



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OUKO, SICHALE & KANTAI J.J.A)

CIVIL APPEAL NO. 4 OF 2017

BETWEEN

JOSPHAT MWANIKI MWANGI.....APPELLANT

AND

ZACHARIA MWANIKI MWANGI.....1<sup>ST</sup> RESPONDENT

JOSEPH KINYANJUI MWANGI.....2<sup>ND</sup> RESPONDENT

KIRATHI MWANGI MWANI.....3<sup>RD</sup> RESPONDENT

*(Being an appeal from the Ruling and order of the High Court of Kenya*

*at Nyeri (Waithaka, J.) dated 28<sup>th</sup> July, 2016*

in E.L.C.A. No. 10 of 2016

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JUDGMENT OF THE COURT

The undisputed facts of this appeal are that **ZACHARIA MWANIKI MWANGI** and **JOSEPH KINYANJUI MWANGI** the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively were the claimants in Kieni East Land Disputes Tribunal (the Tribunal) Claim No. 2 of 2010. The appellant herein, **JOSPHAT MWANIKI MWANGI**, was named as the respondent.

It is also not in dispute that the Tribunal found in favour of the respondents by an award delivered on 14<sup>th</sup> June, 2010. On 10<sup>th</sup> August 2010 the award was adopted as the judgment of the Court vide Nyeri CMCC No. 30 of 2010. The appellant was aggrieved by the award and obtained an order of stay on 23<sup>rd</sup> November, 2010 pending an appeal with the then Provincial Land Disputes Appeals Committee (now defunct) (hereinafter the Appeals Committee) The stay orders were set aside by the trial magistrate (Aringo Esq.) following an application by the respondents vide a ruling dated 20<sup>th</sup> March, 2015. It would appear that thereafter the appellant filed a memorandum of appeal dated 2<sup>nd</sup> April, 2015 and an application dated 13<sup>th</sup> April, 2015. In the motion, he sought the following:

- “1. The application herein be certified urgent and heard ex-parte in the first instance notwithstanding the Easter Vacation.
2. There be a temporary order of stay of execution of the decree (sic) in Award 30/2010 Nyeri or alternative a preservation order in respect of title Nyeri/Waraza/36 pending the hearing of the application.
3. There be (sic) orders preserving the status quo regarding Nyeri Waraza/36 pending the hearing and determination of the appeal herein an appeal subsisting in Central Province Appeal Committee 4/2010.
4. There be orders/directions regarding the appellant’s appeal in Central Province Appeals Committee No. 4 of 2010 filed under the Land Disputes Tribunal Act.

On 22<sup>nd</sup> September, 2015 **Waithaka, J.** granted the appellant’s application for stay subject to the appellant providing evidence that there

existed an appeal before the Appeals Committee. In granting the stay, the court directed that the said evidence be availed within 14 days failing which the stay order was to be vacated. Thereafter the matter took a different turn as the appellant contends that they were not aware of the orders made on 22<sup>nd</sup> September, 2015. On 22<sup>nd</sup> April, 2016 the appellant filed an application seeking an order for enlargement of time to enable him comply with the order of the court to avail evidence of the existence of an appeal at the Appeals Committee. The appellant also filed an application dated 6<sup>th</sup> June, 2016 seeking to enjoin the 3<sup>rd</sup> respondent as a party to the appeal. He also sought orders of restriction against new land titles issued pursuant to the execution of the decree. The two applications were heard together and dismissed vide a ruling delivered on 28<sup>th</sup> July, 2016. In her ruling, **Waithaka, J.** rendered herself as follows:

**“Since the lapse of time had the effect of rendering the application on which the order hereto was premised dismissed, and there being 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.**

**On the reason given for failure to comply with the order of the court; that the ruling delivered on 17<sup>th</sup> September, 2015 did not come to the attention of the applicant until 7<sup>th</sup> April, 2016, I note from the court record that the ruling was not delivered on 17<sup>th</sup> September, 2015 as scheduled. A notice for delivery of the ruling was issued thereafter that the ruling would be delivered on 22<sup>nd</sup> September, 2016. From the court record, this notice was received and signed for by one Monicah from the firm of Nderi & Kiingati Advocates on 21<sup>st</sup> 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.”**

The learned judge also dismissed the application dated 6<sup>th</sup> June, 2016 seeking to enjoin Kirathi Mwangi Mwani and to restrict dealings on the suit property as well as cancel of all entries made on the title. The appellant was aggrieved by the ruling and the appeal before us.

In a memorandum of appeal dated 27<sup>th</sup> January, 2017 the appellant listed 4 grounds of appeal which all hinge on the court failing to act fairly and in delivering a ruling that was not in accord with the law. In his written and oral submissions, the appellant reiterated that his application was for enlargement of time to enable him comply with the court orders issued on 22<sup>nd</sup> September, 2015. Further, that the appellant had failed to comply with the orders of the court as it was not aware of those orders until late in the day. He faulted the judge for finding that notice for the delivery of the ruling made on 22<sup>nd</sup> September, 2015 had been served upon **“Monica who worked for the appellants firm of Advocates”** which issue according to counsel was of no material substance as the core issue was that the appellant was unable to comply with the court orders which he was not aware of and all he was seeking was extension of time to enable him comply.

On their part, the respondents contended that the appellant having obtained an order of stay of the Award adopted by the court following an application made on 23<sup>rd</sup> January, 2010, took no action until the respondent moved the court to set aside the stay which the court in a ruling dated 20<sup>th</sup> March, 2015 set aside. This provoked the appellant to file an application dated 13<sup>th</sup> April, 2015 which was granted on 22<sup>nd</sup> September, 2015 on condition that the appellant would within 14 days furnish evidence that there was in existence an appeal before the Appeals Committee. As the evidence was not forthcoming the application on which the order was premised stood dismissed. According to counsel, no reasonable explanation was given for noncompliance with the orders of 22<sup>nd</sup> September, 2015. In conclusion it was counsel’s contention that the decree in Nyeri Chief Magistrate’s Court Award Case No. 30 of 2010 has been executed, hence the motion is overtaken by events.

We have anxiously considered the record, the rival written and oral submissions of the parties herein. The appellant is aggrieved by the fact that Waithaka, J. did not grant his application for enlargement of time to enable him comply with the court’s orders of 22<sup>nd</sup> September, 2015.

In our view, this appeal turns on whether there exists a substratum to warrant the grant of the orders sought. We say this because on 22<sup>nd</sup> September, 2015, Waithaka, J. ordered.

**“I direct the appellant to within fourteen (14) days following the 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 respondent.”**

The effect of the above order is that the application dated 13<sup>th</sup> April, 2015 stood dismissed on expiry of 14 days with effect from 22<sup>nd</sup> September, 2015.

In the motion of 22<sup>nd</sup> April, 2016 (which was determined with the motion of 6<sup>th</sup> June, 2016) the appellant sought, inter alia that:-

**“The Court be pleased to extend the time within which to comply with the order issued on 22<sup>nd</sup> September, 2015 to forward to this court the appeal lodged at the defunct Provincial Appeals Tribunal”.**

As it were, the motion of 13<sup>th</sup> April, 2015 stood dismissed 14 days from 22<sup>nd</sup> September, 2015 the date of the ruling. There has been no application to set aside the dismissal. For the appellant to seek to have enlargement of time in a motion which is no longer in existence, is superfluous.

We bear in mind that in declining to grant the appellant’s application, the learned judge was exercising judicial discretion, with which we can only interfere if satisfied that the judge misdirected himself materially and as a result arrived at a wrong decision, or that the judge was plainly wrong in the exercise of his discretion. See **Mbogo & another vs. Shah [1968] EA 93**

We are satisfied that before dismissing the application, the Judge considered the fact that the appellant squandered the time given to him to prove that there was a pending appeal in the defunct Provincial Appeals Tribunal; that the time allowed for this having lapsed the application stood dismissed; that without an application to revive the dismissed application, no orders for extension of time was available; and finally the appellant's explanation for not complying with the orders was not plausible. We cannot fault the learned Judge's exercise of discretion.

It is in view of the above that we find no merit in this appeal. It is dismissed with costs.

**Dated and delivered at Nyeri this 6<sup>th</sup> day of May, 2018.**

**W. OUKO**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original*

**DEPUTY REGISTRAR**