



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C. NO. 167 OF 2017**

**GRACE RUGURU MWANGI.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**FRANCIS MWANGI KANYURU.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JOSEPH MWANGI MAINA..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**SIPHIRA WAMBUI NDAIRE..... 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**MARY WANGARI MAINA..... 4<sup>TH</sup> DEFENDANT/ RESPONDENT**

**CHIEF LAND REGISTRAR MURANGA.....5<sup>TH</sup> DEFENDANT/ RESPONDENT**

**RULING**

1. By a Notice of Motion dated 27<sup>th</sup> October 2021, the Plaintiff/Applicant sought for orders;

a) ***THAT the period issued within which to prosecute this suit be extended by a further (90) days.***

b) ***THAT the costs of this application be in the cause.***

2. The application is premised on five **GROUND**s and the Supporting Affidavit by Advocate for the Plaintiff. The Applicant contends that the Court directed that the matter be dispensed with within **90 days** from 29<sup>th</sup> July, 2021. That there has been no compliance due to delay attributed to administrative lapses at the Subordinate Court. That from the requisite **seven (7) Orders**, the Applicant has only gotten hold of **five** of them.

3. Further that the Plaintiff/Applicant is interested in prosecuting the matter, but has been held back by the delay in procuring the two pending orders. It is the Applicant's contention that she should not be subjected to injustices on the mistake of the Court. That she should be allowed to prosecute the matter in line with the oxygen principles.

4. The Application is contested by the 1<sup>st</sup> – 4<sup>th</sup> Defendants/Respondents vide a Replying Affidavit dated 5<sup>th</sup> November 2021, sworn by their Advocate **Jeremiah N. Mbutia**. He contented that there was a mandatory order of the Court that ought to have been complied with. That there being no compliance, the suit stands dismissed and the Defendants/Respondents should be awarded costs. The Defendants/Respondents maintain that the Applicant ought to have dispensed with the matter expeditiously if she alleges it is a serious matter.

5. Further, that the continuance of the suit is prejudicial to the Respondents and an impediment to the provisions of **Article 159(2)(b)**, of the Constitution. The Respondents aver that the suit is an abuse of the Court process and wholly incompetent and should be dismissed.

6. The Application was dispensed with by way of written submissions. The Applicant submitted that the Court had granted her **90 Days**, to comply with directions of Court. The days were to lapse on 30<sup>th</sup> October, 2021, but she brought the instant application on 27<sup>th</sup> October, 2021. That the delay was occasioned by the Court and the Applicant has been keen on prosecuting the matter.

7. The Applicant further submitted that this Court should grant them a further **60 Days** to enable them comply. That the delay occasioned by Court should not be visited on the Applicant in the interest of justice. The Applicant further submitted that she meets the threshold for grant of the Orders sought as were settled in the **Nick Salat's Case**. The Applicant also submitted that the application was brought timely and ought to be considered by this Court. The Applicant called on this Court to exercise justice and allow the application.

8. The Respondents on their part submitted that the application was meant to arrest the effects of the **Orders** issued by **Justice G. Kemei** on **29<sup>th</sup> July, 2021**. That the conduct of the Applicant demonstrates that she has lost interest in the matter and it is only fair that the suit be dismissed. The Respondents also submitted that the Applicant's blame on the Court is absurd, as the Applicant has not demonstrated any follow up. That the expeditious disposal of the suit is dependent on the Applicant and not the Court as suggested by the Applicant. In the end, the Respondents submitted that the Application should be dismissed with costs.

9. This Court has considered at the Application and the annexures thereof, the submissions and case laws attached and the issue for determination are

**i. Whether the Application meets the threshold for grant of the orders sought**

**ii. Who should pay costs for the application**

10. What flows from the record is that this Court on the **29<sup>th</sup> July, 2021**, dismissed an application by the Respondents for dismissal of suit for want of prosecution. The Court in dismissing the application gave Orders that the Applicant herein be granted **90 Days** to demonstrate that the suit was no longer subjudice. In default, the suit was to stand dismissed.

11. As submitted by the Applicant, the Orders were to lapse on **30<sup>th</sup> October, 2021**. Technically, the suit would stand dismissed as of the said date and the Applicant sought to arrest the orders with the instant application. It is trite that Court orders cannot be issued in vain and compliance is therefore mandatory. The Court of Appeal pronounced itself succinctly on Court orders in **Fred Matiang'i, The Cabinet Secretary, Ministry of Interior and Co-ordination of National Government –vs- Miguna Miguna & 4 Others [2018]eKLR**, as follows: -

***“...When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities...***

12. That being the case, the **90 Days** lapsed on **30<sup>th</sup> October, 2021**, and therefore, it follows as per the tone of the judgment in paragraph 14 that the suit stands dismissed. There are no orders capable of being extended. No orders of stay were issued in respect of the Orders issued on **29<sup>th</sup> July, 2021**. The filing of this Application cannot operate as stay and this Court cannot issue orders in vain.

13. If this Court was to exercise its discretion and look at the merits of the application, guidance is placed on the decision of the Supreme Court in **Application No. 16 of 2014, Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**. The Supreme Court laid down the principles that guide a Court in exercising the discretion whether to extend time or not.

**a) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;**

**b) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court**

**c) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**

**d) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;**

**e) Whether there will be any prejudice suffered by the respondents if the extension is granted;**

**f) Whether the application has been brought without undue delay; and**

**g) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.**

14. Further, the Civil Procedure Rules under **Order 50 Rule 6** provides:

***Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.***

15. The power as granted is discretionary not mandatory. The Plaintiff/Applicant submitted that it has met the foregoing principles. She blames the Court for the delay; a letter has been attached indicating the Applicant wrote to Court requesting that she be informed of the status of the referenced matters. There was no subsequent follow up by the Applicant, and this being an important subject matter as alleged by the Applicant, vigilance and extra caution would have been employed. It is not enough to simply write letters and not follow up to confirm if the same has been acted on. A perusal of the Court file would have yielded results, unless the court files were missing, which was not the case herein. Filing an Affidavit to give details of the attempt to secure the Orders would have been prudent, and mere assertions cannot validate delay. (See **Supreme Court Application No. 3 of 2021 Wilfrida Arnodah Itolondo v Attorney General & 9 others [2021] eKLR**)

16. Whereas the application was made two days before the lapse, this Court finds the application was an afterthought by the Applicant herein to delay the course of justice. As one of the principles above, the remedy sought is an equitable remedy. The Applicant in seeking equity and ought to do equity. The Applicant has a duty of laying basis for the delay, as blaming the Court on glaring indolence is unfortunate. **Article 159 (2) (d)** places a duty on this Court to dispense justice without undue delay and to all. The Applicant must not use delay tactics to avert justice.

17. Relevantly, this Court appreciates the sentiments of the Ruling of Justice G Kemei of **29<sup>th</sup> July 2021**, in paragraph 11 *“I have perused the annexed letters of the Plaintiff/ Respondent and although her action has been noted, it is also true that no action has been taken to prosecute this case for over 12 months and therefore the suit is amenable to dismissal under Order 17 rule 2(3) of the Civil Procedure Rules”*

18. The Court also perused the record and notes the Applicant had on a number of occasions sought time to enable her know the status of other suits relating to the subject matter. The Applicant has not demonstrated to the satisfaction of this Court the difficulty she had in complying with the Orders. The Applicant is guilty of laches

19. Justice is a double edged sword and it cuts both ways, Justice J.B Havelock, as he then was, In **Gideon Sitelu Konchella Vs Daima Bank Ltd [2013] eKLR** citing **Mobil Kitale Service Station v Mobil Oil Kenya Limited & another [2004] eKLR** held:

***“It is the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously. The overriding objectives of the Act and the Rules made thereunder are to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.***

20. This Court does not see the Applicant as interested in doing justice, as the Order for **Stay of 25<sup>th</sup> February, 2016**, has been operational for **five years** now. The Applicant has had adequate time to fast track other matters relating to the subject matter. The reluctance should not be left to continue.

21. Having said enough on the unexplained delay, an important principle to consider is the prejudice suffered. The Respondents have not submitted on the prejudice that they will suffer save in paragraph 6 of the Affidavit that it would be prejudicial to them to sustain the matter whereas the Plaintiff/Applicant has lost interest. From the records, the Respondents have at all times been parties to these proceedings. Some of the Respondents are parties in others suits relating to the subject matter.

22. Undoubtedly, the Respondents are prejudiced by the Applicant’s slow pace in her quest of justice. It has been said by a number of Courts that the sword of Damocles should not be left to hang on one party. This Court therefore finds and holds that the Applicant has been an indolent party, underserving of the orders sought. The Court exercises the discretion against the Plaintiff/Applicant and dismisses the instant Application.

23. On who should bear costs, this Court has the discretionary powers to grant costs within the provisions of section 27 of the Civil Procedure Act. It is trite that costs follow the event and costs for the application are awarded to the 1<sup>st</sup> – 4<sup>th</sup> Respondents herein.

24. Having considered the instant Notice to Motion application, as analysed above, the Court finds it **not merited** and the same is dismissed entirely with costs to the Respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 16TH DAY OF DECEMBER, 2021.**

**L. GACHERU**

**JUDGE**

**In the presence of;**

**Kuiyaki & Alex - Court Assistants**

**Mr Njugi for the Plaintiff/Applicant**

**N/A for the 1<sup>st</sup> – 4<sup>th</sup> Defendants/Respondents**

**N/A for the 5<sup>th</sup> Defendant/Respondent**

**L. GACHERU**

**JUDGE**