



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITUI

ELC.CASE NO.19 OF 2021

(Formerly Pet.206 of 2018)

IN THE MATTER CONTRAVENTION OF ARTICLES 27,28,35,40,43,47,50 OF THE CONSTITUTION

AND

IN THE MATTER OF LAND ACT 2012

AND

IN THE MATTER OF ROADS ACT, 2007

BETWEEN

SIMON WAMBUA MUKULA. & 10 OTHERS..... PETITIONERS

VERSUS

1) THE ATTORNEY GENERAL

2) KENYA NATIONAL HIGHWAY AUTHORITY

3) THE PRINCIPAL SECRETARY,

MINISTRY OF LANDS HOUSING AND URBAN DEVELOPMENT

4) THE CHIEF LAND REGISTRAR.....RESPONDENTS

RULING

1. This ruling is in respect of the application dated 4th June 2021. The same is brought under Order 43 Rule 3 of the Civil Procedure Rules and seeks leave to appeal a decision or order of the Court dated 28th May 2021. The application is supported by the affidavit of Simon Wambua Mukula sworn on 4th June 2021.

2. The grounds upon which the application is premised are that the law requires that leave be obtained before the appeal is preferred against a decision made under Order 17 of the Civil Procedure Rules, secondly the Petitioners claim that they are desirous of filing an appeal against the orders issued on 28th May 2021 and thirdly the Respondent will not suffer any prejudice if the order is issued. They further claimed that where there is no order of stay pending appeal there can be no prejudice by mere exercise or the right of appeal.

3. Further the applicant states that they believe that their intended appeal has high chances of success based on the fact that by the courts decision they were denied an opportunity to be heard on merit which is a violation of the right in a decision that was summary in nature. They further claim that they will at the appeal demonstrate that the court wrongly exercised its discretion. They have attached to their application a draft Memorandum of appeal.

4. In oral submissions before the court that Petitioners through their Counsel stated that there is no automatic right of appeal against an order of dismissal of Petition for want of prosecutions under Order 17 of the civil Procedure Rules. It was submitted that the Petitioners have

satisfied the statutory and regulatory requirements by filing the application for leave within 14 days as provided under the rules.

5. The Petitioners submit that whether to grant or not grant leave is a question for the courts discretion and that the reason advanced for delay in prosecution the Petition was a revolving question of a joint survey inspection report and the same is adequate for the exercise of the court's discretion in their favour.

The Respondents case

6. The 2nd Respondent opposed the application and filed a replying affidavit sworn by Samwel Odoyo Orwa on 27th September 2021 in which the Respondent confirms that the law stipulates that an appeal arising from dismissal of a suit for want of prosecution does not lie as of right and that leave of the court must first be sought and obtained before such an appeal can be lodged or filed.

7. They confirm that the petitioners filed this petition to stop their eviction from the road reserve of Kitui-Kanyonyo comprising a stretch of about 30 kilometers of road reserve. That the petitioners showed little interest in having this petition heard and determined in a timely manner once they obtained interim orders restraining the 2nd Respondent from evicting them from the road reserve they were encroaching on. The orders, in effect, restrained the 2nd Respondent from discharging its statutory mandate of managing and protecting the road reserves under its control.

8. That the 2nd Respondent filed an application dated 17th January 2020 seeking to dismiss the suit for want of prosecution. That the honorable court [Hon. Justice Angote] in a considered ruling dated 28th May, 2021, dismissed the petition dated 23rd June, 2015, for want of prosecution. The Court found that the petitioners had not given a plausible reason as to why the petition which was filed in Nairobi in 2015 and transferred to Machakos in 2018 had remained dormant for a period of over one year.

9. The 2nd Respondent further stated that grant of leave to appeal to the court of appeal against decision of this court requires more than just asking for leave to appeal, one must give reasons why the court should grant leave. They stated that petitioners failed to provide sufficient material or any sound, valid reason for this honorable court exercising its discretion to grant them leave to appeal against the ruling of the court of 28th May, 2021.

10. That the powers to dismiss a suit for want of prosecution are vested in the court and it cannot be said that in exercise of that power the court denied the petitioners an opportunity to have their petition heard on merit when the court lawfully exercised those powers to dismiss the petition for want of prosecution after hearing all parties.

11. The 2nd Respondent emphasized the fact that the matter has been pending in court for seven years during which time the Respondent has not been able to discharge its function of protect a head set's like road reserves. They submitted that the court needs to balance the interest of the parties. Public interest militates against granting leave

Analysis and determination

12. Having read the application dated 4th June 2021 and the supporting affidavit and the replying affidavit and having heard the oral submissions of Counsel for the Applicant and the Respondent I find that the issue for determination is whether the applicants have established proper, sufficient and credible grounds for this court to exercise discretion in its favour and grant them leave to appeal against the ruling of the court made on 28th May 2021.

13. The grant of leave to appeal is provided for under *Section 75 of the Civil Procedure Act and Order 43 Rule (2) and (3) of the Civil Procedure Rules*. As submitted by both Counsels for the Petitioner and 2nd Respondent appeals from an order under Order 17 of the Civil Procedure Rules does not lie as of right and a party requires leave of court. The grant of leave to appeal is a matter of the courts' discretion which must, as a matter of course, be exercised judicially depending on the circumstances of each particular case.

14. The matters for consideration in that regard in exercising discretion include length of delay involved, reasons for the delay, chances of appeal succeeding and the prejudice that might result. *Waki, J.A* captured the principle in the context of an application for extension of time to appeal in *Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR* as follows:

“The exercise of this Court’s discretion under Rule 4... is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See Mutiso vs. Mwangi Civil Appl. NAI. 255 of 1997 (UR), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M’Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and Murai v Wainaina (No 4) [1982] KLR 38.”

15. On my part I do agree with the decision of Angote J dated 28th May 2021 dismissing the petition herein for the reason that the period between 2018 and the time of filing the application for dismissal of the petition for want of prosecution on 5th February, 2020 was over one year and no plausible reason had been given for the delay in prosecution of the petition in that period.

16. However, I have considered the fact that the petition herein relates to claims under compulsory acquisition of land and compensation thereof and removal or demolition of the Petitioners properties. It also relates to alleged violation of constitutional rights to land, and other rights under the Bill of Rights Constitution of Kenya 2010 Articles 27, 28, 29, 35, 40, 43, 47 and 50 which claims are considered weighty. I

have also considered that the applicants desire to be heard on appeal against the court's decision of 28th May 2021 was expressed by filing a Notice of Appeal on 8th June 2021 and the application herein on 7th June 2021 which period is considered a reasonable period of time.

17. I have also considered the likelihood of the Respondents being prejudiced by the orders made and find that such prejudice as may be suffered is mitigated by the fact that the interim conservatory orders issued in favour of the Petitioners herein lapsed with the dismissal of the Petition. Under the circumstances filing of the appeal by the Petitioners does not limit or affect the Respondents exercise of their statutory mandate.

18. For the above reasons the court deems it necessary and just to exercise its discretion in favour of granting the Applicant an opportunity to be heard on appeal by the Court of Appeal. I therefore allow the application dated 4th June 2021 on condition that the Petitioners file their appeal within 30 days from the date hereof in default, the leave granted shall forthwith lapse.

DELIVERED, DATED AND SIGNED AT KITUI THIS 14TH DAY OF DECEMBER 2021

HON. LADY JUSTICE G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT, KITUI

Ruling read in open court in the presence of-

C. Nzioka.....

.Court Assistant

Musili h/b for Mutua.....for the Applicant

Obok.....for the 2nd Respondent

N/A.....for the 1st, 3rd, 4th Respondent