



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**MISC. APPL NO. 4 OF 2020**

**JOHN MUCHOKI MWANGI.....APPLICANT**

**VERSUS**

**JOSEPH KARANJA MABULA.....RESPONDENT**

**JUDGEMENT**

1. The Applicant and Respondent are Defendant and Plaintiff respectively in the CMCC No 465 of 2006. The claim of the Plaintiff against the Defendant is that of illegal trespass on parcel MITUBIRI/WEMPA/BLOCK 2/1151 owned by the Applicant. Parcel MITUBIRI/WEMPA/BLOCK 2/1150 is owned by the Respondent. Interalia, the Plaintiff sought declaratory orders that the Defendant's encroachment on the suit land is illegal and in addition a permanent injunction to restrain the Defendant from interfering with his quiet tenement of the suit land.

2. It is said that in 2009 the parties agreed by consent that the Land Registrar Thika do visit the suit lands and establish the extent of the encroachment and file a report within 21 days. The survey report was filed on the 26/11/2010 which report according to the Applicant was adopted by the Court. It is borne of the record that the Court in its ruling of 24/10/18 in addition to the surveyor's report filed pursuant to the consent of the parties, allowed the second report to be prepared on conditions interalia, to ascertain who amongst the parties was responsible for the encroachment. The Court ruled that if the second report shall have similar finding as the first surveyors report dated 26/11/12 then the matter shall stand fully determined with no orders as to costs. It is also borne of the record that the orders of the Court issued on the 24/10/18 were not complied with by the Plaintiff/Applicant with the result of which the suit stood dismissed by the 7/11/2018 leaving the Defendants counterclaim to be determined.

3. On the 5/3/2020 the issue of the surveyor's report of 26/11/12 was raised by the Plaintiff through his Advocate as being suspect and prayed for orders to call the Surveyor to present the survey report in Court. In response the Defendant argued that the issue of the surveyor's report was settled. The Plaintiff's position was that the Court had been misled on the Surveyor's report and that no prejudice would be visited on the Defendant if the surveyor is called to ascertain the authenticity of the report.

4. In its ruling delivered on the 12/3/2020 the Court held as follows;

“the crux of the dispute before the Court is boundary between parcel of land vis MITUBIRI/WEMPA BLOCK 2/1151 and MITUBIRI/WEMPA BLOCK 2/1150. The integrity and authenticity of the Surveyors report dated the 26/11/2012 has been put to question. Considering the issue before me revolves around boundary and the surveyors report is an integral part of resolving the issues. At the heart of it are the clear provisions of Section 18(2) and 19(2) of the Land Registration Act, 2012. Then, it is paramount that when such a report is filed in Court, it ought to be beyond reproach particularly on its authenticity. This is a serious allegation which this Court cannot wish away regardless that the Court had previously considered it and gave its determination. I find the Defendant does not stand to suffer any prejudice if the District Surveyor is called upon to authenticate the document in issue.”

5. On application, the Defendant was granted leave to Appeal the decision of the Court.

6. The Defendant failed to file his Appeal on time or at all hence the application, the subject of this Judgement.

7. The Applicant filed a motion on 22/7/20 seeking interalia orders of stay of proceedings in CMCC No 464/2006 pending the hearing and determination of the application and leave to file an Appeal against the ruling/directions of Hon B M EKHUBI delivered on the 12/3/2020.

8. The reasons advanced for the delay in filing the Appeal on time are; the Applicant was yet to be supplied with the directions, proceedings and orders of the Court and only got them on the 22/7/2020; due to the corona pandemic the Courts had scaled down operations.

9. In opposing the application, the Respondent contends that no reasons have been advanced for the inordinate delay in filing the Appeal to convince the Court to warrant the exercise of discretion in his favour. That the Applicant failed to file the Appeal within 30 days. That the Applicant failed to file his notice of Appeal and memorandum of Appeal within the stipulated time despite the registries having been open

online despite the scaling down of the open Court/ registry operations during the covid lockdown. That the Applicant did not require the proceedings before filing his Notice of Appeal. That the application is a delaying tactic geared towards ensuring the surveyor is not called to produce the report. Further that the Appeal is stale with low chance of success. It stated that the survey report dated the 26/11/2012 was a fabrication by the Defendant/Applicant and lacks authenticity.

10. The parties filed written submissions which I have read and considered.

11. The considerations for grant or denial of an application for extension of time was well expressed in **Nicholas Kiptoo Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others Application No. 16 of 2014 and Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others SC Application No. 15 of 2014**; where the Court stated that in determining such an application, the Court has to consider;

“The discretion to extend time is unfettered. It is incumbent upon the Applicant to explain the reasons for delay in making the application for extension and whether there were any extenuating circumstances that could enable the Court to exercise its discretion in favour of the Applicant. The following were the underlying principles that a Court should consider in exercising such discretion;

- a. extension of time was not a right of a party, it was an equitable remedy that was only available to a deserving party, at the discretion of the Court;
- b. a party who sought extension of time had the burden of laying a basis, to the satisfaction of the Court;
- c. whether the Court should exercise the discretion to extend time, was a consideration to be made on a case- to- case basis;
- d. where there was a reasonable cause for the delay, the same should be expressed to the satisfaction of the Court;
- e. whether there would be any prejudice suffered by the Respondents, if extension was granted;
- f. whether the application was brought without undue delay; and
- g. whether in certain cases, like election petitions, public interest should be a consideration for extending time.

12. Similarly, in the case of **Njagi Wanjeru & Company Advocates vs Ben Momanyi t/a Momanyi & Associates** the Court of Appeal had already established that:

“It is now well settled that the decision whether or not to extend the time for Appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether or not to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chance of the Appeal succeeding if the application is not granted; and, fourthly, the degree of prejudice to the Respondent if the application is granted (emphasis mine).

13. I have considered the reasons advanced by the Applicant that he was not supplied with the proceedings of the Court. The Respondent has argued that for an Appeal to be filed a party does not require the proceedings. I have seen email correspondences by the Advocate of the Applicant requisitioning for the proceedings and directions/ruling of the Court from the registry as early as the 12/3/2020, 9/6/2020 & 30/6/2020. It is our procedural law that an Appeal is initiated through a Notice of Appeal filed with the Memorandum of Appeal. The proceedings are normally requisitioned later. That explains the reason why the registry has to issue a certificate of delay in the event of the delay in obtaining the proceedings. When calculating time for filing an Appeal, the time taken to obtain the proceedings in any event is taken into consideration. The Applicant may have detoured and focused on the proceedings instead of filing the notice of Appeal and the Memorandum of Appeal thus squandering the time within which they ought to have placed their Appeal on record.

14. The second reason for the delay revolves around the Covid -19 pandemic which led to restriction of movement around certain cities/parts of Kenya. The Applicant has explained that the delay was caused by the scaling down of the operations of the Court during this period.

15. The Court takes judicial notice that due to the Covid Pandemic containment restrictions were put in place in the country effective the 13/3/2020 and thereafter the operations of the Courts were scaled down effective the 16/3/2020. Later the said operations were upscaled from mid-June and matters were handled online by the Registries with little open Court operations in place.

16. Appreciating that during the containment measures the Courts were not operating in full capacity and in the ordinary manner, it would be unjust to hold it against the Applicant. I note that the Applicant filed this application on the 22/7/2020 soon after the scaling down was lifted. On that ground therefore I do not find that the time taken to move the Court was inordinate. The reasons given are satisfactory in my view given the circumstances.

17. The scaling down of the operations of the Court is an administrative issue which should not thwart the Applicants quest for seeking justice. I am guided by Art 159 (2)(b) of the Constitution which mandates this Court to pay fidelity to the substance of justice and not procedural technicalities.

18. I have seen the draft memorandum of Appeal which raises issues interalia that the issue of the surveyors report had been determined and thus resjudicata; no evidence was placed before the magistrate to sufficiently challenge the authenticity of the surveyors report; the ruling has the effect of reopening the plaintiffs suit. These to my mind are issues that cannot be considered frivolous. In the interest of justice these matters should be determined on their merits.

19. Is there prejudice to the Respondent if the application is allowed?. The Respondent has not explained any prejudice that he stands to suffer save what can possibly be compensated with costs.

20. Should the Court grant stay of proceedings? In the case of **Christopher Ndolo Mutuku & Another vs. CFC Stanbic Bank Ltd (2015) eKLR**, the Court observed that;

“...what matters in an application for stay of proceedings pending Appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice.

21. Having granted the application, the next order that commends itself is that to stay the proceedings in CMCC No 465 of 2006. Allowing the proceedings in the lower Court to go on simultaneously with the Appeal runs foul of the provisions of subjudice as set out in Section 6 of the Civil Procedure Act that prohibit parallel proceedings in our Courts. Care must be taken not to render the intended Appeal an academic exercise should the lower Court proceedings be maintained.

22. For the reason above the application is merited.

23. **Final orders and disposal;**

The application is granted.

a. The proceedings in CMCC 465 of 2006 are stayed pending the hearing and determination of the intended Appeal.

b. The Applicant is ordered to file his intended Appeal within the period of 30 days from the date hereof, in default these orders shall lapse with no further orders from the Court.

c. The Applicant shall meet the cost of the application.

24. **It is so ordered.**

**DATED, SIGNED & DELIVERED ONLINE THIS 26<sup>TH</sup> DAY OF NOVEMBER 2020.**

**J. G. KEMEI**

**JUDGE**

**Delivered online in the presence of:**

Mutuku Wambua for Applicant but mute.

Mr Muriithi for Respondent

Njeri: Court Assistant