



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

JUDICIAL REVIEW APPLICATION CASE NO. 6 OF 2017

IN THE MATTER OF AN APPLICATION BY

CLEUS WATAKO LUTA TO APPLY FOR ORDERS OF

JUDICIAL REVIEW

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNALS ACT NO. 18 OF 1990

AND

IN THE MATTER OF MUMIAS DISPUTES TRIBUNAL CASE NO. 17 OF 1996

REPUBLIC.....APPLICANT

AND

THE CHAIRMAN MUMIAS LAND DISPUTES TRIBUNAL.....1STRESPONDENT

THE CHIEF MAGISTRATE'S COURT AT KAKAMEGA.....2ND RESPONDENT

EX-PARTE CLEUS WATAKO LUTA.....APPLICANT

AND

ASMAN MOMBO OKWARO.....INTERESTED PARTY

RULING

The application is dated 29th September 2015 and is brought under Section 1A, 1B & 3A of the Civil Procedure Act Order 9 Rule 9, Order 10 Rule 11, Order 22 Rules 22 seeking the following orders;

1. That this matter be certified as urgent and be heard ex parte in the 1st instance.
2. That the firm of M/s J. 1. Khayumbi & Company Advocates be allowed to come on record for the Applicant in place of M/s Ateya & Company Advocates.
3. That pending interparties hearing of this application the interested party/Respondent and or any other persons acting on his behalf be restrained by an order of this court from demolishing the Applicant's building, uprooting his trees and plants, destroying the fence and or in any other manner interfering with the Applicants peaceful occupation and use of his parcel of land No. N/Wanga/KhoIera/842.
4. That this Honourable court be pleased to set aside the orders made on 8.11.2012 dismissing the Applicants suit for want of prosecution.
5. That in the alternative the Honourable Court Orders made on 8.11.2012 be set aside and the suit be reinstated.

6. That further in the alternative pending the Hearing and final determination of this application, the status quo pertaining occupation and use of parcel of land No. North Wanga /Kholera/842 be maintained.

7. THAT the costs of this application be provided for.

The applicant submitted that on 14.2.2015, properties belonging to one Flavian Okere his son were attached and carried away by M/s Eshikhoni Auctioneers in a purported execution of costs to the Interested Party. The said auctioneers served a proclamation of sale of movable property, warrant of sale of property in execution of a decree for money annexed "C.W.L-Ia, h & c". The said notification stated that the attachments would proceed to auction the said cows which were undervalued to recover a sum of KShs. 70.050/= being taxed costs in the above case. I did not receive adequate communication and information about any judgement or decision of the court regarding his case to enable him know the way forward in good time. The issues he had brought to court for determinations are still pending yet have been shut out. That I have been advised by my Advocates aforesaid which advise do believe to be true that in view of the said order dismissing my case and the execution initiated as a result thereto it has become absolutely necessary to file the present application. If the subject application is not allowed, I will have been completely shut out of my right to be heard. Annexed hereto is a copy of the court order marked "C.W.L- 2". That I have been frequenting my former advocates to be updated of the progress of my case but all along he has been informing me that there is no land court in Kakamega and my case is still pending which I found out to be false in view of the developments referred to above. That I should not be penalized due to mistakes of my Advocates who had proper instructions to act in my best interest. That the Interested party/ Respondent has taken advantage of the court orders made on 8.11.2012 moved to his parcel of land No. N/Wanga/ Kholera/842 destroyed my trees, fence, coffee and plantations thereon in an attempt to execute an order purportedly issued by the Land District Tribunal and my efforts to get assistance of the police have been futile as those actions are continuing unchecked. Annexed hereto is a copy of the order and letter from the police marked ' C.W.L -3a & b'

The respondent submitted that, the application is belated the same is vexatious scandalous tendered to waste the courts time. That the applicant was well represented by the firm of Ateya & Co. Advocates in this matter annexed are the return of services and the Notices of Hearing and Taxation Marked AMO la-even when the services were effected properly for hearing of the interested parties application dated 28th February 2011. The applicant through his own advocate and himself did not attend, annexed is the order marked as AMO-2 "The applicant through his own advocates or himself failed to move the court vide their judicial review motion dated 22nd July 2010 which was dismissed by the notice of motion of motion of the interested party dated 28th February 2011. Annexed are the notice of motion and judicial review motion marked as AMO 3a-b upon the judicial review of the applicant being dismissed, even when costs were taxed vide the certificate of cost dated 6th August 2014. Annexed marked AMO.-4 The applicant did not move the court only woke up on 11th July 2015 to file the current application That no reasonable grounds have been advanced to warrant the setting aside of the orders of dismissal made on 8.11.2012 and all the allegations raised upon the grounds on the face of the supporting Affidavit of this current application are just mere allegations and even if it were Mr. Ateya advocate has not tendered an affidavit to the effect to support the applicant that he represented well no official communication in form of letter either by the Applicant or from his Advocate. That the applicant Acleus Watako Lutta knows very well that the orders issued on 3rd May 2010 on the issue of land parcel no North Wanga/Kholera/842 are still valid to purport that the respondent has moved into the land without consent or Authority is to mislead the court Annexed is the order marked AMO-5. That the applicant has not met the financial obligations of paying for the costs of Ksh. 68,500 (plus 105 +1500) All totaling to ksh.70,500 no security for costs has been tendered to be paid to the Advocate on the sum due and owing and he admits that the cow that were attached were not his by his own supporting Affidavit on paragraph 2. 'a'. That it will be his the interest of justice to dismiss the current application as it is and order for further costs for being incompetent frivolous, vexatious, scandalous tendered to waste the courts time. That equity demands that he who comes equity must come to court with clean hands. The applicant has not demonstrated the seriousness on his application to warrant the orders sought to be set aside.

This court has considered the application and the submissions herein. The Application is based on the grounds that, the Applicant was not aware of orders issued on 8.11.2012 dismissing his suit for want of prosecution having been not informed of the same by his advocates on record then. That the Applicant avers that he only became aware of those developments after the firm of Eshikhoni Auctioneers attached his properties on 2.02.2015. That the Applicant avers that he did not receive adequate communication and information about his case hence his failure to attend court on 8.11.2012 was not deliberate. That the Applicant avers that he should not be penalized due to mistakes of his Advocates who had proper instructions to act in his best interest. That the Applicant has appointed a new firm of Advocates and intends to have the suit reinstated. That the interested party has taken advantage of the court order, moved to the Applicants land and engaged into wanton acts of destruction of his property. That in view of the court's order made on 8.11.2012 it has become absolutely necessary for the applicant to file the present application. If the subject application is not allowed, the Applicant will completely be shut out on his right to be heard and the entire object of the application will be defeated and rendered nugatory. That it is in the interest of justice that the application be allowed and that the mistake of Applicant's previous Advocate on record should not debar him in pursuit of his rights. I have perused that court file and find that, the applicant was well represented by the firm of Ateya & Co. Advocates in this matter annexed are the return of services and the Notices of Hearing and Taxation Marked AMO la-Even when the services were effected properly for hearing of the interested parties application dated 28th February 2011. The applicant through his own advocate and himself did not attend, annexed is the order marked as AMO-2. The applicant through his own advocates or himself failed to move the court vide their judicial review motion dated 22nd July 2010 which was dismissed by the notice of motion of motion of the interested party dated 28th February 2011. This is a very old matter and the plaintiff has been indolent and is guilty of laches. I do not accept his reasons for nonattendance.

In the case of Utalii Transport Company Ltd & 3 Others v NIC Bank & Another (2014) eKLR, the court held that it is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court. The decision on whether the suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. In Ivita v Kyumbu (1984) KLR 441, Chesoni J as he then was, stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Justice is justice for both the plaintiff and the defendant. I find this application has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 10TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE