



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA NO. 6 OF 2022

JAMES MUTHOMI KIOMEAPPELLANT

VERSUS

JAYNE MAKENA.....RESPONDENT

RULING

1. By an application dated 21.2.2022 the court is asked to stay further proceedings in Meru CMCC No. 51 of 2020 based on the reasons and grounds set out in the affidavit sworn by James Muthomi Kiome on the even date.

2. The reasons are that, on 25.11.2021 the 2nd defendant was granted leave to file additional documents and issue summons to the land registrar to appear in court and testify regarding transfer documents presented to them for the transfer of the suit land. That the land officer attended court on 18.1.2022 but was not in the possession of the documents as per summons delivered to them and sought for more time to avail them but the trial court declined to grant them a chance forcing the appellant to prematurely close the case.

3. The application was opposed through replying affidavit sworn on 8.3.2022 by Jayne Makena.

4. The grounds of the opposition are;- are that on 13.10.2020 the court gave the defendant 7 days to comply with pretrial directions failure of which he was to be deemed to have waived his rights to tender evidence.

5. That afterwards, the defendant filed all the pleadings but never at all applied for summons to the land registrar to come and testify. That the hearing proceeded on 25.11.2021 with PW 1 & PW 2 after which the defendant sought for summons to issue to the land registrar to come and present the Land Control Board consent and transfer form, which application was vehemently opposed by the plaintiff for being made after the plaintiff had called his witnesses. That a ruling was rendered and leave granted to file further documents and statements within 14 days with corresponding leave to the plaintiff to file any additional documents if need be. That the respondent did not comply with the ruling or order and neither did he appeal against it or apply for its setting aside. That when the matter came up on 18.1.2022, PW 3 testified and the plaintiff closed her case and the defence commenced only for the applicants advocate to apply to re-open pre-trial and seek to file fresh documents. That the application was opposed citing prejudice under Article 50 of the Constitution to the respondent and non-compliance with previous court orders. The trial court declined the request. That the applicant has been indolent and even after he was given two more chances, he failed to comply.

6. In brief oral submissions, Miss Kaunyangi counsel for the applicant repeated the contents of the application and the affidavit in support. Counsel submitted under Section 3A of Civil Procedure Act and Article 159 of the Constitution, the court had the powers to ensure that ends of justice were attained without undue regard to technicalities hence urged the court to find that if the trial court delivered its judgment the appeal shall be rendered nugatory, given the 1st defendant who had sold the land to the 2nd defendant now

the appellant had not entered appearance, default judgment was then entered and that he had done what was necessary to serve the summons and her client risks losing the land by being condemned unheard. Reliance was placed on **KCB Ltd vs Nicholas Ombija (2009) eKLR**. Mr. Mutuma counsel for the respondent relied on the replying affidavit sworn on 8.3.2021, which in his view had not been controverted.

7. Counsel urged the court to exercise its powers under Section 79B Civil Procedure Act and reject the appeal summarily since no decree or order had been attached to the memorandum of appeal.

8. Counsel submitted the issue before the court was on about Order 11 Civil Procedure Rules and non-compliance with the timelines. Given the directions appearing on page 5 of the proceedings counsel submitted that the applicant filed the documents as ordered by the court and proceeded to call the applicant to testify, after weighty issues were raised in cross examination, an application was made to summon the land registrar when already pretrial had closed and the plaintiff had testified.

9. Nevertheless the court gave the applicant a chance to file the documents within 14 days Counsel submitted that under Article 50 of the Constitution, if the court was to allow the application it would amount to unfair hearing since the respondent shall have no opportunity to counter such evidence contrary to the principles of equity.

10. Counsel submitted that the applicant should not have started the defence hearing on 18.1.2022 and should have sought for an adjournment and that order 11 Civil Procedure Rules had a purpose to avoid trial by ambush.

11. Counsel further submitted there was no arguable appeal before the court given the circumstances herein and it would be a travesty of justice because the applicant was given three chances to comply in vain and only purported to call a land registrar after serious issues were raised on his testimony.

12. Lastly, counsel submitted that under Order 46 Rule 2 Civil Procedure Rules the court has to be satisfied there would be substantial loss and that the applicant had failed to file Land Control Board consent, transfer and valuation reports to counter the issue of fraud which in any event must have been in the possession of the applicant even without calling the evidence of the land registrar. Counsel therefore urged the court not to stall the process given the foregoing.

13. In a rejoinder, Miss Kaunyangi Advocate submitted the suit property was occupied by the applicant and if she loses the case she would suffer a lot. As regards prejudice counsel submitted section 146 (4) of the Evidence Act provides for a recall of a witness hence respondent would have an opportunity to cross examine the land registrar as an expert witness and the custodian of land documents and that the failure of the land registrar to come with the documents to court should not be visited upon the applicant.

14. The issue commending themselves for determination is:- *whether the court should stay the proceedings in the trial court pending the hearing and determination of the appeal.*

15. Stay of proceedings is ordinarily a critical aspect since it goes to the very cardinal root of the rights to parties for an expeditious dispensation of justice as provided for under *Article 159 (b) (2) as read together with Articles 19, 20, 21, 22, 23, 35, 40, 47, 48 & 50 of the Constitution*. Further under Section 1A, 1B, 3A Civil Procedure Act as read together with Section 3 and 13 of the Environment and Land Court Act parties and their advocates are mandated to help the court to further the overriding objectives above mention since a court is not a packing bay for cases.

16. In **Global Tours & Travel Ltd Nairobi High Court winding up case no. 43 of 2000 & another** cited with approval by Gikonyo J in **Kenya Wildlife service vs James Mutembei (2019) eKLR** the court held stay of proceedings was not a matter of right but of judicial discretion to be exercised in the interest of justice while balancing the pros and cons of granting or not granting the order bearing in mind the expeditious disposal of cases, merits of the intended appeal, whether it would probably succeed or not, optimum use of scarce judicial resources and on whether the application has been brought expeditiously.

17. The court citing with approval **Halsbury law of England 4th edition volume 37 page 330**, held that stay of proceedings was a grave, serious and fundamental interruption of access to justice and that the general practice was that it should not be imposed unless the proceedings beyond all reasonable doubt ought not to continue, which power should be sparingly used except where the proceedings were shown to be frivolous, vexatious, harassing, or manifestly groundless.

18. The court went on to state the onus was on the applicant to demonstrate that the plaintiff might not or probably would not succeed but that he would not succeed on the basis of the pleadings and facts of the case.

19. In this matter, the applicant's appeal was filed on 8.2.2022 while the order appealed against was made on 18.1.2022, followed by this application which was filed on 21.2.2022. This was over a month after the ruling. The delay of over one month has not been explained at all.

20. Secondly, looking at the proceedings after interlocutory applications by parties consent on 13.10.2021 agreed on interim orders and compliance with Order 11 Civil Procedure Rules a hearing was fixed by consent on 25.11.2021.

21. The basis of this application and the grounds of appeal rotate around two key issues namely the appellant being condemned unheard and secondly being denied an opportunity to call an expert to produce some exhibits.

22. Looking at the proceedings it is obvious that the suit had been pending since 16.4.2020. By the time the application to call for the Land Registrar was disallowed on 18.1.2022, the applicant had more than two years to file, serve and disclose his evidence and witnesses. The defendant had also brought two witnesses to testify.

23. It cannot therefore be true that the appellant was condemned unheard or was not given adequate time to file, serve and summon witnesses.

24. The non-compliance with Order 11 Civil Procedure Rules is not a mere technicality but goes to the very heart of fair trial especially in an adversarial system such as ours, where a party must disclose and serve the other party all documents and witness statements and list of the witness for adequate preparation.

25. Therefore I find no justification to put on hold the lower court proceedings. It would also not be in the interest of justice to derail the wheels of justice on account of inaction by the applicant.

26. Given the circumstances obtaining in this matter, I find no merits in the application dated 21.2.2022. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 27TH DAY OF APRIL, 2022

In presence of:

Mutuma for respondent

Kaunyangi for applicant

HON. C.K. NZILI

ELC JUDGE



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