REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

PETITION NO. 15 OF 2017

IN THE MATTER OF ARTICLE 22(1), 165, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 27, 35(2), 40, 47, 50(1) AND 73(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 94 OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF THE SURVEY AND PARTITIONING OF NYERI/GATARAKWA/866

MARGARET NJAMIO MBAUINI *(Suing as the legal representative of*

CATHERINE NYAGUTHII MBAUINI).....PETITIONER

VERSUS

DISTRICT SURVEYOR, NYERI.....1ST RESPONDENT

CHIEF, GATARAKWA LOCATION .....2ND RESPONDENT

ATTORNEY GENERAL .....3RD RESPONDENT

GREGORY MAINA MBAUNI.....INTERESTED PARTY

RULING

1. In an application dated the 18th February 2020 brought under Order 42-Rule 1-6, Order 40 Rule 10, Order 43 and Order 51 of Rules 1-3 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act, the Petitioner herein seek for leave to appeal against the ruling which was delivered by this Court on the 13th February 2020 and for stay of further proceedings pending the hearing and determination of their intended Appeal.

2. The said application is supported by its grounds as well as on the supporting affidavit of Margaret Njamio Mbauini the Petitioner herein sworn on 18 February 2020.

3. The said application was opposed by the Respondents vide their Replying Affidavit dated 11th March 2020 in which they had deponed that on 15th February 2018, parties entered into a consent in a bid to determine the Petitioner's application dated 7th November 2017 to the effect that the status quo shall be maintained pending the hearing and determination of the Petition and secondly that each party appoints a private surveyor to visit the suit property together with the 1st Respondent for purposes of conducting a joint survey.

4. A joined site visit was conducted on 14th December 2018 in the presence of all parties where on 28th November 2019 parties appeared before Court and by consent agreed that the Petition be disposed of by calling only the evidence of the private surveyors thereinafter the 1st Respondent to testify and produce their respective reports on record after which the Court would render its determination.

5. That the matter was then scheduled for hearing on 13th February 2020 when the surveyors testified and produced their respective reports on behalf of parties as earlier agreed. The consent orders of 15th February 2018 and 28th November 2019 had never been varied or set aside and therefore the present application was a calculated attempt by the Petitioner to do so after hearing the Respondents' evidence.

6. That the Petitioner's application was an afterthought and a complete abuse of the Court process as it sought to reopen the suit afresh after directions had been issued under Rule 20 of the Constitution (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, and at the close of the hearing which would be prejudicial to the Respondents herein.

7. That the Petitioner's application offended the principle of finality in litigation which is well settled within our jurisdiction the term has to come to an end, this being a historical dispute dating back to the year 2004 when it was before the Court of Appeal.

8. That the Court should not aid a litigant who seemed to have pre-empted the outcome of the suit and was currently forum shopping for a favorable judgment by circumventing the law.

9. That it was in the interest of substantive justice and fairness that the Orders sought by the Petitioner/Applicant be disallowed and application be dismissed with costs and the Respondent.

10. The Petitioner's application was further opposed by the interested party vide his Replying Affidavit of 4th March 2020 where he had deponed that pursuant to the Court of Appeal judgment, that the suit land herein be shared between himself and the Petitioner on the ratio of 3:5 where judgment had been fully executed and they were now the registered owners of their parcels of land respectively as per the official search annexed to his affidavit. That the Petitioner had filed various suits and applications to challenge the judgment without success.

11. That when this particular matter came up for hearing, it had been unanimously agreed that the only dispute was how the land was to be partitioned wherein all parties had agreed to dispose of the suit by each party appointing a surveyor and jointly they would visit the land and thereafter file their report in Court. The purpose of the visit was for the surveyors to agree on what was the best way to partition the land by distributing the area zones to the parties. The surveyors visited the suit and each filed their respective report wherein on the 13th February 2020 the surveyors presented their report in Court pursuant to an agreement by parties to finalize the issue by adopting the reports.

12. The interested party deponed that at the close of the session, they were surprised when Counsel for the Petitioner made an application from the bar seeking to re-open the case by adducing further evidence and the Court was in Order to dismiss the application.

13. That if the issue had been topography and the quality of the land, neither of the parties had been qualified to give an expert opinion other than the experts who were the surveyors themselves. He deponed that the intended Appeal raised no grounds to merit judicial consideration and application ought to be dismissed.

14. On the 12th March 2020, by consent directions were taken to the effect that the said application be disposed of by way of written submissions to which only the Petitioner and the interested party complied.

Petitioner's written submissions

15. The Petitioner's submissions were that pursuant to a ruling delivered on 13th February 2020 by the Court and being aggrieved by the same, she had filed a Notice of Appeal and applied for proceedings to enable her to lodge an Appeal against the same.

16. That on 13th February 2020 the Court had received reports from surveyors from all parties in support of the interested party wherein at the end of the hearing the Petitioner sought for the Court to visit the suit property and the Petition be heard by way of oral evidence to which application was declined. The Petitioner then applied for stay of further proceedings.

17. That the Petitioner and her family's livelihood is derived from the suit property whose greater portion the interested party resides on and which at one time the High Court had awarded the interested party half of the property where the Petitioner had successfully applied to the Court of Appeal against the decision.

18. It was her submission that the interested party had been given a bigger portion of the land than he was entitled to after the Court of Appeal had Ordered that the suit land being Nyeri/ Gatarakwa/866 be divided into the ratio of 3:5. That the only issue in contention now was how the suit property was to be partitioned between the two houses of the Petitioner's late father.

19. That both the interested party's surveyor and the Government surveyor presented to the honorable Court a case which was untrue and by paying a visit to the premises the truth could be established as it concerned a single issue as to whether the area was sloppy or hilly or not and whether the lower part flooded thereby destroying crops.

20. The Petitioner submitted that no party would be prejudiced from the visit by the Courts upon the suit property but certainly her house would be prejudiced if the Court did not establish the truth as she stood to get land which was flooded all the time when it rained.

21. The Petitioner placed reliance on the decided case in **Sango Bay Estates & Another vs Dresdner Bank [1971] EA 17** to submit that for an Applicant to be granted leave they must show that the intended Appeal raises grounds that merited a judicial consideration. That their Appeal raised the following grounds that merited judicial consideration;

i. Whether the Court was right in declining to view the property in view of the contestation of 33.2 hectares which the Applicant described as sloppy and the lower part prone to flooding during rainy seasons.

ii. Whether the Court was right in declining the AApplicant's application under Rule 20 Legal Notice No.117 of 2013 that inquiries into status of the land be made through oral evidence to be tendered by the parties.

iii. Whether the proceedings so far undertaken on the Petition were adequate for disposal of the Petition.

iv. The exercise of discretion by this honorable Court was plainly wrong against the law as set out by the Court of Appeal in **Kennidia Insurance Co. Ltd. vs East African Underwriters Kenya Limited & Others [1982 – 1988] KLR 639.**

22. That in the case of **Re: Estate of Mbiyu Koinange (deceased) [2015] eKLR,** the Court had held that the Applicant for leave to appeal need not demonstrate that had proposed appeal had overwhelming chance or probability of success, rather it merely required that she has an arguable and reasonable Appeal

23. The Petitioner submitted that her rights to appeal was granted by Article 48 of the Constitution which guaranteed the right to access to justice to all.

24. That the Petition concerned partition of land which was governed by Partition Acts of England which the statutes of general application and as interpreted by the Court of Appeal in **Khamis vs Kirombe [1956] 23 EA 195** required that enquiries be made as to the status of the land and its ecological zones and history of user, but the Court had declined to order oral evidence to be called by the Petitioner and in so declining the Court did not appreciate the nature of the land being partitioned and therefore it contravened the Petitioners rights to fair hearing under Article 50 of the Constitution.

25. The Petitioner further relied on the decided case in **Madhupaper International Limited vs. Kerr [1985] KLR 840** to submit that the jurisdiction of the Court was extended by Order 40 Rule 10 of the Civil Procedure Rules which empowered the Court to make such Orders for preservation of any property which is the subject matter of a suit as it deems fit. That the purpose of the application for stay Orders herein sought was to preserve the subject suit. The Petitioner sought for their application to be allowed as prayed.

Interested party's submissions.

26. The interested party submitted that on 10th of July 2009 the Court of Appeal in Civil Appeal No. 34 of 2004 ordered for the suit parcel of land to be shared between the Interested Party and the Petitioner on a ratio of 3:5 where the Petitioner was to get12.20 hectares and the Interested Party was to get 7.30 hectares.

27. That being a judgment of the highest Court one would have expected parties to process the title deeds smoothly but this was not to be as Petitioner filed ELC No. 133 of 2009 seeking to have the land shared out using a new formula to which the Court was quick to discern the mischief wherein the suit was struck out on 19th of March 2015, The Petitioners further filed an Appeal in the Court of Appeal being Civil Appeal No. 55 of 2016 which Appeal was also dismissed on 20th December 2017. That the Petitioners intention has been to frustrate the process of partitioning the suit land by erecting hurdles by filing new suits, applications and appeals.

28. That when the matter came up on 15th February 2018, there had been only one issue remaining which was how the land was to be partitioned taking into account the topology, ecology and how parties were settled. By consent thereto, parties had agreed to each engaged a surveyor to visit the suit property and come up with ways to petitioned the land and thereafter file their reports in Court. There was no intention that parties would be called to adduce evidence or for the Court to visit the suit land again. That the issues the Petitioner was therefore raising regarding the manner of partition were issues that were to be addressed by the surveyors who were the experts in that field.

29. That on 13th February 2020 the surveyors presented their report in Court wherein they had been cross examined and the Court had reserved its ruling pending the filing of submissions, that was when Counsel for the Petitioner had made an application from the bar for the Court to visit the land and for the parties to adduce oral evidence. The Court's refusal to adopt the said application then gave rise to the application and intended Appeal.

30. That the Application by Counsel for the Petitioner made from the bar on 13th February 2020 was premature, the surveyors had presented the reports in evidence where the Court was to deliver its rulings and therefore the Petitioner's application for the Court to visit the suit land while the matter was awaiting the ruling was misplaced.

31. That the Petitioner had been given an opportunity to raise the issues she was now raising when the surveyors visited the suit land to determine its partition but she refused to seize the opportunity. That by her seeking leave to appeal against the refusal to visit the suit land and further the Application for parties to adduce evidence did not have a realistic prospect of success.

32. The interested party relied on the case of **J.P Macharia & Company Advocates vs Wangechi Mwangi & Another Nairobi CA Application No. 433 of 2001** to submitted that in the present case, there was no realistic prospect of an appeal of this nature succeeding.

33. That the leave was not a matter of right and the Court must consider factors such as the need for expeditious disposal of cases and the past conduct of the Applicant. In the present case leave has been sought when there is a pending ruling.

34. On the issue of stay of further proceedings, it was the interested party's submission that what was pending was the delivery of a ruling and only thereafter its delivery could any aggrieved party bring any application. That at this juncture the Petitioner/Applicant had not established a prima facie arguable case keeping in mind that it was by consent that parties had agreed on the mode of disposal of the matter by engaging experts to determine the manner of partitioning the land. That until the Court ruled on the surveyors report, any intended Appeal against a preliminary decision was not an arguable Appeal

35. They sought that the Court declines to grant leave to appeal for there existed no Appeal. That then Court should also decline to stay its orders because in affect this would stay the ruling.

36. The Interested Party submitted that most importantly granting the orders sought was not in the best interest of the need for expeditious disposal of the dispute which came into the Courts in 1999. He sought for the application to be dismissed with costs.

Determination

37. I have considered the application and prayers sought substantially, for leave to appeal from a decision by the Court of 13th February 202 refusing to visit the suit property and secondly, stay of further proceedings in this matter pending the lodging, hearing and determination of the intended Appeal. The main issue for determination therefore is whether the application has any merit.

38. The Application before me is premised on the provisions of Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules. The said provisions provide for Orders from which appeals lie as of right.

39. Order 43 Rule (3) of the Civil Procedure Rules which provides as follows:

> *"An application for leave to appeal under section 75 of the Act shall in the first instance be made to the Court making the Order sought to be appealed from, either orally at the time when the Order is made, or within fourteen days from the date of such Order.*

40. The rationale for requiring leave to appeal in certain instances was stated in **Rene Dol vs. Official Receiver of Uganda [1954] 21(1) EACA 116** where it was held that:

> **"The general purpose of requiring leave to appeal from some Orders is to restrict appeals from made in minor procedural or interlocutory matters which do not go to the root of the litigation or determine finally the substantive rights of the parties and which can themselves be brought into question in an appeal from the final decision.."**

41. Indeed the Court of Appeal in **Kenya Shell Limited vs. Kobil Petroleum Limited [2006] eKLR found that the** decision as to whether or not to grant leave to appeal was discretionary when it held that;

> **"Whether or not the Court would grant leave to appeal is a matter for the discretion of the Court. As in all discretions exercisable by Courts, however, it has to be judicially considered."**

42. In **Machira T/A Machira & Company Advocates vs. Mwangi & Anor [2002] 2 KLR 391** where the Court stated that:

> **"The Court will only refuse leave if satisfied that the Applicant has no realistic prospects of succeeding on the appeal. The use of the word "realistic" makes it clear that fanciful prospects or an unrealistic argument is not sufficient. When leave is refused, the Court gives short reasons which are primarily intended to inform the Applicant why leave is refused. The Court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the Court is not satisfied that the appeal has no prospects of success. For example, the issue maybe one which the Court considers should in the public interest be examined by this Court or, to be more specific, this Court may take the view that the case raises a novel point or an issue where the law clarifying. There must however almost always be a ground of appeal which merits serious judicial consideration."**

43. **In case before me, it has not been disputed that indeed this matter had been decided by the Court of Appeal in Catherine Nyaguthii Mbauni v Gregory Maina Mbauni [2009] eKLR** wherein via its judgment of 10th July 2009 the Court had Ordered that the suit parcel of land be shared between the interested party and the Petitioner at a ratio of 3:5

44. Following this pronouncement, it is not in dispute that on the 15th February 2018 parties to the suit entered into a consent with the following terms:

"By consent:

1. *The Petitioner, respondents and interested party each avails a surveyor.*
2. *parties to arrange when to visit the suit property for determination on how to partition the suit property.*
3. *The Orders of status quo to be maintained until the mention date.*
4. *The Petitioner and the interested party to bear their own costs for the private surveyors.*
5. *Matter to be mentioned in 30 days.*

45. Pursuant to recording of the said Consent, it is on record that parties visited the suit property on the 14th December 2018 with their respective surveyors who filed their individual reports in Court thereafter.

46. On the 20th November 2019, parties submitted to Court that due to the discrepancies in the three surveyors reports that they wished to have the matter fixed for hearing only on the three surveyors report.

47. The Court again adopted this consent as follows:

> *''There having been a 3rd report from the surveyor which is disputed and the parties having conceded by consent to have all the three surveyors cross-examined on their respective reports, the matter shall be set down for cross-examining of the said 3 surveyors on their respective report.''*

48. The matter thus proceeded on this basis wherein the surveyors testified and were cross examined on their respective reports. Upon closure of their testimony, Counsel for Petitioner made the following application:

> *''I wish to apply that the Court visits the site at a convenient time. I wish to apply for further directions that the further hearing of the petition be by way of oral evidence. By calling people on the ground to testify on the terrain''.*

49. Based on fact that litigation has to come to an end, the history of this matter, the consent entered by the parties on how to dispose of the Petition and further that the application by the Petitioner's Counsel was another way of seeking to adduce additional evidence in contravention of the consent entered into by the parties which in turn would open up a Pandora's box on matter that had already been decided, the Court rejected Counsel's application which then gave rise to the present application.

50. The Petitioner is challenging the procedure in which trial Court heard the matter. It is not in dispute that on the 20th November 2019, the parties Counsel herein entered into a consent for the Petition to be heard through the evidence of the Surveyors and which consent was confirmed by the Court wherein parties were given a fair hearing by calling the surveyors, examining and cross examining them and thereafter producing their respective reports/ documents.

51. The Petitioner/Applicant has now filed the present application to fault the Court for proceeding with a matter in a way in which parties had consented to. The law on variation of a consent is now settled to the effect that the variation of a consent can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the Court, absence of sufficient material facts and ignorance of material facts.

52. In **Hirani v. Kassam (1952)**, **19EACA 131**, the Court of Appeal with approval quoted the following passage from **Seton on Judgments and Orders, 7th edition, Vol.1 p.124** as follows:

> *"Prima facie, any Order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them..... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court ..... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement."*

53. The Court of Appeal in the case of **Kenya Commercial Bank Ltd v. Specialized Engineering Co. Ltd (1982) KLR P. 485** held that:

> *"A consent Order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement.*

In the same case the Court further held that:

> *"An advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the Order shall be binding".*

54. This Court has not been informed that the Petitioners' Counsel had no authority at all to enter a consent as to how to proceed with the hearing of the Petition therefore there having been no such evidence placed before this Court that the Petitioners Counsel on record had no authority to enter into the consent that was recorded to the effect that the matter proceeds for hearing through the evidence of the surveyors, I find that there are no **prima facie grounds of appeal which merit serious judicial consideration** with realistic prospects of success.

55. On the Application to stay further proceedings pending the hearing and determination of the Petitioners intended Appeal, I am guided by the case in **Global Tours & Travel limited (Nairobi) H.C. Winding up Cause No. 43 of 2000** quoted with approval in **Kenya Wildlife service -versus- Mutembei (2019) eKLR** where the Court held;

> **"As I understand the law whether or not I grant a stay of proceedings or further proceedings on a decree or Order appealed from is a matter of Judicial Discretion to be exercised in the interest of justice. The sole question is whether it is in the interest to Order a stay of proceedings, and if it is on what terms it should be granted.**
>
> **In deciding whether to Order a stay, a Court should essentially weigh the pros and cons of granting or not granting the Order, and in considering those matters it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not or whether it is an arguable one.**

The scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously."

56. The end result is that having found that the applicant herein had not established prima facie case to warrant leave to Appeal and further having regard to the fact that the matter is at its final stage and only awaits a ruling, and further having regard to the objectives of the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, I find no merit in the Application dated the 18th February 2020 and proceed to dismiss the it with costs.

Dated and delivered at Nakuru this 17th day of December 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE