REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CIVIL APPEAL CASE NO 108 OF 2017

FORMERLY MERU HIGH COURT CIVIL APPEAL CASE NO. 7 OF 2009

DESDERIO WILLIS MBAKA……...……....1ST APPELLANT

WILFRED MICHENI NJUE…….…...……..…2ND APPELLANT

JUSTUS MUTHARAKA……..……..…….……..3RD APPELLANT

JAPHET KIRIMO NTHIGAI……..……....4TH APPELLANT

DOROTHY CIANDURU JUSTIN……...……...5TH APPELLANT

SELESIO MWIKAMBA……..…..……...6TH APPELLANT

JEDIDA KAGENDO NJERU……..……7TH APPELLANT

ASHFORD NKARI……..……..……8TH APPELLANT

MICHENI STANLEY……..……..……....9TH APPELLANT

VERSUS

THE PRESBYTERIAN FOUNDATION…….....……1ST RESPONDENT

THE P.C.E.A. KAMBANDI PARISH …….…….....……2ND RESPONDENT

SIMON KIEMA……..…....……..3RD RESPONDENT

(Being an appeal from the Judgment/Decree of P. NGARE GESORA (SRM) delivered on 21.01.2009 at Chuka in SRMCC No. 32 of 2007)

RULING

1. When the matter came for directions on 8.11.2017, Mr. Muriithi told the court that he had not filed a paginated record of appeal which would contain the decree that had spawned this appeal and he was granted 15 days.

2. On 5.12.2017, Mr. Muriithi told the court that he was unable to file his supplementary record of appeal as he had failed to access the lower court's file. The court ordered that Mr. Muriithi be given access to the lower court's file and he was granted 14 days to file his supplementary record of appeal. Parties were ordered to come to court for directions on 24.1.2018.

3. On 24.1.2018, Mr. Desiderio Wilis Mbaka, the 1st Appellant told the court that Mr. Muriithi's vehicle had broken down but he had assured him that he would be in court at 10.00am.

4. At 10.30am, Mr. Otieno J, representing the respondents complained that the appellant's advocate had disobeyed the court orders issued on 5th December, 2017. As a result of the appellants' inaction, he lamented that the respondents are stuck. He told the court that he and his clients had come to court more than 10 times. He recounted that during all those times the court had graciously accommodated the appellants. He, however, decried that the appellants failed to reciprocate the court's generous indulgence and had failed to heed to the orders of the

court. In the meantime, he complained, the appellants had continued to engage the respondents to appear in court in obedience to all orders the court issued.

5. Mr. Otieno debunked the claim that the petitioners were unable to access the lower court's file. He pointed out to court that the file was in court and was attached to the file for this appeal. He proffered that the file had always been available and was before the court. I confirmed that the file was before the court.

6. Mr. Otieno decried that the appellants had done nothing to extract the decree even though the Memorandum of Appeal is dated 29th January, 2009, almost ten years ago. He vehemently complained that the appellants had taken no concrete steps to have the appeal prosecuted.

7. Mr. Otieno submitted that court orders cannot be issued in futility. He urged the court to decline further orders to adjourn this appeal. He urged the court to dismiss the appeal in the interest of justice.

8. I note that this appeal was admitted by the Hon. Lady Justice Kassango on 30th September, 2009. It is quite clear that over the years the appellants never set down the appeal for hearing. Indeed had the procedure contemplated by Order 42 Rule 35 (1) and (2) of the Civil Procedure Rules been followed, this appeal would have been dismissed many years ago.

9. On 12th May, 2016, the Hon. Justice Mabeya, J, noted that the impugned decree was not part of the record of appeal. However more than 1 ½ years later that decree has not been availed. I agree with the respondent's advocate that the file for the lower court's proceedings was always available. I opine that it was indolence on the part of the appellants, meant to further delay the hearing and determination of this appeal, that was the cause of the non-production of the apposite decree. The absence of the decree, had the effect of delaying the hearing and determination of this suit further.

10. Although the appellant's advocate filed written submissions on 8th November, 2017, he nevertheless, on 5th December, 2017, asked the court to give him time to file a supplementary record of appeal which would include the apposite decree. He was granted 14 days to do so. His explanation for not having filed the decree was that he could not access the lower court's file. I find this explanation veritably mendacious. This is because the lower court's file was attached to the file for this appeal even before this appeal was admitted to hearing. It is clear to me that the shenanigans employed by the appellants were geared towards procrastinating the hearing and determination of this suit and so far, they have succeeded in delaying the hearing and determination of the suit for nearly ten years.

11. There is no evidence that the submissions filed by the appellants on 8th November, 2017 were served upon the respondent's advocate. Even if they were served, the respondents would have done nothing as the appellants were supposed to file a supplementary record of appeal which would have occasioned the filing of other submissions.

12. On **5th December, 2017**, the 9th Appellant was removed from the appeal. On **26th September, 2017**, Mr. Muriithi, the appellants' advocate informed the court that the 3rd appellant had died and that his family seemed not to be interested in the suit. It was not made clear when he died and if or if not the appeal had abated against him.

13. The court gave the following orders on **5th December, 2017**:

a) Advocate Muriithi to be given access to the lower court's file to allow him to extract a decree.

b) Mr. Muriithi, the appellants' advocate to file a supplementary record of appeal and to file and exchange fresh submissions within 14 days of today.

c) The respondents to file and exchange their written submissions within 14 days after receipt of the appellants' submissions.

d) Directions on 24.1.2018 when date for judgment will be given.

14. As a result of the appellant's failure to file a supplementary record and to file fresh submissions within the stipulated time, the respondents were unable to file theirs. As a result, this court could not give a date for delivery of the apposite judgment.

15. Among the principles contained in Section 1A of the Civil Procedure Act is the facilitation of just and expeditious resolution of Civil disputes. This principle is enunciated, nay plagiarized, by section 3(1) of the Environment and Land Court Act. This principle is enshrined in Article 159 (2) (b) of the Constitution which laconically states:

"Justice shall not be delayed." Article 159(2) (e) has a terse edict: " The purpose and principles of this constitution shall be protected and promoted."

16. HENCE this court has a constitutional duty to protect and promote the principle that justice shall not be delayed. By whatever standard one may employ, this appeal has been inordinately and inexcusably delayed for close to ten years. The suit in the lower court was filed in 2007. The total delay in the hearing and determination of this dispute has taken 11 years or thereabout**.**

17. Upon consideration of all facts and circumstances surrounding this case, I find that the appellants have purposively and inordinately delayed the hearing and determination of this appeal. In the interest of justice and to promote the constitutional and statutory principles already enunciated upon, I find that this suit merits dismissal.

18. Before final orders are issued I find it pertinent to address the issue of costs. Generally costs follow the event. If I take this route costs would be awarded to the respondents to be borne by the **1st, 2nd, 4th, 5th, 6th, 7th** and **8th appellants.** This is because the **3rd Appellant** is deceased and the issues of the appeal concerning him may have abated. Regarding the 9th appellant, he was removed from the suit on **5th December, 2017.**

19. I note that in their plaint, the respondents who were plaintiffs in Chuka SRM's Civil, suit No. 32 of 2007 at paragraph 6, had averred as follows:

> ***"In or about 1975, the plaintiffs constructed a health centre on part of land parcel NO. KARINGANI/MUIRU/975 assisted by the P.C.E.A. Chogoria Mission Hospital which supplied medicine and staff to supplement the plaintiff's inputs. The plaintiffs over and above being owners of the health centre and the suit land remained managers and coordinators of the health facility."***

20. The appellants' Memorandum of Appeal which is dated **29th January, 2009** states as follows:

MEMORANDUM OF APPEAL

The appellants herein being aggrieved by the decree of the Senior Resident Magistrate in Chuka **SRMCC No. 32 of 2007 dated 21.1.2009** do hereby appeal against the whole of the entire decree and hereby set down their grounds of Appeal:

1. The learned trial magistrate erred in law and in fact in failing to hold that the suit filed in the lower court was incompetent and fatally defective.

2. The learned trial magistrate erred in law and in fact in failing to hold that the factual and legal procedures which are necessary to relinquish trusteeship of the suit land from the Chuka Municipal Council to the 1st respondent were defective and therefore unenforceable.

3. The learned trial magistrate erred in law and in fact in misdirecting himself that there was no application by the appellants to relinquish the trusteeship of the suit land to themselves or to third parties while the evidence of PW9 clearly showed that there was such an application presented and subsequently granted.

4. That the learned trial magistrate misdirected himself in failing to find and hold that the ownership of the health centre constructed on the suit land could not be determined independently of the ownership of the suit land therefore disregarding the ***maxim quic quid plantatur solo solo cedit***.

5. The learned trial magistrate erred in law and in fact in failing to address himself on the admission of PW9 that the council held the suit land in trust for the public and that for the council to relinquish trusteeship, she would require authority from the public for whom the suit land was held in trust.

6. The learned trial magistrate erred in law and in fact in disregarding the evidence of the appellants' witnesses thereby arriving at a wrong conclusion by learning heavily on the evidence of the respondents witnesses.

7. The learned trial magistrate erred in law and in fact in failing to hold that the verifying affidavit in support of the plaint had been sworn by one party and was not therefore sufficient to sustain the suit before the trial court.

8. The learned trial magistrate erred in law and in fact in relying on irregular and incomplete minutes of the Municipal Council of Chuka to award the suit land to the respondents ignoring the fact that the same municipal council had subsequently come up with proper resolutions relinquishing trusteeship of the suit land to the Ministry of health.

Reasons wherefore the Appellants pray this honourable court to set aside the judgment/decree of the trial magistrate and in its place enter judgment for the appellants dismissing the suit in the trial court with costs.

21. It is pellucid to me that a careful consideration of the plaint, the Memorandum of Appeal and the apposite proceedings conducted in the lower court, evinces a strong veneer of the issues raised being of a Public Interest Litigation nature. In the circumstances, I am persuaded to order that the parties do bear their own costs both in the lower court and in this appeal.

22. In the circumstances, the following orders are issued:

1. This appeal is dismissed.

2. Parties shall bear their own costs.

23. It is so ordered

Delivered in open court at Chuka this **28th day of February, 2018** in the presence of:

CA: Ndegwa

Otieno J for the Respondents

I.C. Mugo h/b Muriithi for the Appellants

0.P.M. NJOROGE

JUDGE