



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 38 OF 2018

ETHICS AND ANTI-CORRUPTION COMMISSION.....APPLICANT

VERSUS

PETER MARETEH MUGINGA.....1ST RESPONDENT

WILSON GACHANJA..... 2ND RESPONDENT

AND

STANLEY THIRIMA..... 1ST INTERESTED PARTY

STEPHEN MICHUKI KIUNGA AND

THERESA KIUNGA..... 2ND INTERESTED PARTY

RAJESH VALJI HIRANI..... 3RD INTERESTED PARTY

RULING

1. This matter relates to a Notice of Motion dated 1/11/2018 brought pursuant to **Section 1A and 3A of the Civil Procedure Act and Order 51 Rule 15(a) of the Civil Procedure Rules**. The applicant is seeking an order to set aside the order made on 18/10/2018 for non-attendance or appearance.
2. The grounds in support of the application are set forth in the supporting affidavit of Ruth Kilimo sworn on 1/11/2018. The applicant had filed simultaneously with the plaint the application dated 25th September seeking *inter alia* orders to restrain the 1st respondent from dealing with the Suit Property (Plot No. T183 situated at Milimani area within Meru town) pending the hearing of the suit. The hearing of the application was set for 18/10/2018 but the applicant's motor vehicle developed mechanical problems causing them to arrive in court shortly after the application had been called and dismissed for non-attendance. The dismissal of that application of 25.9.2018 is what triggered the filing of the present application.
3. The 1st respondent opposed this application vide his replying affidavit where he avers that there is no explanation as to why the applicant was not in court when their application was dismissed on 18.10.2018, that the applicant has not come to this court under the relevant provisions of law and that the issues raised by the applicant are not merited.
4. The court gave directions for the application of 1.11.2018 to be heard by way of written submissions. The applicant submitted that the applicant had every intention of proceeding with the hearing of the application but was unable to do so due to the mechanical breakdown of the vehicle. Thereafter, they filed with speed the present application seeking orders to set aside the dismissal order. The applicant has also submitted that this is a matter of public interest as it raises serious issues of irregular and illegal acquisition of public property.
5. The 1st respondent submitted that the mechanical difficulty is a mere statement as the applicant would have found other means to reach court in time. That the applicant has not provided any candid ground on which the setting aside prayer should be granted and that the application has not been brought under the correct provisions of law, that is order 12 rule 10 of the civil procedure rules.
6. Likewise, the 1st interested party has also submitted that the applicant does not have good and justifiable grounds as to why she was absent on the day the earlier application was dismissed. It is also averred that the 1st interested party is ailing hence the delay in the disposal of this suit is affecting him.

7. The 3rd interested party too submitted that no sufficient reasons have been advanced as to why the applicant's counsel was not in court when the application was dismissed.

8. The issue for determination is ***whether to set aside the order made on 18/10/2018 dismissing the application dated 25/9/2018***. In determining this issue, I have considered all the arguments raised herein and the cited authorities.

9. I have taken into account some guiding factors which were well articulated by F. Gikonyo J in the case of **Mwangi S. Kimenyi v Attorney General & another [2014] eKLR** on matters dismissal. There in, the court had stated 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.

2) 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.”

10. The hearing of the application dated 25/9/2018 was set to be heard on 18/10 2018. The 1st respondent who entered appearance and filed his response a day prior sought to have the application dismissed for non-attendance. The applicant who apparently arrived soon after found the court had already dismissed the application. The applicant informed the court of what had happened and were advised to enter into a consent for setting aside of the order or the applicant files a formal application. Counsel for the 1st respondent turned down the request for consent which necessitated this application.

11. In my view there is no evidence of intentional delay for the applicant's counsel did manage to appear in court albeit late. Consequently, the delay which was not intentional does not amount to an abuse of the court process. What's more, the applicant acted speedily in filing the present application 12 days later on 1.11.2018. Further, the respondents and the interested party have not stated how they stand to be prejudiced if the orders sought for are granted.

12. Taking into account the fact that the prosecution of the current application has taken more than one year, that most of the parties have already filed their pleadings and that there is a need to have the suit heard expeditiously as even one of the parties is apparently sick, then I find it expedient to give the following orders;

1) The application dated 1.11.2018 is hereby allowed in terms of the alternative prayer (prayer 3), where by the court directs that there be an order of maintenance of the status quo as at the time before the application dated 25/9/2018 was dismissed pending the hearing and determination of the suit.

2) The application dated 25.9.2018 is marked as SPENT.

3) Costs in the cause.

4) The case to be heard on priority basis.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 11TH DECEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Kiuki for 3rd interested party

Kiogora for 1st defendant

1st respondent/defendant

HON. LUCY. N. MBUGUA

ELC JUDGE