REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC MISC NO. 46 OF 2014

NJERU MWANIKI ……..……. APPLICANT

VERSUS

MBUKO MWANIKI ……....……... RESPONDENT

(AN APPEAL FROM THE DECREE DELIVERED ON 31ST MARCH, 2014 BY HON. M. ONKOBA – Ag S.R.M. AT THE PRINCIPAL MAGISTRATE'S COURT AT GICHUGU)

RULING

The applicant herein, citing the provisions of ***Order 50 Rule 5 and Order 51 Rule 1 of the Civil Procedure Rules*** as well as ***Section 3A of the Civil Procedure Act*** filed this application on 24th November 2014 seeking the following reliefs:

1. ***Leave to appeal against the decree of Gichugu Principal Magistrate's Court delivered on 31st March 2014 out of time***
2. ***Stay of execution of the decree in ELC No. 8 of 2012 of Gichugu Law Courts***
3. ***That the draft of the intended memorandum of appeal be deemed as filed after paying the requisite fees***
4. ***Costs of this application be provided for.***

The application was based on the grounds set out therein which were basically that the delay in filing the proposed appeal was not occasioned by the applicant directly but rather, by Gichugu Court. The same was also supported by the applicant's affidavit in which he has deponed, inter alia, that his dispute with the respondent involved the reinstatement of the boundaries of the parcels of land No. BARAGWE/RAIMU/711 and BARAGWE/RAIMU/654 which was referred to the District Registrar Kirinyaga to determine but he waited for so long before being informed of the decision made in the dispute by the said Registrar. Paragraph 8 of the applicant's affidavit is important for purposes of this ruling and it is therefore necessary that I refer to it. He depones in that paragraph as follows:-

> "***That when I waited for so long without hearing anything from the Court and on 22nd day of July, I visited the Court to ask Court clerks of what might have happened to my case. When the Court file was produced, the proceedings were led (sic) to me and I was informed that the suit was determined on 31st March 2014 the date when the District Registrar addressed the Court and that my suit had failed".***

The applicant's main ground for filing this application is therefore that he was not in Court when the determination by the Registrar was read and a decree extracted by the Court. The record however shows a different story. The record in Gichugu Principal Magistrate's Court Case No. ELC 8 of 2012 (and that

Court must be disabused of the notion that it is an ELC and must stop prefixing land cases filed therein as ELC cases) shows that the parties therein had a dispute over their two parcels of land described above which the appellant wanted to be reinstated. In the course of the trial, the two parties recorded and signed a consent on 31st December 2013 that their dispute be referred to the District Surveyor and Registrar Kirinyaga to determine the same.

On 31st March 2014 and in the presence of both parties, the District Land Registrar Mr. C.M. Kironji delivered his report to the Court to the effect that infact the boundaries between the two parcels of land are intact and have never been disturbed. That report was made an order of the Court and a decree followed in which the applicant was ordered to meet the costs of the suit which on 6th October 2014 were assessed at Ksh.9,536 in the presence of both parties and the applicant said he wished to pay Ksh. 5,000 and the balance in 30 days and sought a stay of execution which was granted. It was the then that he filed this application.

In this application, the applicant is complaining that he did not know when the report of the Registrar was made a judgment of the Court until he visited the Gichugu Court Registry on 22nd July 2014. That is plainly un-true. The record shows that the report was adopted as a judgment of the Court on 31st March 2014 in the in the presence of both parties and a decree drawn on the same day. He therefore knew of the judgment on 31st March 2014 and the record indicates that he even addressed the trial Court in the following terms:-

"I have heard the report by the Surveyor. I will sue the defendant afresh".

On the same day, the record shows that the trial magistrate (M. ONKOBA Ag. Senior Resident Magistrate) explained to the parties that there was a "***right of appeal within 30 days".*** The applicant has not explained why he did not exercise that right. He has infact come to Court with un-clean hands alleging that he was not aware about the judgment delivered on 31st March 2014 yet the record clearly shows that he was present and even addressed the Court. He is clearly un-deserving of the orders to file appeal out of time as he has not explained what he was doing during the period between 31st March 2014 to 24th November 2014 which delay is in-ordinate. It is settled law that whenever there is a delay, the party guilty of the same should offer some explanation for it before extension is granted. The delay herein is some eight (8) months and it is both in-ordinate and un-explained. In the circumstances, the Court cannot exercise its discretion in the applicant's favour as there would be no basis for doing so. In the circumstances the first limb of the applicant's application must fail.

The applicant also seeks stay of execution of the decree of the subordinate Court at Gichugu. It is clear to me that what the applicant seeks to stay is the execution of decree of costs which were assessed in his presence and he even paid more than half of the assessed costs and sought time to pay the balance which time was granted. In the premises, what substantial loss would he suffer? The answer is none.

Finally, does the applicant even have any arguable appeal? The simple answer is ***"No".*** From the record of 29th September 2014 when the bill of costs came up for assessment, the applicant made an offer to pay the defendant, Ksh. 500 for filing defence, Ksh. 60 for transport from home to Court and back and Ksh. 200 for every Court attendance and in response to that offer, the defendant said:-

> ***"He has just served me with his response. But following the highlights he has given, I am amenable to receiving the amount he has proposed for my costs"***

The Court then assessed the costs payable to the defendant at Ksh. 9,536 of which the applicant promptly paid Ksh. 5,000 and promised to pay the balance in 30 days and sought a stay for that period which the defendant accepted and the Court granted. The order on costs was therefore essentially a consent order which the applicant partially satisfied immediately on the day that it was made. Such an order would only be set aside on grounds which would justify the setting aside of a contract – see ***BROOKEBOND LIEBIG VS MALLYA 1975 E.A 266*** and also ***FLORA WASIKE VS DESTIMO WAMBOKA C.A CIVIL APPEAL NO. 81 of 1984 (KSM), 1988 e K.L.R***. In the case of ***HIRANI VS KASSAM***

(1952) 19 E.A.C.A 131 at Page 134, WINDHAM J. observed as follows:-

> ***"The mode of paying the debt, then, is part of the consent judgment. That being so, the Court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties"***

What ***WINDHAM J***. stated in the ***HIRANI*** case (supra) applies in the circumstances of this case. Having consented to paying the respondent his costs, that became a debt and the same principles would apply as where there is a consent judgment.

Similarly, ***Section 67(2) of the Civil Procedure Rules*** provides as follows:-

> "***No appeal shall lie from a decree passed by the Court with the consent of parties".***

Taking all the above into account, I am constrained to dismiss the application dated 24th November 2014 with no order as to costs.

B.N. OLAO

JUDGE

8TH APRIL, 2015

8/4/2015

Before

B.N. Olao – Judge

CC – Gichia

Applicant – present

Respondent – absent

COURT: Ruling delivered this 8th April 2015 in open Court.

Applicant present

Respondent absent.

B.N. OLAO

JUDGE

8TH APRIL, 2015