



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO.71 OF 1994**

**UKINGONI FARM LIMITED.....PLAINTIFF/RESPONDENT.**

**VERSES**

**NGENDALEL KOIYO FARM LIMITED.....DEFENDANT/ APPLICANTS.**

**RULING**

1. The notice of motion dated **2nd March 2020** by the defendant/applicant seeks the following reliefs;

**(a) That ELC NO.72 OF 2018 –NAKURU, ELC NO 420 OF 2017 –NAKURU and SUCCESSION CAUSE NO.501 OF 2001 –NAKURU, in the matter of the estate of the late JOSEPH LEITMANN (deceased) touching on parcels numbers LR 8437 and LR NO.10762 situate in lower Subukia in Nakuru county the subject matter of this suit herein stayed pending the hearing and determination of this application and thereafter the intended appeal.**

**(b) That any order or orders touching on the subject suit property L. R numbers 8437 and 10762 contrary to stay orders issued on 4<sup>th</sup> May 2010 in the matter herein be stayed, set aside or reviewed.**

**(c) Any further orders of this court as well as costs.**

2. The application is supported by the sworn affidavit of **EDWARD CHERUTICH KIPTANUI** sworn on the even date. The issues herein and as per the said affidavit are clear and straight forward.

3. The parties litigated in this matter for many years and judgement was delivered on **13<sup>th</sup> October 2006**. Thereafter the applicant filed a Notice of Appeal dated 16<sup>th</sup> November 2006 as per its annexure to the affidavit. There was thereafter a consent dated 4<sup>th</sup> May 2010 in which the parties consented to have a conditional stay pending appeal.

4. From the said supporting affidavit, the original file of this court disappeared and there was an order for reconstruction of a skeleton file. Pursuant to the said disappearance the original exhibits which included the 2 titles of the two contentious parcels of land disappeared as well.

5. There arose thereafter three other suits as clearly indicated in the prayers. Save for the **Succession file no.501 of 2001**, the other two concern the Environment and Land court. The applicant in the premises is asking this court to grant it the orders as the circumstances surrounding the disappearance of the original file militated against it moving forward.

6. On the other hand, it acknowledges that there has been other progress in the suit lands including third parties who have already obtained titles. For the said reasons, it is praying for a date at the Court of Appeal which date was frustrated by issues beyond its control.

7. The respondent filed grounds of opposition as well as the replying affidavit of **HARUN CHEPKEITANY CHEMJOR** filed on **15<sup>th</sup> May 2020**. The deponent on behalf of his co-directors has stated that the issues raised in the application are not meritorious and the same ought to be dismissed with costs.

8. He went ahead to state that indeed they won against the applicant herein who then proceeded to file a defective Notice of Appeal. He said that the judgement was delivered by this court on **13<sup>th</sup> October 2006** and not **3<sup>rd</sup> November 2006** as the applicant has deponed. He said that for that reason the same was outside time and it is evident that there is no appeal pending by virtue of the defective notice.

9. He went further to deponed that since the other two matters are filed in the Environment and Land court this court by dint of **Article 162 (2) of the Constitution** has no jurisdiction to deal with them and that by doing so it will be usurping the powers of the said court.

10. He further deponed that there are many other parties who are in the other suits including the succession matter and any order stopping proceedings in the suits without notice shall greatly prejudice them. In a nutshell he blamed the applicants for laches noting that it is over 14 years since the matter was determined and yet they have not bothered to prosecute the appeal. The respondent prayed for the application to be dismissed with costs.

11. The parties were ordered to file their written submissions which they did and the court has perused the same. Both parties agree especially on the chronology of events in this matter. The question or issues for determination and which they seemed to agree is whether the above orders are capable of being issued.

12. It is the applicant's contention that given the inherent powers of this court and seeing that the respondent breached the consent order staying proceedings pending appeal it is necessary that the application is allowed. In essence all that the applicant is saying is that despite the happenings in this case including the loss of the files, the subsequent filing of the three suits, this court can still grant the orders.

13. The respondent on the other hand disputes these facts. The court is incapable of issuing the same for the simple reason that there is no Notice of Appeal known in law on record since the one herein is defective. It also submitted that the other matters at the Environment and Land Court cannot be interfered by this court as that would be in breach of the constitution and separation of courts though of concurrent jurisdiction.

14. The court having perused the application, the submissions and the authorities relied on by the parties is inclined to disallow the application for the following reasons. First of all, it is true that the applicant lost the case as per the judgment dated **13<sup>th</sup> October 2006** by Hon Lady Justice Martha Koome (as she then was). Thereafter on 16<sup>th</sup> November 2006 it filed a Notice of Appeal. The said notice was received on the same date.

15. Although in his Replying Affidavit dated **29<sup>th</sup> July 2020**, the applicant through Edward Kiptanui has stated that the proper date when the judgement was issued was on **3<sup>rd</sup> of November 2006**, there is no evidence contradicting the date as indicated in the judgement as attached to the affidavits herein. The dates on the Bill of costs or the Notice of Appeal as he claims must be preceded by that on the judgement as was signed by the Honourable Judge.

16. In the absence of any prove this court presumes that the judgement was delivered on the date signed. That then brings in the issue of whether the Notice of Appeal is defective as indicated by the respondent. It is evident that given the date when the judgement was delivered, the notice of appeal dated 16<sup>th</sup> November 2006 was filed outside the prescribed 30 days as per the provisions of the Act.

17. In the premises, the only recourse was and is still left for the applicant is to seek the extension as provided by **Rule 75(1) and (2) of the Court of Appeal Rules**. For now, there is no Notice of Appeal or an appeal for that matter.

18. On whether to stay **Nakuru ELC cases no.72 of 2018 and 420 of 2017** as well as **Succession cause no 501 of 2001** the same is untenable for the simple reason that the said courts are seized with constitutional jurisdiction to determine their own issues independent of this court. The best the applicant can do is to make formal applications in the said courts.

19. Moreover, the parties in the three suits may not be the parties herein. Staying the suits will therefore prejudice them as they were not parties herein.

20. The best recourse in my view is for the applicant to take the battle to the Appellate Court. This court vide the judgement of 13<sup>th</sup> October 2006 pronounced itself and it is thus *functus officio*. The consent order dated 4<sup>th</sup> May 2010 seemed not to have been set aside and this court shall not as such make any comments over the same.

21. What is intriguing however is the disappearance of the original court file including the exhibits which according to the applicant included the original titles. This if true was a serious breach on the integrity of the file. If then this was true what did the respondent and the rest of the beneficiaries to the two parcels surrender to the ministry of lands so that they could have new titles issued. These and perhaps other issues may be answered in another forum.

22. For now, this court discharged its mandate when it delivered its verdict. The next forum was for the applicant to seek a second opinion in the Court of Appeal. The Notice of Appeal is defective for the simple reason that it was filed way out of time. Unless there is evidence that the judgement herein was delivered on 3<sup>rd</sup> or 13<sup>th</sup> November 2006, the court presumes that the same was delivered on 13<sup>th</sup> October 2006.

**23. The application is otherwise dismissed with no order as to costs.**

**Dated, Signed and Delivered at Nakuru this 4<sup>th</sup> March 2021.**

**H K CHEMITEI**

**JUDGE**