



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 16 OF 2019

ELIAS BORONA LAICHENA.....1ST APPLICANT/APPELLANT

ISAIAH MIRITI.....2ND APPLICANT/APPELLANT

VERSUS

MICHAEL KIRIMI KOBIA

(Suing as the legal representative and

administrator of the estate of GABRIEL

GIKUBU KOBIA – DECEASED).....RESPONDENT

RULING

1. The application dated 18.1.2019 seeks the following orders:

(i) Spent

(ii) That this honourable court be pleased to grant a stay of execution of the rulings and orders by **Hon. Mr. A.G Munene, Senior Resident Magistrate** dated **15th and 17th January, 2019** and subsequent orders, in the chief Magistrate's court **civil case No. 144 of 2014 at Maua** pending the hearing and determination of this application.

(iii) That this honourable court be pleased to grant a stay execution of the rulings and orders **Hon. Mr. A.G Munene, Senior Resident Magistrate** dated **15th and 17th January 2019** and subsequent orders in the Chief Magistrates' court **civil case no. 144 of 2014 at Maua** pending the hearing and determination of this appeal.

(iv) That this honourable court be pleased to recall the court file in the chief magistrate's court **civil case No. 144 of 2014 at Maua** to this honourable court hereof.

(v) That the costs of this application be in the cause.

2. The grounds in support of the application are that:

(a) The appellant's appeal is arguable and has very high chances of success.

(b) That on **17th January 2019**, the lower court purported to proceed with the hearing of the suit without regard to the predicament of the applicant's advocate and proceeded to make orders that are prejudicial to the applicants.

(c) The trial court erred in law and fact in finding that it had jurisdiction yet the suit thereof is statutory barred.

(d) The trial court erred in law and fact in finding that the appellant's **Notice of Preliminary Objection** dated 13th December 2019 lacked merits and failing to allow the same and failing to consider the grounds of opposition by the appellants.

(e) The lower court erred in setting unreasonable pre-trial directions and too short timelines for hearing the main suit without

considering the objection by the applicants thus proceeding with the matter in the absence of the appellants and or their advocate thus occasioning prejudice of the appellants.

(f) On **15th January**, the trial magistrate wrongly granted substantive and unreasonable orders that were not prayed for by any party.

(g) Unless this application is immediately heard and determined, the applicants will stand to suffer irreparable loss and damage.

3. The first appellant has also sworn an affidavit filed on **18.1.2019** where he has reiterated the grounds in support of the application. He has availed annexures marked "EBL1" which includes the proceedings and the **ruling of 15.1.2017** amongst other documents.

4. The application is opposed vide the lengthy **Replying Affidavit** of the respondent filed on **15.2.2019**. The gist of this response is that the trial court exercised its discretion when it gave directions on **17.1.2019** to the effect that the case was not to be adjourned. In particular the respondent avers that the court had considered that the date was chosen by the appellants and their counsels, that the case was filed in **2013** and hence was a backlog, that no sufficient reason was given as to why the matter was to be adjourned, that the appellants were in the habit of applying for adjournments and that the appellants were in court on the date of hearing on **17.1.2019** but they opted to walk out of the court room. Further, the Respondent contends that plaintiff's witnesses have passed on and the remaining one is very sick.

The Record

5. I do not have the full record of the lower court file, rightly so because the **Maua CM's case no. 144/14** is still on going. The appeal herein is still at the infancy stage but meanwhile the appellants desire to have a stay of proceedings in the lower court.

6. The ruling of **15.1.2019** and the proceedings **15.1.2019** which triggered this appeal have however been availed and they will go a long way in assisting the court to make a determination.

Determination

7. The issues for determination are;

(i) Whether the trial court (in Maua CMCC No. 144/14) had jurisdiction to hear the matter.

(ii) Whether the pretrial directions set by the court were unreasonable.

(iii) Whether the trial magistrate wrongly granted substantial and unreasonable orders that were not prayed for by any parties on 15.1.2019.

(iv) Whether the prayers sought in the application dated 18.1.2019 can be granted.

Whether the trial court had jurisdiction to hear the matter.

8. It appears that in the ruling of **15.1.2019**, the court was making a determination on a **Preliminary Objection** raised by the then defendants (now appellants) as well as **an Application for injunction** filed by the then plaintiff (now respondent). In the **Preliminary Objection** the present appellants were apparently stating that the suit was statute barred.

9. I have perused the documents availed by applicants over and over again, and I have not seen the **Preliminary Objection**, nor the arguments for or against the **Preliminary Objection** by way of submissions or otherwise save what is captured in the ruling of **15.1.2019**. This court cannot therefore make a full determination on the merits of that **Preliminary Objection** at this stage.

10. Notwithstanding the absence of further particulars of the **Preliminary Objection**, I find that the ruling of **15.1.2019** does capture the analysis of the issue where the trial court has stated that;

"The 1st defendant did not explain how this court lacks jurisdiction other than stating that under section 13 of the land and environment act, the court lacks jurisdiction".

11. Further the court went on to state that;

"I have further read the 1st defendant's defence and counter claim. The issues of limitation has not been pleaded. The afore-stated notwithstanding, the issue of the alleged agreement which the 1st defendant refers is in dispute and the issue can only be dealt with by way of a trial".

12. I have perused the pleadings of the parties which are at page 25, 28-36, 50-55 of the applicant's bound bundle and one cannot state with certainty as to when the agreement was made.

13. I have perused the Defence and counter claim of the appellants which runs from page 28 to 36 of the appellants bundle and I find that the issue of limitation has not been raised.

14. Order 2 rule 4 of the Civil Procedure Rules provide that;

“A party shall in any pleading subsequent to a plaint plead specifically any matter for example.....any relevant statute of limitation.....which he alleges makes any claim or defence of the opposite party not maintainable...”

15. In **Avtar Singh Bhamra vs. Oriental Commercial Bank ,Kisumu H.C.C.C. Nn.53 of 2004**, the court held that ;

“A preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained”.

16. In **Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd 1969** it was held that;

““A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication of pleadings and which if argued as a preliminary point may dispose off the suit.

17. In **Oraro vs. Mbaja [2005] 1 KLR 141, Ojwang, J** (as he then was) expressed himself as follows on preliminary objections:

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.... A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....”

18. From the foregoing legal analysis, it is clear that the issue of limitation ought to have been captured in the pleadings. Further, even if I have not heard the benefit of seeing the **Preliminary Objection** and the arguments thereof, the pleadings clearly show that the agreements between the parties elicit arguments which ought to be raised in a trial and not as a **Preliminary Objection**. I find no fault in the ruling of **15.1.2019** in so far as the issue of the **Preliminary Objection** is concerned.

Whether the pre-trial directions set by the court were unreasonable.

19. The pretrial directions given by the court on **15.1.2019** were as follows:

I. Plaintiff and his witnesses are allocated 1 hour for evidence in chief and 15 minutes for re-examination.

II. The defendants are allocated 1 hour each for their evidence and 15 minutes for re-examination.

III. Each party is allocated 30 minutes for cross examination.

IV. Hearing of the main suit is set on 17.1.2017 which the 1st defendant’s advocate had suggested shall be available.

V. No interim application shall be heard unless it concerns the orders granted herein.

VI. Judgment of this matter is set on 6.3.2018

VII. If parties fails to avail witnesses or to attend hearing, the court will proceed to write judgment based on the pleadings, statements and documents already filed in this court file.

VIII. Each party to obtain a copy of this order today.

20. Applicant avers that the time lines given for the hearing were too short and that the directions were unreasonable. Further applicant has averred that the trial magistrate erred in proceeding with the matter on **17.1.2019** in the absence of the appellants and their advocates thus occasioning prejudice to the appellants.

21. Again the court does not have the benefit of the full record of the trial court. However there are pertinent points of concern that the court will analyze to see if there was any justification in giving the directions on **15.1.2019** and proceeding with the hearing of the suit on **17.1.2019**. These points for consideration are; Delay, Availability of witnesses, Presence of witnesses and Active Case management.

Delay

22. One of the cardinal principles in our constitution is “**the expeditious delivery of justice**” –see **Article 159 (2) (b) of the Constitution of Kenya**, which in effect codifies the 17th century maxim of “**Justice delayed is justice denied**”. This means that if justice is not provided in a timely manner to the parties, it loses its importance and it violates the human rights of the litigants and their family. That is precisely why rights to speedy trials are incorporated in law worldwide. Thus in law and in Equity, delayed justice is abhorred.

23. The people of Kenya have for decades cried out to the justice system to embrace the aforementioned principle of expeditious delivery of justice, and in response thereof, the Judiciary formulated its blue print “**Sustaining Judiciary Transformation - (SJT)**” where speedy delivery of justice was one of the key strategic area of concern. Under that key area, Judiciary embarked on an exercise of clearing old cases that had clogged the justice system for years. The matters identified as falling under this category were cases which were five years old and/or older.

24. The present case though bearing a number, **Maua C.M. E & L 144/2014**, was previously registered as **Meru ELC case No. 143 of 2013**. The amended plaint also bears a date of **2013**. It follows that this matter was part of the back log that the courts were trying to deal with by the end of year **2018**.

25. The respondent has in his paragraph **5, 7, 26, 31-42, 44** and **47** captured the litigation odyssey of this case where he has blamed the appellant for the delay. These allegations were not challenged. On **20.2.2019** when I handled the matter for the very first time, no leave was sought by the appellants to file any further affidavit to rebut the allegations made in the aforementioned Replying Affidavit.

26. It was therefore quite in order for the trial court to give the directions on **15.1.2017** and on **17.1.2019**.

Availability of the witnesses

27. This is another issue that the court has given due consideration. The pleadings before the lower court indicate that plaintiff was one **Gabriel Gikubu Kobia**. He has since died but apparently he had testified in year **2016**. Plaintiffs other witnesses were listed as **Jane Mwakachiu Kobia** and **Millicent Kinya Kobia**. One of the witness has also died while the other is apparently very sick, - **See paragraph 28, 29, 30, 43** and **52** of the Respondent’s Affidavit. The **national values** entrenched in **Article 10 of the constitution** entreats this court to uphold the value of **human dignity, equity, social justice, equality and human rights**. This however cannot be achieved to the fullest in situations where cases are heard when parties and witnesses have passed on.

28. The preamble of the Kenyan constitution provides that;

“We the people of Kenya Recognizing the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law – ADOPT, ENACT and GIVE this constitution to ourselves and to future generations.

29. **Article 159 (1) of the constitution** provides that; “**Judicial Authority is derived from the people and vests in and shall be exercised by the courts.....**”.

30. This implies that the powers donated to the court by the people must be exercised in a manner that upholds the aspirations of the people. It was therefore right for the court to give a hearing date and to stick to that time table.

Presence of witnesses

31. It has been averred by the Respondent in paragraph **46** of his Replying Affidavit that that on **17.1.2019**, the date of hearing, the 1st appellant signaled the 2nd appellant to walk out of the court room during the hearing and as such, the matter proceeded in their absence!. Again there is no rebuttal to this allegation. I consider it a very serious matter for a witness to walk out on his case during a hearing.

32. The first appellant has averred that the court did not consider their predicament. The question is, “**what was this predicament**”? In paragraph **31** of the Replying Affidavit of the Respondent, it is averred that Appellants had expressly informed the court that they would not be inconvenienced if the matter was fixed on any date from **15.11.2018**. This issue is aptly captured by the trial court under **Direction NO. 4** in the ruling of **15.1.2019**.

33. This is a matter that had been in court corridors for five years. I find that the Appellants have not demonstrated to this court the reasons which prevented them from tendering their evidence on **17.1.2019**.

Active Case Management

34. What is evident from the directions given by the trial court on **15.1.2017** and **17.1.2019** is that the magistrate has embraced Active Case Management in order to meet the objectives set out under article **159 of the constitution** and **section 1 A and 1 B of the Civil Procedure Act**. Active Case Management is one of the best practices to combat case backlog and it is anchored on the courts ability to exercise Judicial control over the legal processes with a view to ensuring that the **overriding objective** is achieved.

35. Active Case management enhances processing efficiency, promotes court control of cases, and provides judicial officers with the tools that may be used to dispose off a case efficiently. These techniques reduce delays and case backlogs, and provide information to support the strategic allocation of time and resources - all of which encourage generally better services from courts.

36. Active Case management is also the effort by courts to handle cases in such a manner that they are resolved fairly and as promptly and

economically as is reasonable in the circumstances of the case. The fairness part can be found within the notion of **procedural justice** while the promptness and economics part of case management can be found within the notion of the **efficiency of justice**. Efficiency of justice implies that justice is done at reasonable costs to the parties and the court and within a reasonable time, that is without an abnormal delay that can be attributed to a court. Procedural justice concerns the fairness, consistency and the transparency of the processes by which progress in a case is made.

37. I find that the magistrate has picked up a style of ensuring that there is no obscurity at every step of the trial process. The trial court had set timelines for the process of examination in chief, cross examination and re-examination, each side being allocated a total of 1 hour and 45 minutes which appears reasonable. The court had also set a date a date for the delivery of judgment.

38. A document availed by the applicant on page 13 of their bundle reveals that this is the magistrate's style of case and court management. The document is an order giving timelines on how a certain application was to be heard. I have no doubts that this style of court/ case management ensures there is efficiency and efficacy in the administration of justice. I find no fault in these directions.

Whether the trial magistrate wrongly granted substantive orders that were not prayed for by any parties on 15.1.2019

39. I have perused the ruling of **15.1.2019**. The magistrate recognized that the 1st defendant (read 1st appellant) was in occupation of the suit property. The orders given by the magistrate were as follows:

- (a) **“The 1st defendant not to put possession of the suit property to any 3rd party.**
- (b) **The 1st defendant not to do any major/fundamental development by way of altering whatsoever the suit property.**
- (c) **The 1st defendant not to erect any structure on the suit property**
- (d) **The 1st defendant to keep the suit property in repair without violating order 2.**
- (e) **Court shall have access of the said suit property to check whether the 1st defendant is complying with the orders herein.**
- (f) **To expedite the hearing of this matter and taking into account section 1A and 1B of the Civil Procedure Act and further taking into account order 18 rule 3 of the civil Procedure Act, the court set the following timelines and events.”- See the timelines in point 16 herein.**

40. These orders are clearly meant to preserve the suit property and to maintain status quo. In short the 1st appellant was not to alienate the suit land and he was not to make any alterations. This is a reasonable order in view of the fact that the hearing was already underway with even a known date of Judgment. I find no fault in the said orders.

Whether the prayers sought in the application dated 18.1.2019 can be granted

41. There are no reasonable grounds to allow this application. It is not lost to this court that the matter is pending judgment. I find no reason to interfere with the ongoing case before the trial court.

42. **This application is hereby dismissed with costs to respondent.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 27TH MARCH, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Michael Ngunjiri for respondent

HON. LUCY. N. MBUGUA

ELC JUDGE