REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

MISC. CIVIL APPLICATION NO. 25 OF 2013

(*Formerly Embu Misc. App. No. 65 of 2012)*

REPUBLIC..... APPLICANT

VERSUS

THE MINISTER FOR LANDS.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JOHN NJIRU NGURU (representing

KIURA NGURU).....INTERESTED PARTY/RESPONDENT

RULING ON APPLICATION DATED 16/12/2019

1. This suit was dismissed for want of prosecution on the 14th December, 2018 and orders of stay of implementation of the Judgment/Award in **Minister's Land Appeal Case No. 324/2003** issued on the 27/10/2011 vacated.

This was upon application by the Interested Party John Njiru Nguru representing Kiura Nguru dated 18th January, 2018.

2. By an application dated 16th December, 2019, the Exparte Applicant, Muturi Mwaniki, representing 16 other persons moved the court under **Order 51 Rule 1 & 15, and Order 17 Rule 1 of the Civil Procedure Rules and Section 1A, 1B and 3A and Article 159(2) (d) of the 2010 Constitution** seeking **ORDERS *to set aside the dismissal orders of the 11th April 2018, re-instatement of the suit for hearing on merit and stay of the implementation of the Award/Judgment dated 27th October, 2011 in* Ministers Land Appeal case No. 324 of 2003**, upon grounds stated at the face of the application, and Supporting Affidavit sworn by the Exparte Applicant on the 16th December, 2019.

3. The application is opposed by a Replying Affidavit by the Interested Party, sworn on the 6th February, 2020 together with Grounds of Opposition dated 16th December, 2019.

The Attorney General representing the 1st Defendant (Minister for Lands) though served, filed no responses to the application.

4. The parties filed written submissions to urge the Court on their respective positions on the application. I have read and considered them.

5. **The Exparte Applicant's submissions** are that the dismissal of the suit for want of prosecution was mainly due to total breakdown of communication and breach of duty by the then Advocates in conduct of the matter, terming it as a mistake of Advocate that ought not be visited on the applicant; by his failure to take action to list the suit for hearing or placed before the court since 16th July, 2012 when the stay orders were issued against the Respondents in **Ministers Appeal Case No. 324 of 2003.**

6. In the case of **Lucy Bosire Vs Kehancha Div. Land Disputes Tribunal & 2 others [2013] eKLR** the court (Odunga J) rendered:

> ***"It is true that where the justice of the case mandates, mistakes of advocates even if blunder should not be visited on the clients when the situation can be remedied by costs. It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined in its merits… The court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice".***

7. The Applicants further submit that setting aside the dismissal order will not prejudice the Respondents nor will they suffer any harm as

each party will then be accorded time to ventilate their issues for court's determination.

It further submitted that a party ought not be shut out of its case due to procedural technicalities citing **Article 159(2)(d) of the Constitution**, and the case of **St. Patrick's Hill School Ltd Vs Bank of Africa Kenya Ltd [2018] eKLR**.

8. The Applicant further submits that it has an arguable case with a probability of success, and that should the orders sought be denied, the Applicants, who have built their homes and developed the suit properties thereon, would suffer damage and rendered homeless, thus causing irreparable damages and urge for allowing of the application.

9. **Interested Party's/Respondents** submissions are based on the Replying Affidavit dated 16th December, 2019 and the equitable maxim/remedy that "***Equity does not assist the indolent but the vigilant***" and urges that the decree issued close to 20 years ago should not be overturned.

10. It is further submitted that the dismissal of the suit amounted to a judgment and the current Advocates did not seek leave of court to come on record, and therefore his pleadings are incompetent and ought to be struck out with costs.

It is further submitted that the **Ministers Land appeal case No. 324/2003** Judgment has long been executed and the land subject of the appeal has since been registered to 3rd parties who are not parties to this suit.

11. It is a further submission that the Applicant has not demonstrated to the court that the suit properties still exist and are registered to the Applicants. They further submit that the Applicants' indolence and failure to attend court after filing Grounds of Opposition ought not be visited on the Respondents. They urge for dismissal, with costs, of the application.

12. **Analysis and determination**

There is no doubt that the applicants, by themselves and their former advocates were indolent, and for a period of close to nine years failed to take action to progress their case, leading to its dismissal for want of prosecution and vacation/lapse of the stay orders of all orders previously granted to them by the court.

13. Mistakes by Advocates, by non-attendance to court, or filing documents or taking hearing dates on behalf of their clients always happen. It is a traversity of justice to visit such mistakes upon the innocent client who may have paid the advocate his fees, to progress the case, and may not be aware, or have any knowledge of court processes.

14. I concur with the holding of the Court in the case of **Lucy Bosire (Supra)**, where Odunga J expressed the situation similar to the one before me, and rendered that because a mistake has been made by an advocate, a party (client) should not be made to suffer the penalty of not having his case determined on its merit. See also the cited case, **St. Patrick's Hill School Ltd (Supra)** where the same sentiments were repeated and upheld.

15. It is trite that an indolent party ought not be assisted, but each case depends on the material facts as placed before the court. Though the Applicants' advocates may have been indolent, a case belongs to the party, and it is his duty to keep checking and following up with his advocate to know the status. The blame can therefore not be fully attributable to their Advocates. They must too share the blame.

16. The court ruling sought to be set aside was delivered on 14th December, 2018. This application was filed on the 16th December 2019, one year down the road. The court has not been informed as to whether or not the Exparte Applicant was duly and promptly informed of the dismissal of the suit.

17. From the Court records, the current advocates were instructed on the 16th December, 2019 and on the same date, moved and filed the present application. The affected parties, by the affidavit of Muturi Mwaniki, have built their homes on the suit properties, and developed the same. This has not been controverted by the Respondents nor the Interested Party.

18. Without a doubt, if the orders sought are not granted, and if they have not been executed, no evidence has been tendered by the Respondents that execution has taken place, they stand to lose their homes and their developments which loss may be irreparable.

19. The status quo on the ground has not been explained by either party with demonstratable evidence.

Other than stating in the submissions, the Respondent has not demonstrated that **Judgment/Award in the Ministers Land Appeal Case No. 324/2003** has been executed.

20. It is not enough to only state, there must be some prove or evidence to persuade the court that what the party states is true.

Justice ought to be administered without undue regard to procedural technicalities – **Article 159(2)(d) of the Constitution**. It is about doing the right thing to both parties, and balancing the scales, upon considering the probability of success of the suit sought to be re-instated.

21. In the application before me, it is urged that the Exparte Applicants have a *prima facie* case with probability of success and reinstatement of the case will not cause any harm/loss to the Respondents, and therefore urge for an order of status quo pending hearing and determination of the suit upon its reinstatement.

22. There is no dispute that the case sought to be reinstated is quite old, having been filed in 2012 at Embu High Court and later transferred to Kerugoya High Court. Notwithstanding, and for good reasons, a party seeking justice from the court should not be shut out from pursuing justice by a dismissal of the suit for want of prosecution, more so, for reasons beyond the party's understanding and its advocates fault.

23. In the case of **Ivita vs Kyumbu [1984] KLR 441**, dealing with the matter of dismissals of suits for want of prosecution, the court held and expressed itself that:

> ***"the test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant so both parties to the suit must be considered and the position of the judge too..."***

24. Having considered the totality of all the arguments by the parties, and the justice of the case and to the parties, and the prejudices that may be suffered by either of them, and weighing the damage and loss that either party may suffer if the orders sought in this application are denied, I am persuaded to tilt the scales of justice in favour of the ex-parte Applicant.

25. **Consequently, I allow the application dated 16th December, 2019 in terms of prayers No. 2, 3 and 4.**

26. However, the Exparte Applicant shall pay throw away costs to the Interested Party, to be agreed and or taxed.

27. The Exparte Applicant shall take the necessary steps to list the case for hearing, and in any event, within 60 days of this ruling, failing which the suit shall stand dismissed.

DATED AND SIGNED THIS……...……DAY OF……...…….2021

J. N. MULWA

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 11TH DAY OF NOVEMBER 2021

R. M. MWONGO

JUDGE