearing on **8/10/2019**. Once again on **8/10/2019** the applicant sought for more time and was granted till **12/11/2019**. Summons for the witnesses were also re-issued. On **12/11/2019**, the applicant sought for a third adjournment for lack of witnesses. The sought adjournment was granted with a hearing for **28/2/2020**. Parties appeared on **28/2/2020** and the applicant sought to have the surveyor’s report filed in court. An adjournment was therefore granted with a mention for **31/3/2020** to confirm filing of the said report.

11. The record shows the next action was on **30/7/2020** when the applicant took a mention date for **29th September 2020** during which once more the court noted the surveyor’s report had not been filed as ordered previously within 2 weeks.

12. On **16/3/2021** parties attended court and the court re-issued summons for hearing on **8/6/2021** during which the respondent objected to further adjournment for non-filing of the report as ordered and unavailability of the alleged applicant’s witnesses.

13. The record shows the respondent insisted the applicant closes her case, but with an option call the surveyor at a later date, which proposal was agreed upon by the applicant and the matter proceeded for defence hearing.

14. It is not clear if the applicant was present or not and why she did not cross-examine the defence witnesses. Be that as it may the defence was closed and a date given for filing of submissions on **29/6/2021**.

15. Following the above, the applicant filed the notice of motion dated **15/6/2021** which was listed for mention on **13/7/2021**. Directions were to be dispose the motion through written submissions.

16. A ruling was delivered on **10/8/2021** in which the court held the applicant had sought for and was granted six adjournments to avail the witness in vain. The decision to proceed was by consent; the application amounted to an abuse of court process; it was proportionate to allow the matter to proceed; the issue of the surveyor’s report was an afterthought aimed at unjustly delaying the suit and that the applicant was being unfair to the respondent.

17. The **Constitution of Kenya 2010** gives each party rights of access to justice, fair hearing and mandates the court **under Article 159 (2) (a) (b) (c) & (d) as read together with Section 1A & (B) of the Civil procedure Act** to foster and facilitate the overriding objective of the Act to render justice to parties in a just, expeditious, proportionate and affordable cost.

18. The law mandates parties to comply with **Order 11 Rules** to ensure all reports, statements and dispositions are in place before a suit is set down for hearing. Similarly once case conference directions are undertaken, a party may for good reasons seek to bring forth and file additional documents or witnesses statements. The court has to adhere to strict timelines so as to render justice in an expeditious manner. It is therefore not a luxury left to the whims of parties to take control of the process.

19. On the contrary the court is the one in control since introduction of **Civil Procedure Rules 2020, Environment and Land Court Act 2011**, practice directions thereof, and the **Magistrates Courts Act 2015**. All these laws and policies have been put in place to ensure there is compliance with **Articles 48, 49 & 159 of the Constitution**.

20. In the instant case, the alleged surveyor’s report has neither been filed in court nor served upon the respondent. There is no copy filed with the supporting affidavit herein. Its nature and probative value has not been disclosed.

21. At the time the applicant testified she had more than enough time to cause for its filing and service. There is nowhere in her testimony to indicate she would rely on it. It is clear counsel for the applicant sought for its alleged production after cross-examination and re-examination of the applicant. There was no prior indication that there was a document to be relied upon before the applicant took the witness stand. A party who comes to court must play by the rules of the game by making full disclosure as per rules of practice and evidence to avoid trial by ambush.

22. The trial court nevertheless gave the applicant a benefit of doubt and adjourned the hearing more than five times to avail her witness and the report. Unfortunately, the applicant did not exploit that opportunity until the court put to a halt the flagrant breach of its directions.

23. In my considered view the trial court exercised its mandate properly, to which the applicant conceded and agreed to proceed to defence case with, yet another rider to bring forth the report at a later stage. Once again the applicant did not exploit that avenue.

24. The supporting affidavits are silent on whether the surveyors’ report is now available such that this court can make an appropriate order in the circumstances and at the very least establish if the alleged appeal is arguable or not; and that there will be substantial loss or grave injustice to shut out that evidence.

25. This court cannot just stay a hearing without enough material or justification. It is not enough for applicant to throw **Constitutional and Legislative Provisions** without basis in fact and law.

26. The applicant has not demonstrated she has since refusal of adjournment and or re-opening of the case, acquired the surveyor's report.

27. The record is clear there was counsel during the hearing of defence testimony. Why and how the applicant failed to cross-examine the defence witness is not clear and has not explained.

28. Judicial time is a precious resource. Any party given an opportunity to ventilate their case has to prudently use such time to further the overriding objective of expeditious disposal of the case. The applicant had all the opportunity to procure the report within the timelines indicated by the trial court. There was obviously undue and inordinate delay in filing the application herein. The hearing proceeded on **8/6/2021** and the application was filed on **16/6/2021** way after the defence was closed. There was no appeal against the order made on **8/6/2021**. Instead the applicant opted to file an application for review or setting aside. Further, after the refusal to review there was no leave sought and obtained to prefer the pending appeal herein.

29. Regarding the issue of whether or not counsel on record was competent and if not so the implication of the documents filed, while the same fact is conceded. There is no indication between the time of the filing the suit and 2020, counsel then on record had no practicing certificate. Be that as it may this court is bound by the holding in **Anaj Warehousing Ltd (supra)**, and takes the view that the said documents are valid in law. I am however not persuaded to extend the same reasoning to hold the mistakes to adhere to court timelines, and directions to file the surveyor's report as a mistake by counsel.

30. On the contrary, it is a party who procures witnesses and brings in exhibits to counsel on record. It is not the duty of an advocate to bring witnesses and or documentary evidence. The applicant cannot by any stretch of imagination blame his then counsel on record for not availing the witness or the failure to file the surveyors' report.

31. Due to the foregoing it is therefore my considered view the application herein lacks merit. The same is dismissed with costs to the respondent. Interim orders given on 24.9.2021 are hereby vacated.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 13TH DAY OF OCTOBER, 2021 IN PRESENCE OF:

Miss Gitonga holding brief for Mugambi for appellant/applicant

Miss Gitau for respondent

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE