



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELCA 10 OF 2015

JOSPHAT MWANIKI MWANGI.....APPELLANT/APPLICANT

VERSUS

ZACHARIA MWANIKI MWANGI.....1ST RESPONDENT

JOSEPH KINYANJUI MWANGI.....2ND RESPONDENT

RULING

1. This ruling is in respect of the motions dated **22nd April, 2016** and **6th June, 2016** respectively.
2. The motion dated **22nd April, 2016** seeks to, *inter alia*, enlarge the time within which the applicant, **Josphat Mwaniki Mwangi**, ought to have complied with the order issued on 22nd September, 2015.
3. The order required the applicant to forward to this court the appeal allegedly pending at the defunct Provincial Appeals Tribunal within 14 days of the date of delivery of the ruling (22nd September, 2015).
4. The application is premised on the ground that owing to inadvertence on the part of the applicant's advocate, the applicant was unable to comply with the order.
5. Arguing that unless the orders sought are granted he will suffer irreparable injury, the applicant urges the court to, in the interest of justice, allow the application.
6. The application is opposed on the ground that the applicant has not been diligent in all applications he filed in this matter. Terming the application an abuse of the process of the court, the respondent states that all parties were informed of the date of delivery of the ruling hereto. The application is also said to have been overtaken by events (execution has already been effected and property suit property transferred to a new owner).

Analysis and determination

7. In the ruling which is the subject matter of the application dated **22nd April, 2016** this court expressed doubt as to existence of a valid appeal against the award read in favour of the respondents. Nevertheless, it gave the appellant the benefit of doubt and ordered him to forward the appeal allegedly pending before the Defunct Provincial Land Disputes Appeals Tribunal within 14 days of delivery of the ruling to enable it make further directions.
8. In that ruling, the court was categorical that if the appellant failed to forward the appeal, the

application that was the subject matter of the order would at the expiry of the time given be automatically dismissed with costs to the respondents.

9. The time given by the court lapsed on or about 6th October, 2015 after the applicant failed to comply with the said order of the court.

10. As pointed herein above, the effect of the lapse of the time given by the court was to render the application that was the subject matter of that order dismissed with costs to the respondents.

11. Since the lapse of time had the effect of rendering the application on which the order hereto was premised dismissed, and there been no prayer to set aside the order dismissing the application, I hold the view that the current application is bad in law for want of substratum and/or for being premised on an application that was dismissed without first setting aside the order for dismissal or review of those orders.

12. On the reason given for failure to comply with the order of the court; that the ruling delivered on 17th September, 2015 did not come to the attention of the applicant until 7th April, 2016, I note from the court record that the ruling was not delivered on 17th September, 2015 as scheduled. A notice for delivery of the ruling was issued thereafter that the ruling would be delivered on 22nd September, 2016. From the court record, this notice was received and signed for by one Monicah from the firm of Nderi & Kiingati Advocates on 21st September, 2016. It is therefore not true as alleged by counsel for the applicant, that his client and his firm were not notified of the ruling date for the application.

13. Even assuming that parties were not notified of the date for delivery of the ruling, owing to the delay in presentation of the application for enlargement of time, the failure to first set aside the order dismissing the application on which the order was premised and failure to demonstrate the existence of the Appeal yet the court had expressed doubt concerning existence of the appeal; I find the applicant's conduct not to be the conduct of a diligent litigant. Consequently, I find the application to be without merit and dismiss it with costs to the respondent.

The motion dated 6th June, 2016

14. The motion dated 6th June, 2016 seeks to, *inter alia*, enjoin Kirathi Mwangi Mwaniki, to the appeal and to restrict dealings with the suit properties pending hearing and determination of the appeal. The applicant also seeks cancellation of all the entries made during the pendency of this application.

15. The application is premised on the grounds that this court has recognised the pendency of the appeal herein; that the respondents are unlawfully interfering with the suit property and that there is a danger of the appeal being rendered nugatory.

16. The application is undefended.

Analysis and determination

17. This application is related to the application dated 13th April, 2015 in that the orders sought therein are affected by the orders issued in that application.

18. A reading of the ruling in that application (application dated 13th April, 2015) reveals that the temporary orders issued pursuant to that application lapsed at the expiry of the 14 days within which the applicant was to forward the appeal to this court. See paragraph 18 of the said ruling where the court stated:-

“18. That being the case, like the lower court, I entertain doubt whether there exists a legally sustainable appeal on which the orders sought can hinge. Be that as it may, noting that the fourth prayer is for direction on the alleged existing appeal, I direct the appellant to, within fourteen (14) days following delivery of this ruling to forward the appeal allegedly pending

before the defunct Provincial Appeals Tribunal to this Court for further directions, failing which the application herein shall automatically stand dismissed with costs to the respondents.

19. In the meantime, the existing orders are extended until then.”

19. It is clear from the foregoing cited portions of the ruling, that the temporary order of stay of execution of the decree issued in favour of the respondent lapsed at the expiry of the 14 days given to the applicant to forward the appeal.

20. As pointed out in the application for enlargement of time, there being no prayer for setting aside or review of the orders dismissing the applicant’s application for stay of execution; the application is bad in law for want of substratum.

21. In view of the foregoing, I find it to be lacking in merit and dismiss it with no orders as to costs as the application was not defended.

Orders accordingly.

Dated, signed and delivered at Nyeri this 28th day of July, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Nderi for the appellant/applicant

Mr. Gacheru h/b for mr. Wamahiu for the respondent

Court assistant - Lydia