REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC APPEAL NO. 9 OF 2018

(Formerly Machakos ELC Civil Appeal No. 54 of 2009)

EDWARD KARANJA......................APPELLANT

VERSUS

KOISANI OLE KAWUONKO......RESPONDENT

RULING

What is before me for determination is the Appellant's Notice of Motion application dated the 4th August, 2015 brought pursuant to Sections 1A, 1B and 3A of the Civil Procedure Act as well as Order 51 Rule 1 of the Civil Procedure Rules, 2010. The Appellant/ Applicant seeks for the following orders:

a. Spent

b. That this Honourable Court be pleased to issue a temporary injunction as against the disposal, alienation or any other dealings on the suit properties namely LR. No. Kajiado/ Kaputiei North/ 2500 and LR No. Kajiado/ Kaputiei North/ 25001 pending the hearing and determination of this application.

c. That the Honourable Court be so pleased to reinstate the Appeal herein.

d. That the Honourable Court be pleased to reinstate the orders of the Court granted by Hon. Justice Isaac Lenaola on 12th May, 2009.

e. That the costs of this Application be in the cause.

The application is premised on the grounds that the suit herein was dismissed on 17th July, 2015 pursuant to a Notice to Show Cause which was never served upon the Appellants. There have been steps taken in this matter with the most recent action before the Notice to Show Cause was issued being an invitation to fix a Mention Date on 25th February, 2015. Further, the Appellant has been diligent in the pursuit of this Appeal and the same is not ripe for dismissal under Order 17 Rule 2 of the Civil Procedure Rules.

The Application is supported by the affidavit of MAUREEN MAITAI who is an Advocate acting on behalf of the Appellant where she explains the reasons surrounding the Appeal herein. She contends that she sent several letters to the Machakos Court to set the Appeal down for mention. Further, Justice Mutende had directed that the matter should await the Constitution of an Environment and Land Court in Machakos. She insists the Appellant has been desirous of pursuing the Appeal but the court file could not be traced. She claims they were not served with the Notice to Show Cause why the Appeal should not be dismissed for want for prosecution. She confirms that the suit property was originally Kajiado/ Kaputiei North/1276 which was subsequently subdivided into Kajiado/ Kaputiei North/ 2500 and 2501 and transferred to third parties. She avers that there is reasonable apprehension that should the court fail to grant interim orders herein, the suit property will not be preserved as the registered owners of the property are not parties to this suit.

The Respondent in opposing the application filed Grounds of Opposition on 5th March, 2018 where he stated thus:-

1. The Application is guilty of non disclosure of material facts.

2. The Application is made in bad faith.

3. The Applicant had come to court with unclean hands.

4. The Application has been overtaken by events.

5. The Application lacks merit and there are no sufficient grounds upon which the orders prayed for can be granted.

6. The Application is made in abuse of the process of the court.

7. The Applicant is indolent and guilty of laches.

The Respondent filed an affidavit sworn by ALFRED NYANDIEKA the Advocate acting on his behalf where he deposes that the Applicant is guilty of deliberate non-disclosure of material facts as he attempted to mislead the Court in hearing and determining the Appeal herein while the same had been dismissed. He contends that the suit property forming the substratum of the Appeal does not exist anymore as the same is not owned by the Respondent which fact is admitted by the Appellant. He reiterates that the Orders granted by the Hon. Justice Lenaola as he then was expired on 2nd July, 2009 and in any event an injunction lapses within 12 months unless the suit is either prosecuted within the period and or the order extended. Further, the prayer seeking the reinstatement of the Appeal has been overtaken by events and would serve no purpose.

Both the Applicant and the Respondent filed their respective submissions to canvas the instant Notice of Motion.

Analysis and Determination

Upon consideration of the Notice of Motion dated 4th August, 2015, Parties' affidavits, Grounds of Opposition and Submissions, the following are the issues for determination:

- Whether the Appeal herein should be reinstated.
- Whether the Court should reinstate the orders of the Court granted by Hon. Justice Isaac Lenaola on 12th May, 2009

As to whether the Appeal herein and the orders of the Court granted by Hon. Justice Isaac Lenaola on 12th May, 2009 should be reinstated.

The Applicant has submitted that he took all the necessary steps to ensure the Appeal was set down for hearing. Further, that there was no Environment and Land Court Judge in Machakos to hear the Appeal. He contended that parties had filed their respective submissions to the Appeal and the only issue remaining was highlighting the same. He submitted that he had not been indolent in prosecuting the Appeal and explained the reasons for the delay. He further submitted that the Orders granted by Justice Isaac Lenaola granting a temporary injunction against disposal, alienation or any other dealings against LR No. Kajiado/Kaputiei North/ 25000 an 25001 should be reinstated pending the hearing and determination of the present Appeal. He relied on the cases of **Elem Investments Ltd Vs John Mokora Otwoma (2015) eKLR, Abdulrahman Abdi Vs Safi Petroleum Products Ltd & 6 Others (2011) eKLR, Allan Otieno Osula Vs Gurdev Engineering & Construction Ltd (2015) eKLR, Giella V Cassman Brown & Company Ltd (1973) EA 358 and Yalwa Vs Indimuli & Another (1989) KLR** to buttress his arguments. The Respondent submitted that the Applicant was not entitled to the orders sought since he had not demonstrated good faith and justification for the grant of the same. He relied on the case of **Johnson Kimeli Vs Barclays Bank of Kenya Ltd Kisumu HCCC No. 171 of 2003** cited in approval in the case of **Kenya Planters Cooperative Union Ltd Vs Kenya Commercial Bank Limited & 4 others (2016) eKLR** to oppose the instant application. He contended that the substratum of the suit had vanished and the subject matter was no longer in the hands of the Respondent. He insisted that the subdivisions were done as a result of the lower court judgment. Further, the third parties are not parties to this suit. He disputed the reinstatement of the injunctive orders and contended that the Court cannot issue orders against a party who is not before it. He relied on the decisions of **Yasser Ali Sheikh v Amani National Congress (ANC), Forum for Restoration of Democracy-Kenya, (Ford-K), Orange Democratic Movement (ODM)-Kenya & Wiper Democratic Movement-Kenya (WDM-K) Jointly as the National Supper Alliance (NASA) Coalition & 2 others [2018] eKLR and the Supreme Court of India in the case of J. S Yadav Vs State of U.P & Another (2011) 6 SCC 570** to support this line of argument.

The Applicant contended he had always been desirous of pursuing the Appeal, but the lower Court file was unavailable and Justice Mutende had also directed that the matter should await the Constitution of an Environment and Land Court (ELC) in Machakos. From the annexures to the supporting affidavit, it is evident that the Appellant had sent several letters to the Machakos High Court seeking to have the Appeal set down for mention. From the Court record, there is no affidavit of service indicating that the Appellant was indeed served with a Notice to Show Cause why the Appeal should not be dismissed for want of prosecution. I note that the Appellant had been granted a mention date and before the said date, the Appeal was dismissed for want of prosecution. From the Court records, it is evident that the parties had filed their respective submissions to the Appeal, and the same was set to be highlighted on 7th October, 2013 but the Court directed that the matter be set down for hearing before an ELC Judge who was yet to be posted to Machakos. However, on 16th July, 2015, the Appeal was dismissed for want of prosecution by Justice Nyamweya. The Respondent has opposed the reinstatement of the Appeal and contended that the Application is made in bad faith with the Applicant not having clean hands and the same having been overtaken by events. Further, that the Application lacks merit as there are no or no sufficient grounds upon which the orders prayed for can be granted. He contended that the applicant is guilty of laches. To my mind, it is pertinent for the Court to decipher whether the application was brought without undue delay and if the Appellant delayed in prosecuting his Appeal. I note Justice Mutende had indeed given directions that the Appeal was to await the constitution of an Environment and Land Court. Further, I note the instant application was filed in August 2015 less than one month after the dismissal of the Appeal for want of prosecution. In the case of case of ***Ivita Vs Kyumbu [1984] KLR 441***, **Chesoni, J** as he then was stated thus:

"The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite the delay. Justice is justice to both the plaintiff and the defendant; so both parties to a suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory

resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced by the delay. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time."

Since it is clear from the records that the parties had indeed filed their respective submissions to canvass the Appeal but there was indeed no ELC Judge to hear them, I opine that the Applicant cannot indeed be blamed for failure to set the Appeal down for hearing.

Further, in the case of **Allan Otieno Osula Vs Gurdev Engineering & Construction Ltd (2015) eKLR** the Court held that: **' I employ the principle that the right to appeal is constitutional right and in as much as there has been delay which has not been satisfactorily explained by the Appellant, this court has to weigh the cost and prejudice that is likely to be occasioned to the Appellant as well as the Respondent, if the appeal is struck out at this stage without according the Appellant an opportunity to be heard on the merits of the Appeal.'**

In associating myself with these decisions and based on the evidence before me, I find that the Appeal was prematurely dismissed for want of prosecution. I opine that the Appellant has a constitutional right to be heard as enshrined in Article 50 of the Constitution and disagree with the Respondent that the Appeal is an abuse of the court process and is a mere academic exercise. In the circumstance, I will proceed to reinstate the Appeal.

As to whether the Court should reinstate the injunctive orders granted by Hon. Justice Isaac Lenaola on 12th May, 2009 in respect to the suit property. It is not in dispute that the suit property is no longer in the hands of the Respondent but are owned by third parties. Further, the Appellant confirms that the suit property was originally Kajiado/ Kaputiei North/1276 which was subsequently subdivided into Kajiado/ Kaputiei North/ 2500 and 2501 and transferred to third parties. He avers that there is reasonable apprehension that should the court fail to grant interim orders herein, the suit property will not be preserved as the registered owners of the property are not parties to this suit. The Respondent insists that the orders sought have been overtaken by events.

In the case of **Thomas Mumo Mangey (Suing on his own and on behalf of the Franciscans of Our Lady of Good Counsel Sisters Registered Trustees) v Sarah Nyiva Hillman & 3 others (2018) eKLR, the Court of Appeal while citing in approval the case of Nguruman Limited V Jan Bonde Nielsen & 2 others (2014) eKLR** held as follows:**' if the Applicant established a prima facie case that alone is not sufficient basis to grant an interlocutory injunction. The court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the Applicant's claim may appear at that stage. If prima facie is not established, then irreparable injury and balance of convenience need no consideration.'**

From the evidence presented and relying on this case, I find that the Applicant's claim for reinstatement of orders of injunction made on 12th May 2009 is indeed overtaken by events and he has not established a prima facie case to warrant the orders sought since the suit property is in the hands of third parties. It is my considered view that since the suit property has been in the hands of third parties who are not parties to this suit, any injury suffered by the Applicant will be recoverable by way of damages.

It is against the foregoing that I allow prayer no. (c) only of the application dated the 4th August, 2015.

I direct the Appellant to set the Appeal down for hearing within 90 days from the date hereof.

Costs of the Application are awarded to the Respondent.

Dated signed and delivered via email this 7th day of May, 2020.

CHRISTINE OCHIENG

JUDGE