Brenchly (Appealing as the Legal Representative of the Estate David Lee Brenchley – Deceased) v Imathiu (Environment and Land Appeal E076 of 2022) [2024] KEELC 7236 (KLR) (23 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7236 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E076 OF 2022

CK NZILI, J

OCTOBER 23, 2024

BETWEEN

SUSAN MWARI BRENCHLY ..... APPELLANT

APPEALING AS THE LEGAL REPRESENTATIVE OF THE ESTATE DAVID LEE BRENCHLEY – DECEASED

AND

PETER KIRIMA IMATHIU ..... RESPONDENT

RULING

1. On 16.11.2023, the appeal before the court was admitted for hearing under Section 79 C of the *Civil Procedure Act*. Directions were also issued that the record of appeal be filed within 60 days from the date thereof and that certified copies of the proceedings be supplied to the parties upon payment of the requisite fees. A mention date was given for 22.1.2024. Communication to the law firms through emails was sent on 24.11.2023 at 15.27 hours. The emails used were calpetersmbaabuadvocates@gmail.com and infor@albertkamunde.com.

2. On 4.12.2023, the law firm of Kinoti & Kibe Advocates filed a notice of motion dated 29.11.2023 seeking a temporary injunction, following a notice of change of advocates filed on 30.11.2023 to come on record for the appellants. It is not clear if the same was served upon the former advocates on record for the appellant. The application went before the Presiding Judge of the Environment and Land Court. who directed that the same be served for inter-partes hearing on 14.12.2023 before this court. The court issued directions on the way forward and listed the matter for mention on 18.1.2024, to take to a ruling date.

3. On the next mention, as earlier directed in the email sent on 23.1.2024, Miss Gedion appeared for the respondent and told the court that the record of appeal had not been filed and served. Learned Counsel

prayed for the appeal to be struck out. The court struck out the appeal with costs for non-compliance with the directions issued on 16.11.2023.

4. When the matter came up for the ruling on 20.3.2024, the court read the ruling and proceeded to mark the file as closed.

5. As to the written submissions in the former application, the directions for 14.12.2023 were that the replying affidavit be filed within seven days and the written submissions by 18.1.2024. Whereas the applicant appears to have sent an email attaching the written submissions, it is not clear if payments of the same were made and a court-stamped copy availed to the court.

6. The court takes judicial notice that it went online after 1.3.2024, in receiving online documents through the Case Tracking System. Before the said date, everything was being filed manually. This is the background of this file.

7. In the application dated 26.7.2024, the court was asked to review or set aside its ruling dismissing or striking out the appeal; dismiss the notice of motion dated 29.11.2023; deem the incomplete record of appeal filed on 20.3.2024 as duly filed and grant leave to file a supplementary record of appeal. The reasons are contained on the face of the application and in the affidavit of Kibe Muigai advocate, sworn on 26.7.2024.

8. From the face of the grounds and the affidavit, it is apparent that the applicant did not take time to peruse the court file and see the chronology of events mentioned above. A law firm replacing a former law firm must appraise itself on the status of the file and any pending court directions.

9. The law firm presently appearing for the applicant inherited the file and is deemed to have known what was pending for immediate action when it came on record on 4.12.2023. Directions were made on 16.11.2023 and the mention for 23.1.2024 were the immediate business. A party can not merely say that it concentrated on an application for interim orders at the expense of the substratum of the file, the record of appeal. The directions issued on 16.11.2023 have not been set aside, varied, or sought for the time to comply be extended.

10. Order 45 of the Civil Procedure Rules, as read together with Section 80 of the *Civil Procedure Act*, requires that the application for review be based on three paramount grounds: new and vital material that was not available at the time the order or decree was made, that could not be procured through use of due diligence, error apparent on the face of the record, or for any other sufficient reason. The application must also be made without unreasonable delay.

11. Between 23.1.2024 and 28.7.2024, the inordinate delay of close to six months is not explained. Secondly, the error or mistake apparent on the face of the record, is not glaring and visible on the face of the record. If anything, it is the applicant who was not keen, vigilant, or diligent enough; otherwise, she would have known the directions of the court, timelines given and the mentioned date to confirm compliance. The applicant was not aware of any of three, yet communication had been made by the court registry or court assistant on 24.11.2023. Similarly, had the appellant been keen, she would have known on 14.12.2023 and 18.1.2024, that there was another mention on 23.1.2024.

12. Again, had the applicant been keen she would equally have known why the court was marking the file closed on 20.3.2024. Between 20.3.2024 and 31.7.2024, the applicant had not taken any step, if at all, there had been the filing of a record of appeal on 20.3.2024.

13. One also wonders how the applicant was filing the record of appeal on 20.3.2023, if she was not aware of the earlier orders on 16.11.2024. Something must have prompted the applicant to act in the way

she did on 20.3.2024, which was almost two months after the appeal had been struck out for non-compliance.

14. Learned counsel has said that the record of appeal could also not be filed since there was no decree. The lower court record shows that the decree was signed on 19.12.2022 and was requested for issuance by the former lawyers through a letter dated 9.12.2022. It was collected by Brenda Maitethia on 19.12.2022. The lower court file was forwarded to this court with all three sets of the proceedings, judgment and decree duly certified on 12.10.2023, following a calling letter dated 4.4.2023 by the Deputy Registrar. So, to blame the court registry due to the alleged pressure of work inaccessibility of the proceedings, judgment and decree mistaken belief that there were no written submissions no is not supported by any tangible evidence.

15. In an attempt to justify compliance, learned counsel Mr. Kibe Muigai has sworn that there was compliance. There is no evidence that a follow-up was made on 18.1.2024, to cause the written submissions dated 17.1.2024 to be paid for, court stamped and be filed in the court file. There are no receipt payments for the same dated 18.1.2024.

16. That notwithstanding, the applicant urges the court to find that an incomplete record of appeal was filed on 20.3.2024, in an attempt to comply with the directives of the court. Learned counsel for the applicant avers on oath that the respondent might sell, charge, or lease the suit property. The applicant insists that had the court considered the written submissions; it would have made a finding that the temporary injunction was merited.

17. Learned counsel still insists that a lawyer is not precluded from swearing affidavits in the course of his duties as per Habiba Ali Mursal & others vs Mariam Noor Abdi (2021) eKLR and Rule 9 of the Advocate's Practice Rules.

18. On the part of the respondent, he has not discounted the apprehension by the applicant on the likelihood of the subject matter dissipating during the pendency of the appeal.

19. It has not been averred that the apprehension by the applicant is far-fetched, an impossibility and or unreal.

20. Learned counsel for the respondent conceded that her client was not in physical occupation, since she lives in the United States of America and only farm workers were in occupation. One of the reasons the court found that the application was unmeritorious is that, there was no pending appeal likely to be rendered nugatory.

21. Learned counsel for the applicant, in his oral submissions on 29.9.2024, expressed his profound regret for the circumstances leading to the striking out of the appeal. He admitted that the directions given on 16.11.2023 came when his law firm was not on record, and due to transitional issues, there was an error or miscommunication, such that his client gave preference to the application for a temporary injunction, only for the learned counsel to discover that there were existing court directives, which had not been complied with, until the late compliance on 20.3.2024, which was equally marred by technological difficulties.

22. Learned counsel has submitted that there will be no prejudice if the application for reinstatement and the preservation of the subject matter is allowed; otherwise, any prejudice to the opposite party can be dealt with by way of throw-away costs, which fall under the discretion of the court.

23. Learned counsel has urged the court to rely upon Sections 1A, 1B & 3A of the *Civil Procedure Act*, Articles 50 (1) and 159 (2) of *the constitution*, Micro and Small Enterprises Association of Kenya Mombasa Branch vs County Government of Mombasa (2014) eKLR, Section 9 (2) *Environment and*

Land Court Act, Section 80 of the Civil Procedure Rules, Order 45 Rule 1 of the Civil Procedure Rules, Wangechi Kimita vs Wakibiru Mutahi (1985) eKLR, Registered Trustees of Archdioces of Dares Salaam vs The Chairman Bunju Village Government and others, C.M.C. Holdings Ltd vs Nzioki (2004) 1 KLR 173, Paul Gitonga Wayau vs Gathuthi Tea Factory Co. Ltd and others (2016) eKLR and Mbuthai vs Jimba Credit Finance Corporation Ltd (1988) K.L.R. 1.

24. To reinstate or not to reinstate a dismissed or struck-out appeal is the discretion of the court. In Alex Wainaina t/a John Commercial Agencies vs Janson Mwangi Wanjihia (2015) eKLR the Court of Appeal observed that the principles governing the exercise of discretion as set out by Ringera J. A (as he then was in Gathiaka vs Nduriri (2004) 2 K.L.R. 67, requires the same be exercised on sound reason rather than a whim, caprice, or sympathy and with the sole aim of fulfilling, the primary concern of the court to do justice to the parties before it.

25. In Ronald Makenzi vs Damaris Kiarie (2021) eKLR, the court cited Ivita vs Kyumbu (1984) KLR 441, that a court should consider notwithstanding the prolonged delay, if justice can still be done to the parties.

26. In *Vintage Investment Ltd vs Amcon Builders Ltd & another (Civil Appeal 45 of 2019*) (2021) KEIA 259 (K.L.R.) (December 3rd, 2021) (Judgment), the court observed that what is or is not inordinate delay must depend on the circumstances of each particular case whether the delay is inexcusable, the prejudice to be visited by the delay. In Philip Chemwolo & another vs Augustine Kubede (1982 – 1988) KAR 103, the Court of Appeal held that a mistake made by a party, should not cause him to suffer the penalty of not having his case heard and that broad equity approach unless there was fraud or intention to overarch, should be employed for no errors was incapable of being put right by payment of costs since the court exists not to punish or impose discipline, but to decide the rights of the parties.

27. Again, in Habo Agencies Ltd vs Wilfred Odhiambo Musingo (2020) eKLR the court observed it would excuse a genuine mistake on the part of Counsel where it is satisfied that such a mistake existed. Further, in Belinda Murai and others vs Amos Wainaina (1978) LLR 2782, the court observed that a mistake is a mistake and was pardonable a mistake regardless of whether a senior counsel made it.

28. I have considered the circumstances which led to inaction on the part of the current law firm. The same is attributed to the transition stage between 14.12.2023 and 23.1.2024. There were belated efforts to comply despite the expiry of time. I am convinced that there was no intention to overreach or derail the cause of justice. The respondent has not said that justice can still not be done, even if the appeal were to be reinstated. Nothing has been alleged by the respondent to have changed to the substratum of the appeal such that the reinstatement of the appeal would be rendered academic and or an exercise in futility.

29. As to the preservation of the substratum of the appeal, the court is Nguruman Ltd vs Jan Bonde Nielsen and others (2014) eKLR, said that there must be more than unfounded fear or mere apprehension on the part of the applicant. In Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR, the court held that balance of convenience refers to what would be caused to the applicant if the respondent deals with the property in any other manner, would be greater than that which would be caused to the defendants, if an injunction is granted but the suit is ultimately dismissed as opposed to the vice versa.

30. In Paul Gitonga Wanjau vs Gathuthia Tea Factory Co. Ltd (supra), the court observed that where any doubt exists at to the applicant's right or if the right is not disputed, but its violation is denied, the court takes into consideration the balance of convenience and the nature of the injury likely to be suffered, if the injunction is not granted and he ultimately wins in the appeal and vice versa. Further, the court

held that if the applicant has a strong case on the merits, the court will seek to maintain the status quo in determining where the balance of convenience lies.

31. In Amir Suleiman vs Amboseli Resort Ltd (2004) eKLR, the court, while expounding on the balance of convenience, held that it would opt for the lower rather than the higher risk of injustice.

32. Guided by the above-cited case law, I am of the considered view that there is a lower risk in preserving the suit property at its current status by granting a temporary injunction as the court awaits to hear the appeal on merits. The opposite of not granting the orders sought is that the suit property may be dealt with otherwise, as indicated by the applicant.

33. The applicant is directed to deposit Kshs.50,000/= as security for costs and also throw-away costs of Kshs.15,000/= to the respondent. Supplementary record of appeal to be filed within 15 days from the date hereof. Parties to canvass the appeal by way of written submissions due by 30.10.2024. Judgment on 20.11.2024.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 23RD DAY OF OCTOBER, 2024

In presence of

C.A Kananu/Mukami

Ms. Gideon for respondent

Ms. Lagat for Kibe Mungai for appellant

HON. C K NZILI

JUDGE