



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO.20 OF 2009

IN THE MATTER OF: SECTION 84 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION 70 AND 75 OF THE CONSTITUTION OF KENYA

BETWEEN

MALINDI ESTATE LIMITED.....PETITIONER

AND

- 1. THE ATTORNEY GENERAL**
- 2. THE COMMISSIONER OF LANDS**
- 3. THE PRINCIPAL REGISTRAR OF TILES**
- 4. MUNICIPAL COUNCIL OF MALINDI**
- 5. TWALIB OMAR NAJI }**

MANSUR NAJI SAID } sued as the administrators of

ABDALLA NAJI SAID } the estate of Omar Naji Said (Deceased)

MOHAMED SALIM BANAMANA}

6. FATIMA MOHAMED NUREIN.....RESPONDENTS

RULING

1. The Application by the Petitioner is dated 13th March 2015 seeking for the following order:

That the Petition dated 14th December 2009 and all consequential Orders therein be reinstated.

2. The Application is premised on the grounds that the Petition was listed for hearing on 18th February 2015 and was dismissed owing to non-attendance of the Petitioner's main witness; that the Petitioner's main witness is an 85 year old octogenarian with health issues who at the time of hearing had sought for medical attention abroad and that the Petition is not frivolous.
3. The Application is supported by the Affidavit of M.V. Chhaya, the Petitioner's Managing Director.
4. In opposing the Application, the 5th Respondent, Abdalla Naji Said, deponed that the delay in prosecuting the Petition was on account of the Petitioner who was indolent; that in a company, there is no reference for a star witness and that any director or even a company secretary can give evidence on behalf of a company.
5. It is the Respondent's deposition that the court gave its directions on the matter that the hearing dates for 18th and 19th February, 2015 shall be the last adjournment and that the Petitioner has been enjoying conservatory orders.
6. The 4th Respondent filed its Grounds of Opposition and averred that no reasons have been given to warrant the court to exercise its discretion in favour of the Petitioner.
7. In his submissions, the Petitioner's counsel informed the court that his client was out of the country for treatment when the matter came up for hearing; that he did a letter dated 15th February 2015 informing his colleagues about the absence of his client and that Article 50 of the Constitution emphasizes the importance of the right to a fair hearing.
8. The 6th Respondent's advocate submitted that the Petitioner is a company with more than one director; that the Petitioner had been granted the last adjournment and the matter had to proceed on 18th and 19th February 2015 and that the letter that was authored by the Petitioner's advocate did not have an attachment to show that the Petitioner's witness had travelled to India for treatment.
9. Counsel submitted that procedural laws are meant to facilitate the rights of parties; that parties are bound to comply with the Civil Procedure Rules and that if a party cannot pursue his constitutional rights with diligence, he is bound to lose those rights.
10. Although this Petition was filed in 2009, it was not until 28th July 2014 that this court directed, with the consent of all the parties, that the Petition proceeds by way of viva voce evidence. Indeed, the Petitioner's Application dated 14th December 2009 for conservatory orders was allowed by consent on that date. The court then fixed the Petition for hearing on 16th October 2014.
11. On 16th October 2014, the Petition did not proceed because the Petitioner's counsel was attending to his sick wife. The matter was adjourned to 18th and 19th February 2015.
12. On 18th February, 2015, the Petitioner's counsel informed the court that the Petitioner's main witness was in India undergoing treatment. The Application for adjournment was opposed by the Respondents' advocates.
13. After hearing the advocates, this court declined to adjourn the matter because there was no evidence to show that the Petitioner's witness was undergoing treatment in India. The court proceeded to dismiss the Petition for want of prosecution with costs.
14. The Petitioner has annexed on his Affidavit in support of the Application to set aside the order dismissing the Petition a copy of a letter dated 29th January 2015 from Mody Hospital.
15. According to the letter, Mr. Chhaya, aged 85 years, was examined for severe deafness and was advised to get a hearing aid.
16. The evidence before me shows that Mr. Chhaya was out of the Country on 29th January, 2015. It is not clear to this court whether Mr. Chhaya was back in the country on 18th February 2015 when the matter came up for hearing.
17. Considering that Mr. Chhaya was in India in January, 2015 seeking for medical attention, and in view of the long outstanding issue of ownership of the suit property, I shall grant to the Petitioner an opportunity to prosecute its Petition to enable the court arrive at a just decision.
18. For the purpose of expediting the hearing of the Petition, I direct the Petitioner to fix this Petition for hearing within 120 days from today, excluding the days the court shall be on vacation and if not, the Petition shall stand dismissed with costs.
19. In the circumstances, I allow the Application dated 13th May, 2015 on terms that I have

enumerated in the preceding paragraph. Each party shall bear its/his own costs.

Dated and delivered in Malindi this **23rd** day of **October** 2015.

O. A. Angote

Judge