



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC JUDICIAL REVIEW NO. 27 OF 2016

REPUBLIC.....APPLICANT

VERSUS

THE LAND ADJUDICATION OFFICER, TIGANIA EAST (AKAIGA ADJUDICATION SECTION).....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

NDENGWA KAMUURU.....INTERESTED PARTY

JOSEPHAT MBAABU ANAMPIU

STEPHEN NTONGAI ANAMPIU.....EX-PARTE APPLICANTS

JOEL MUTIHGA ANAMPIU

EZEKIEL MUTEMBEI

RULING

1. This Ruling relates to the ex-parte applicants notice of motion dated 3rd December 2018 where he seeks orders to set aside or vacate the Orders made on 19/11/2018 and reinstate the suit for hearing on merit. The application is supported by the grounds set out on the face of the application and in the supporting affidavit of **Mercy Kaume**, advocate for the *ex-parte* applicants.

2. It is averred that the clerk of the advocate took the date in court and diarised it on 21/11/2018 as opposed to 19/11/2018. When the advocate appeared in Court on 21/11/2018 she did not find the matter in the cause list and when she inquired in the registry she was informed that the matter had been dismissed.

3. The advocate for the exparte applicant sought to rely on extracts of her diary for the dates 21/11/2018 and 19/11/2018 in support of the application. I have however perused the supporting affidavit and the same does not contain the said annexures.

Brief History

4. The ex-parte applicants sought leave to file the Judicial Review Motion against the respondents vide application dated 23/09/2016, where the orders sought were; Orders of Certiorari to remove into this Court the proceedings and decision of the objection No. 835 Akaiga Adjudication Section dated 5/8/2016; orders of Prohibition to the effect that the 1st Respondent be debarred from implementing his decision made on 5/8/2016 in regard to objection No. 835 Akaiga Adjudication Section and orders of mandamus compelling the 1st Respondent to return the suit land to its original location, reverse any registration and return the original land to the applicants. **The applicant also prayed that leave so granted was to operate as a stay of proceedings and decision in objection case no. 835 Akaiga adjudication section.**

5. On 3rd November 2016 this honourable court allowed the aforementioned application. The applicant proceeded to file his substantive motion of 23rd November 2016. Thereafter, the exparte went into slumber and took no steps to have the matter prosecuted. This court in the process of following up on dormant matters retrieved this file from the registry on 20.4.2018 and had it listed for mention before the Deputy Registrar on 14.6.2018, when M/s Kaume sought for another date and she undertook to effect service. The matter was eventually set down for hearing on 19/11/2018 before Judge Cheron. This date was given on 9.10.2018 and the Exparte Applicant was represented. On 19/11/2018 none of the parties were present. The court on its own motion dismissed the suit for non-attendance and for want of prosecution.

6. The Orders of this Honourable Court in dismissing the *ex-parte* applicant's suit were was couched in two legal aspects; want of

prosecution and non-attendance.

7. In considering whether or not a suit should be dismissed for want of prosecution the test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay. In **Mwangi S. Kimenyi v Attorney General & another [2014] eKLR** the court restated the acceptable test as follows;

(1) When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties. Invariably, what should matter to the court, is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.

8. As shown from the brief history of the facts of the case the *ex-parte* applicants were granted leave to file judicial review proceedings on 3.11.2016. They obtained leave effectively halting the implementation of the decision of the respondents. It is not lost to this court that the adjudication process in this region has been sluggish because of unending court litigation. Parties who obtain such stay orders should be at the fore front of ensuring that their cases are prosecuted expeditiously. The delay in the prosecution of this matter is unacceptable.

9. The second issue is dismissal due to non-attendance. As stated herein, the supporting affidavit does not provide the advocates extract of the diary for the date 19/11/2018. Given the history of the file, the *ex-parte* applicant ought to have been extremely vigilant to ensure that the case proceeded as scheduled.

10. The upshot of my findings are that the application dated 3rd December 2018 lacks merit and the same is hereby dismissed with no Order as to costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 13TH DAY OF NOVEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Kaume for *exparte* applicant

Exparte applicant

HON. LUCY. N. MBUGUA

ELC JUDGE