



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 68 OF 2002 (O.S.)

JOHN MARETE ANAMPIU & STANLEY KAREMU ANAMPIU (having substituted the original

plaintiff M'ANAMPIU M'

MUKINDIA.....PLAINTIFFS

VERSUS

FRANCIS M' RINGERA M'RIMBERIA.....1ST DEFENDANT

SATNLEY MWENDA BAIKARABA.....2ND DEFENDANT

RULING

1. This Ruling relates to two applications, the one dated 24.9.2018 filed by the plaintiffs and the one dated 10.6.2019 filed by the 2nd defendant. On 16.7.2019, the court gave directions on how the two applications were to be heard as follows;

- 1. “The 2nd defendant to file his reply to the application dated 24.9.2018 within 14 days (that is up to 30.7.2019).**
- 2. The plaintiff to file a replying affidavit to the application dated 10.6.2019 within 14 days (by 30.7.2019).**
- 3. The parties to file their written submissions and serve the same simultaneously by 30.7.2019.**
- 4. Mention on 2.10.2019 for submissions.**
- 5. Any documents filed outside the given timelines shall stand as expunged and the relevant application shall also stand as dismissed with the costs to the opposite party”.**

Application dated 24.9.2018

2. The plaintiff's pray for orders that the firm of John Muthomi advocates be allowed to come on record in lieu of the firm of Carl Peters Mbaabu advocates, that the inhibition Order issued and registered against parcel of land known as Title Number Nyaki/Chugu/316 be lifted and that the Order lifting the inhibition be served upon the District Land Registrar Meru Central District for compliance.

3. The application is supported by the joint affidavit sworn by the plaintiffs who aver that on 24th January 2018, this Court delivered a judgement in their favour for them to be registered as the owners of L.R. No. Nyaki/Chugu/316 by way of adverse possession. That no appeal or review has been preferred by the Defendants in this matter hence this application ought to be allowed to effectuate the judgement.

4. No Replying affidavit was filed by the 2nd defendant in opposition to this application as per directions NO. 1 given on 16.7.2019, thus this application stands as unopposed. I however, add that the issue of change of advocates is spent as Messrs Carl Peters Mbaabu did continue to act for the plaintiffs going by the notice filed on 16.7.2019.

5. Further, the records of the court indicate that Judgment herein was delivered in favour of the plaintiff's way back on 24.1.2018. The orders given way back on 8.5.2002 were as follows;

“That inhibition orders be and are hereby issued prohibiting the registration of any dealings in respect of land parcel no. Nyaki/Chugu/316 untill this suit is heard and determined, (Emphasize added)”.

6. It follows that, the inhibition orders were not to subsist after the determination of the suit, hence the orders sought are merited.

Application dated 10.7.2019

7. In this application, the 2nd Defendant seeks orders that the Court be pleased to review the Judgement/Decree Orders dated 24th January 2018 and set the same aside, that the court do visit Locus quo to determine occupation, and that defendant's case be reopened and he be allowed to adduce his defence/evidence.

8. The 2nd Defendant averred that he has been out of the Country since the start of this suit till 18.5.2019 when he officially came back. That the former counsel informed the court of the same when he said he cannot trace him to adduce evidence. He blamed the lack of communication due to the hostile nature of life in Iraq as a country and pleaded this court to take notoriety of this fact.

9. This application is supported by the grounds set out on the face of the application and in the supporting affidavit of the applicant. He avers that he is an innocent purchaser of the suit premises and some factual and legal evidence were not considered during the trial. He opined that the plaintiffs' claim succeeded because their allegation that they are in occupation of the suit land was not challenged by contrary evidence. The applicant contends that the appeal in the tribunal case was not brought to court and his former advocates did not challenge the aspect of abatement of the suit.

10. This application was opposed by the plaintiffs vide their joint sworn affidavit filed on 29.7.2019. This document met the timelines set by the court as per direction number two of 16.7.2019. They aver that this is an old case and litigation must come to an end. They took issue as to whether the 2nd Defendant was actually in Iraq, stating that the documents attached did not prove this fact and that the former advocates did not also indicate to court that the 2nd Defendant was based in Iraq. The plaintiffs further stated that if the 2nd Defendant was in Iraq, he ought to have deputed a representative to this suit. The plaintiffs also deny that there has been an appeal to the tribunal proceedings i.e. Meru Central L.D.T. Case No. 2 of 1999. They further stated that the 2nd Defendant's counsel aptly represented him during the proceedings including but not limited to cross-examining their witnesses.

11. On the issue of abatement, the plaintiffs averred that Hon Justice. E. Chero no had allowed the 1st Defendant to be substituted by Lydia Kagira on 15.5.2017. That it is also the same date when the court granted the 2nd Defendant leave to file his statements and documents but none were filed.

12. The plaintiffs also state that there was an unreasonable delay in filing the present application spanning a period of 1 ½ years.

13. Parties have since filed their respective submissions both restating the contents of their affidavits. Of particular interest however is the plaintiff's submissions that the firm of Elijah Ogoti & Co. advocates are not properly on record, having not complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules.

14. I find that as per the court's direction of 16.7.2019, direction No.5, any document filed outside the given timelines was to stand as expunged. Direction number 3 was to the effect that parties were to file their submissions simultaneously by 30.7.2019. The 2nd defendant filed his submissions on 24.7.2019 while the plaintiffs filed their submissions on 29.7.2019. These are the submissions the court has considered in the determination herein. I note that the submissions filed on 5.8.2019 were duly withdrawn by the 2nd defendant vide a notice of withdrawal filed on 6.8.2019.

Legal Representation

15. In paragraph 6 of the Judgement dated 24.1.2018, the court stated that; ***"All along, parties have been represented by advocates. The plaintiff was initially represented by the firm of Mwenda Mwanja, Akwalu Associates up to 11.08.15 when the firm of Carl Peters Mbaabu & Co. Advocates took over the case. The Defendants have all along been represented by the firm of Kiogora Arithi & Co. Advocates"***.

16. **Order 9 Rule 9** of the **Civil Procedure Rules** stipulates that an advocate seeking to come on record on behalf of a party should seek leave from the court before representing a party to the suit. On this point, it has been submitted for the plaintiffs that the firm of Elijah Ogoti did not comply with the aforementioned provisions of law. The plaintiffs cited the case of **Jackline Wakesho vs. Aroma Café (2014)** to buttress this point.

17. I have keenly gone through the proceedings of 13.5.2019 whereby, Mr. Kiogora the then advocate for 2nd defendant, Mr. Muthomi who was applying to come on record for the plaintiffs and Mr. Ogoti who wanted to come on record for the 2nd defendant were all in court and they generally agreed that Mr. Kiogora's application to cease acting dated 17.1.2019 be allowed and Mr. Ogoti was to come on record. Even if no consent to that effect was filed, I find that the status of representation of 2nd defendant by M/s Elijah Ogoti advocates falls under order 9 rule 9 (b) as the advocates consented to such representation. The court takes into account that Article 159(2) (d) of the constitution provides that justice shall be administered without undue regard to procedural technicalities. I do not foresee any prejudice occasioned by the firm of Elijah Ogoti & Co. Advocates acting for the Appellants.

18. I find fortress in the case of **Tobias M. Wafubwa v Ben Butali [2017] eKLR** where the Court of Appeal Held that;

"We would go further to add that, provided that where the failure to comply with the rule 9 did not undermine the jurisdiction of the court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then, Article 159 of the Constitution and the overriding principles could be called upon to aid the court to dispense

substantive justice through just, efficient and timely disposal of proceedings....”

19. I therefore conclude that the firm of M/s Elijah Ogoti advocates are properly on record for the 2nd defendant.

Review

20. For a Court to issue an Order of review, it has to be satisfied that the applicant has met the provisions set out in **Order 45** of the **Civil Procedure Rules** where it is provided that;

“Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay”.

21. In this case the applicant relied on the element of discovery and mistake on the record. During the proceedings, the firm of Kiogora Arithi & Co. advocates represented the applicant throughout the trial and even filed submissions on 26.9.2017. Counsel also cross-examined the Plaintiffs during the hearing of the case.

22. Whereas the 2nd Defendant’s advocate stated that he could not trace the 2nd Defendant to come and testify, the record shows that there was no mention that the 2nd Defendant was in Iraq at that particular time. The defendants counsel took the alternative to close the 2nd Defendant’s case.

23. In the case **Nbi HCCC No Utalii Transport Company Limited & 3 Others Vs Nic Bank & Another [2014] Eklr**, it was stated that:

“It is the primary duty of the Plaintiffs to take steps to progress their case since they are the ones who dragged the Defendant to court..... Over one year has lapsed without the Plaintiffs taking any step to progress their case.The Plaintiffs’ inertia runs contrary to the overriding objective of the court stipulated in section 1A, 1B and 3A of the CPA”.

24. This case was filed on **30.4.20002**. Those are 17 years which have gone by! The 2nd defendant entered appearance way back on 7.5.2002, so he has been aware of the existence of this suit for the last 17 years. Indeed, on 8.5.2002, Mr. Kiogora addressed the court as follows; **“We were instructed yesterday...”** What steps did the 2nd defendant take to ensure that the case was defended? He has not explained the steps he undertook to ensure that he gave his advocate proper instructions to proceed with this case. After all there are many steps which can be under taken when a litigant may not be available physically in court. For instance, an application to be heard earlier on in the proceedings can be made, a litigant can also give a power of Attorney and one can even apply to testify via video conferencing. What is clear is that 2nd defendant was able to give his advocate instructions way back on 8.5.2002.

25. This matter having been in court for the last 17 years with the knowledge of the 2nd defendant, I find that the application to reopen the case is hopelessly outside any reasonable limit to have the fresh prosecution of the case. It is also not lost to this court that even the present application was filed one and a half years from the time Judgment was delivered.

26. 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. The applicant has sought to invoke equity, yet himself, he has failed to uphold the same principles of equity.

27. I therefore conclude that the prayer for review is unmerited.

Abatement of the suit against 1st defendant

28. The applicant has averred that there was a mistake apparent on the face of the record as the case against the 1st Defendant had already abated when the suit was heard. However, the records of the court indicate that on 15.5.2017, Hon. Justice. E. Cherono allowed the 1st Defendant to be substituted by Lydia Kagira and the suit was revived pursuant to the consent of the parties through their advocates. The court also took cognizance of this fact in the courts judgement at paragraph 5 and 8 where I stated as *follows*;

“5.1st Defendant also passed on 10/4/2012 and he was substituted by his wife one Lydia Kagira on 15/5/2017.

8. It is noted that on 15/5/2017 the application to substitute the 1st Defendant (Francis) with Lydia Kagira, his wife was allowed”.

29. There is hence no mistake on the record in so far as the issue of abatement is concerned.

Final orders

30. The application dated 24.9.2018 is allowed as drawn.

31. The application dated 10.7.2019 is dismissed with costs to the plaintiff, but M/s Elijah Ogoti advocates are considered to be properly on record for the 2nd defendant.

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

C/A: Kananu

Murithi holding brief for C. Peters for plaintiff/respondent

2nd plaintiff

HON. LUCY. N. MBUGUA

ELC JUDGE