



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**ELC CASE NO. 42 OF 2021**

**MARY WANYAMA CHANGILWA .....PLAINTIFF/APPLICANT**

**VERSUS**

**NEWMAN PETER MWANGOMBE KANANGU.....DEFENDANT/RESPONDENT**

**RULING**

**I. INTRODUCTION**

1. Before this Honorable court for determination is a Notice of Motion application dated 27<sup>th</sup> August, 2021 by the Plaintiff/Applicant. She is acting in person. It is brought under the provisions of Sections 1A, 1B 3, 3A, 83, 9 (e) and 64 of the Civil Procedure Act, Cap. 21, Article 159 of the Constitution of Kenya, Order 21 Rule and Order 22 Rules 18,19, 20, 22 and 31 of the Civil Procedure Rules, 2010.

2. From the very onset, I wish to state that it's a rather difficult matter to fully comprehend taking that the Applicant is a lay and illiterate person but profusely wise person. Additionally, the records are extremely scanty and scattered. Be that as it may, during the brief duration I have interacted and handled with the case, I have taken cognizance that, the Applicant is extraordinarily persistent, pro – active and passionate on the matter. She is well known within the corridors and registries of the courts. Unfortunately, for obvious reasons, she seem to over rely on middle men or court brokers' advise rather than professional legal services a state of affairs which has tended to prolong the matter whatsoever. Further, it's a rather protracted litigation having been before this court for over ten (10) years which I strongly feel is completely unnecessary for such a straight forward issue. I need not say more.

**II. THE APPLICANT'S CASE**

The Applicant seeks for the following orders:-

**(a) Spend.**

**(b) That pending hearing and determination this application the orders of the sabotage ( Sic ) court of 19<sup>th</sup> August, 2021 in CMCC No. 315 of 2009 that the appellants/applicant be arrested be stayed.**

**(c) That pending hearing and determination of the application dated 15<sup>th</sup> February, 2021 file in this court, the proceedings in CMCC No 315 of 2009 between the Appellant/Applicant and the respondent be stayed.**

2. The afore stated application is premised on the grounds testimony and averments contained in the 11 Paragraphed Supporting affidavit of MARY WANYAMA CHANGILWA sworn and dated 27<sup>th</sup> August, 2021 and the two ( 2 ) annexures marked as “MC 1 & 2” annexed hereto. She deposed being the Applicant herein and therefore competent to swear this affidavit hereof. She averred having been served with a Notice to show Cause why she should not be committed to civil jail which was heard on 19<sup>th</sup> August 2021. She held that on that material day, the said execution case was heard virtually without her participation and by the time she got to court the trial Magistrate informed her that court had already granted and/or issued the orders for her committal to civil jail. According to her, she proceeded to the offices of the advocate for the Respondent – Messrs. B.W Kenzi Advocates where she was pre – conditionally advised to either withdraw an appeal filed by her or be committed to the civil jail as ordered by court.

3. She deposed that she had filed an application dated 15<sup>th</sup> February, 2021, a supporting affidavit dated 7<sup>th</sup> May, 2021 and a further affidavit dated 4<sup>th</sup> June, 2021 pending before this Honorable court seeking for orders to reinstate the appeal. From the said pleadings, she challenged the notice to show cause for being irregular as the decree had been issued in the year 2011 which was more than a year and further an application for execution for costs had already been made. Therefore, she held that she stood to suffer irreparable loss if she was committed to civil jail and her application to reinstate her appeal would be rendered useless. In the long run she contended that she was never accorded an opportunity to defend herself when the notice to show cause was heard on 19<sup>th</sup> August, 2021. She urged court to grant her the prayers sought from the application.

### **III. THE RESPONDENT'S CASE.**

4. On 5<sup>th</sup> November, 2021, the Advocates for the Respondent the law firm of Messers. B.W Kenzi & Co. Advocates filed a four (4) points grounds of opposition dated 18<sup>th</sup> October, 2021. The grounds were responding to the issues raised by the Applicant herein. The Learned Counsel held that the said application was misconceived, frivolous vexatious and otherwise and abuse of the due process of court. They argued that the orders sought could not be granted by this court since there was no appeal instituted before it against the orders of the trial sub – ordinate - CMCC No. 315 of 2009 on 19<sup>th</sup> August, 2021. On 14<sup>th</sup> December, 2020, they stated that she was notified of the notice to show cause dated 11<sup>th</sup> August, 2021 which was slated for hearing on 19<sup>th</sup> August, 2021. But she failed to attend causing the court to proceed issuing the said orders. They held that the said application was ambiguous. Thus, they urged court to have the application dismissed with costs to the Respondent.

### **IV. THE SUBMISSIONS.**

5. On 10<sup>th</sup> November, 2021 in lieu of any written submissions by any of the parties herein, the Honorable Court accorded the Applicant and the Advocate for the Respondent an opportunity to orally prosecute the application in open court. They all executed that mandate so effectively.

The Applicant informed court that on 28<sup>th</sup> July 2020 the Sub – ordinate court, delivered a Judgement in CMCC (Mombasa) No 315 of 2015 a matter that was between her and the Respondent. She was ordered to pay the decretal amount a sum of Kenya Shillings Eighty Two Thousand Nine Hundred and Seventy Five (Kshs 82,975/=) as the outstanding rental arrears. On 3<sup>rd</sup> September, 2010, being dissatisfied by the said decision, she preferred an appeal before High court, Civil Appeal No 189 of 2010 through a Memorandum of Appeal dated 26<sup>th</sup> August, 2010 against the Judgment of the trial court. The appeal was on the following grounds, verbatim:-

*(a) That the Learned Senior Magistrate erred in law and in fact in granting ruling to the Respondent herein despite overwhelm evidence that the appellant had not received the full purchase price of the sale on the house on Plot No. 622/44 Kongowea Maweni which was Kshs 200,000 and the balance was to be made to the Appellant within 60 days from that date which was never paid to the Appellant.*

*(b) That the Learned Senior Magistrate erred in law and in fact in concluding that the Defendant was paid the balance of Kshs 200,000 through a cash deposit into account of Ciesco Building and construction which account was the Fanuel Mkongula Changilwa which account the Appellant was not aware of the payment.*

*(c) That the Learned Senior Magistrate erred in law and in fact in failing to appreciate that this was not a clear case to warrant summary judgment at and application stage and totally failing to consider the affidavit sworn by the Defendant appellant therein.*

*Reasons therefor the Appellant prays that the Honorable court do allow this appeal set aside the whole ruling of the lower court refer the civil case to retrial before another court of competent jurisdiction.*

6. She deponed that in January 2021, the said appeal was dismissed for want of prosecution and following the said dismissal, she filed an application dated 15<sup>th</sup> February, 2021 seeking to reinstate it. According to her the said application was still pending hearing and determination. Eventually, in July, 2021 her case was transferred from high court to this court.

7. In his submission, the Learned Advocate Mr. Kenzi relied on the filed grounds of opposition. He held that this was a case of what is now known as “**House without land**” within the Coastal region and the County of Mombasa. He submitted that the Appellant sold the house to the Respondent but refused to vacate the house and provide vacant possession. For this reason, she became susceptible to be paying rent. Indeed, the rental income accumulated. In order to recover the outstanding rental arrears and attain vacant possession, the Respondent instituted the case before the Sub – ordinate court. The case was heard and a decision arrived at. He held that on being dissatisfied, indeed she filed an appeal in high court. Nonetheless, he submitted, she failed to prosecute the afore said appeal for want of prosecution after one (1) year. As a result, the appeal got dismissed for want of prosecution. It was the Learned Counsel’s contention that in the given circumstances, there was no pending appeal the same having been dismissed by court. He contended that she has been making emphatic efforts to reinstate the said appeal without success. He informed court that on 22<sup>nd</sup> July, 2021, the high court at Mombasa transferred the suit to this court being one involving on title and ownership of land it had not jurisdiction to hear the case.

8. In the meantime, on 11<sup>th</sup> August, 2021 the trial court in CMCC No 315 of 2009 issued the notice to show cause against the appellant to appear in court on 19<sup>th</sup> August, 2021 why she had not honored the orders and decree in paying the decretal amount. The Counsel averred that she failed to attend and the execution orders to commit her to civil jail were issued accordingly. Finally, he prayed that the application be dismissed with cots to the Respondent.

### **V. ANALYSIS AND DETERMINATION.**

9. I have read the pleadings in this matter and heard the oral submission by both the Applicant and the Learned Counsel for the Respondent with regard to the Notice of Motion application dated 27<sup>th</sup> August, 2021 and the relevant enabling provisions of law.

In order to arrive at an informed decision I have framed two issues as follows:-

*(a) Whether the Notice of Motion application dated 27<sup>th</sup> August, 2021 by the Applicant has any legal basis before this honorable court .*

***(b) Whether the Applicant was in the interest of justice fairness and equity has any opportunity to prosecute her filed Memorandum of appeal dated 26<sup>th</sup> August, 2010 before this court.***

***(c) Who will bear the costs?***

**ISSUE No (a) Whether the Notice of Motion application dated 27<sup>th</sup> August, 2021 by the Applicant has any legal basis before this honorable court**

10. Before embarking on the full analysis of this matter, let me provide brief facts of the case. From the pleadings and the submissions adduced, it appears the Applicant once owned the house on Land Reference - Plot No. 622/44 Kongowea Maweni within the suit land in what is now commonly known at the coastal parance and phenomenon as “**House without land**”. My understanding of this colloquial concept only known at the Coastal region of Kenya, is a replica of “Tenant at Will” where people claiming ancestral land rights live and build structures on land they claim to belong to their ancestors for generation. Again based on it, they are claiming land under Land Adverse possession.

Apparently, from the sketchy facts available, she sold the house to the Respondent who claimed to have fully paid up the purchase price. Indeed, the Respondent insisted the payments were done through a cash deposit into the bank account of Ciesco Building and construction. According to the Respondent, the account belonged to one Fanuel Mkongula Changilwa. The Applicant refuted knowing the said bank account nor the payments made there as alleged. According to her, there was still a balance of the purchase price an amount of Kenya Shillings Two Hundred (Kshs. 200,000) which was to be made to her within 60 days from that date but which was never paid. From the Respondent, despite of this, she failed to provide vacate possession.. Arising from her refusal to provide vacant possession, she then became a tenant and the rental arrears accumulated. In the given circumstances, the Respondent instituted a suit before the trial court being CMCC No 315 of 2009. On 14<sup>th</sup> December, 2021. The case was heard and judgment was delivered in favour of the Respondent. Being aggrieved by the said decision, the Applicant preferred an appeal before HCCC appeal No. 189 of 2009. For some reason or other, she never got to be diligent on it. The same was dismissed for want of prosecution. She later on made emphatic efforts to reinstate the appeal to appoint the high court eventually caused it to be transferred to this court. In the meanwhile an execution process was on motion.

All said and done, this court is of the opinion that the application dated 27<sup>th</sup> August, 2021 should be allowed in the interest of justice, proportionate disposal of the matter and assessible resolution of this rather protracted land dispute.

**ISSUE No. b). Whether the Applicant was in the interest of justice fairness and equity has any opportunity to prosecute her filed Memorandum of appeal dated 26<sup>th</sup> August, 2010 before this court.**

11. As stated before, the Applicant is a very persistent person. This case seem to be her only pre – occupation. To her it’s a matter of life and death. Therefore, I find it incredible to appreciate how she would fail to attend a court session on her matter. I would hate to be casting aspersion on the proceedings herein, but strongly feel based on the principles of natural justice, equity and conscience, the Applicant needs to be accorded an opportunity to be heard for the filed appeal.

In as much as I fully concur with the preposition advanced by the Learned Counsel for the Respondent through its oral submission filed ground of opposition that indeed there exists no appeal preferred by the Applicant the same having been dismissed by the high court in January, 2021 for want of prosecution. I strongly feel that this matter has been dealt a major blow on undue technicalities rather than on its merit at the behest to the Applicant who is acting in person one would have expected. I reiterate, as a fair trial, there is need to accord her opportunity to prosecute her filed Memorandum of appeal dated 26<sup>th</sup> August, 2010 before this court. She needs to have her day in court on the filed appeal. The provision of Article 48 of the Constitution of Kenya on access to justice come here to play. For a long period, the Applicant seem to have been exploited by middle men who are merely quacks or brokers masquerading as legal experts. As a law a binding citizen of this country, she is entitled to adequate and professional legal representation as provided for under the provision of Article 50 (2) (h) of the Constitution of Kenya.

**V. DETERMINATION.**

For the foregoing basics reasons, this honorable court therefore wishes its powers bestowed and vested on its under the provision of Article 159 (1) and (2) of the Laws of Kenya Sections 1, 1A, 3 and 3A of the Civil Procedure rules Sections 101 of the Land Registration Act 2021; 150 of the Land Act, of 2012, 3,13,19,22, and 30 of the Environment and Land Court Act No 19 of 2011 and the Environment and Land rules and Practices Directions to facilitate a just expeditious, proportionate and accessible resolution of land dispute and make the following orders:-

**(a) THAT the Notice of Motion application dated 27<sup>th</sup> August, 2021 by the Applicant be and is hereby allowed but only under the following specific terms;**

**(i) The judgment of the trial court in CMCC 315 of 2009 and all the other consequential orders thereof be and are hereby stayed thereof pending the outcome of the Appeal.**

**(ii) The appeal through the Memorandum of Appeal filed by the Applicant before High Court on 3<sup>rd</sup> September, 2021 and dated 26<sup>th</sup> August,2020 be and is hereby reinstated.**

**b). THAT the Deputy Registrar Environment & Land Court, Mombasa is directed to assist and/or facilitate the Appellant/Applicant obtain competent professional legal Counsel/assistance under the provisions of Article 50 (2) (h) of the Constitution of Kenya from any available source under the pauper briefs vote or elsewhere.**

c). THAT the Appellant/Applicant is directed through her legal advocate to prepare record of appeal within the next ninety (90) days and cause to it seek approval and directions by this Court under the provisions of Section 79B of the Civil Procedure Act Cap. 21 and Order 42 Rule 11 of the Civil Procedure Rules.

d). THAT this matter be mentioned on the 7<sup>th</sup> February, 2022 to ascertain compliance of these orders and further directions thereof

e). THAT the costs for the application to be in the cause.

**IT IS SO ORDERED** accordingly.

**RULING IS DATED, SIGNED and DELIVERED at MOMBASA VIRTUALLY THIS 7<sup>TH</sup> DAY OF DECEMBER, 2021.**

**HON. JUSTICE L.L NAIKUNI**

**JUDGE**

**ENVIRONMENT AND LAND COURT, MOMBASA**

**In the presence of:-**

*M/s. Yumna – the Court Assistant*

*Mrs. Mary Wanyama the Plaintiff/Applicant.*

*Mr. Kezi Advocate Defendants/Respondents.*