Case Number:	Environment and Land Case 525 of 2017 (Formerly Milimani Land Suit 277 of 2015)
Date Delivered:	08 Dec 2020
Case Class:	Civil
Court:	Environment and Land Court at Kajiado
Case Action:	Ruling
Judge:	Christine Atieno Ochieng
Citation:	Robins Nyangau Mosongo & another v Ngoitoi Leiyan & another [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Kajiado
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 525 OF 2017

(Formerly Milimani Land Suit No. 277 of 2015)

ROBINS NYANGAU MOSONGO.....1ST PLAINTIFF

TABITHA MBUTE LAVI.....2ND PLAINTIFF

VERSUS

NGOITOI LEIYAN.....1ST DEFENDANT

KAJIADO COUNTY GOVERNMENT

(SUCCESSOR TO COUNTY COUNCIL OF OL KEJUADO).....2ND DEFENDANT

RULING

What is before Court for determination is the 1st Defendant's application dated the 27th February, 2020 brought pursuant to Section 1A, 1B and 3A of the Civil Procedure Act; Order 51 Rule 1 of the Civil Procedure Rules. The 1st Defendant seeks the following orders:

a) Spent

b) That this Honourable Court be and is hereby pleased to grant a stay of proceedings and orders pending the hearing and determination of this application.

c) That this Honourable Court be pleased to extend time for compliance of the orders issued on 25th September, 2018 pursuant to its ruling of an even date.

d) That costs of this application be in the cause.

The application is premised on the grounds on the face of it and the supporting affidavit of NGOITOI LEIYAN where he deposes that vide a Ruling dated the 25th September, 2018, the Court issued orders for reopening of the Plaintiff's case which had proceeded in his absence and an opportunity to cross examine the Plaintiff's witnesses. He contends that it is only on 4th February, 2020 when the matter came up for judgement that he was made aware of the import of the Court's Ruling and Orders when his current advocates came on record. He explains that his advocates on record have attempted to follow up with his previous advocate as to lapse of time since the orders were granted on 25th September, 2018. He avers that unless the proceedings are put on hold, he is likely to be prejudiced.

The application is opposed by the Plaintiffs' whose Advocate BADIA A FIONA filed a replying affidavit where she provides highlights of the proceedings in this suit including the Ruling dated the 25th September, 2018. She deposes that on 13th November, 2018, this matter was fixed for fresh hearing but neither the 1st Defendant's nor his Advocates appeared in court. She confirms that on 25th January, 2019, the Plaintiffs' Advocates were served with a Notice of Motion application dated the 7th November, 2018 as the said Counsels stated that they had been unable to locate the 1st Defendant. Further, on 8th April, 2019, the said Application was allowed. She contends that it is highly illogical that the 1st Defendant was not aware of the matter proceeding. Further, since the

inception of the suit, the 1st and 2nd Defendants have exuded disinterest as well as indolence. She reiterates that the instant Notice of Motion was filed 520 days from the delivery of the Ruling dated the 25th September, 2018 and no explanation has been provided. The Plaintiffs' further filed a Notice of Preliminary Objection challenging the Notice of Appointment of Advocates which had been filed by the 1st Defendant's Advocates.

The 1st Defendant filed a further affidavit sworn by JOHN OCHOLA an advocate acting on his behalf where he reiterates the Applicant's claim and insists the annexed exhibits in the replying affidavit are not material to the instant application. He insists the replying is bad in law and amounts to relitigating issues. He claims the 1st Defendant is suffering from extended memory lapses and disjointed recollections of court proceedings. He confirms the 1st Defendant may have contributed to the lapses in time but the same ground does not deny him justice. He has not obtained proper medical assessment of the 1st Defendant due to the pandemic. Further, the 1st Defendant has indeed filed a Counterclaim and it is preposterous to suggest he has abandoned the same. He reiterates that the issues raised in the Preliminary objection filed by the Plaintiff can be cured under the provisions of Article 159 of the Constitution.

The Application and the Notice of Preliminary Objection were canvassed by way of written submission.

Analysis and Determination

Upon consideration of the instant application, rivalling affidavits and submissions, the issues for determination are whether the Court should extend time for compliance of the orders issued on 25th September, 2018 and if the notice of appointment of advocate should be struck out. The 1st Defendant in his submissions reiterated his claim and relied on various decisions including **Route Cruisers Ltd V Kenafric Industries Limited (2020) eKLR; Anne Sainaipei Massey V Kenya Commercial Bank (2015) eKLR; James Mosota Onchagwa v Francis Borura Onchagwa & 2 Others (2014) eKLR; James Kanyiita Nderitu & Another V Marios Philotas Ghikas & Another (2016) eKLR**; **Wachira Karani V Bildad Wachira (2016) eKLR; Signature Tours & Travel Limited V National Bank of Kenya Limited (2018) eKLR; and Pinnacle Projects Limited V Presbyterian Church of East Africa , Ngong Parish & Anor (2019) eKLR** to support his various arguments. The Plaintiffs in their submission insisted the 1st Defendant is not deserving of judicial discretion. Further, he does not deserve extension of time as envisaged in Order 50 Rule 6 and 9 (1) of the Civil Procedure Rules. They reiterate that the 1st Defendant is guilty of laches and the application is an abuse of court process. They contend that the lawfirm of Wanam Sale Advocates are not properly on record. To buttress their arguments they relied on the following decisions: **Mae Properties Limited v Joseph Kibe & another [2019] eKLR; Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR; Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR; Jackson Ngungu Kaguae v Attorney General & 595 others {2016} eKLR ; Jane Awino Onyango v Norah Adongo Onyango & 2 others [2018] eKLR; Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR; Naomi Wangechi Gitonga & 3 others v Independent Electoral and Boundaries Commission & 17 others [2018] eKLR; Chairman, Kenya National Union of Teachers & another v Henry Inyangala & 2 others [2018] eKLR.; Joshua Ngatu v Jane Mpinda & 3 others [2019] eKLR; Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR; Kiama Wangai v John N. Mugambi & another [2012] eKLR; and William T. Abira & 12 others v Kenya Civil Aviation Authority [2016] eKLR**.

Before I proceed to decipher whether the instant application is merited or not, I will reproduce hereunder the last orders the court granted on 25th September, 2018.

'It ***is against the foregoing that I will exercise my discretion and proceed allow the application dated the 16th March, 2018 in the following terms:***

· ***The Order of the Court dated the 19th February, 2018 be and is hereby set aside.***

· ***The Plaintiffs' case be and is hereby reopened for the 1st Defendant to cross examine the witnesses.***

· ***The 1st Defendant to cater for the Plaintiffs' counsel and witnesses' costs totalling Kshs. 10, 000 within the next 14 days from the date hereof.***

· ***The matter to be fixed for hearing within the next 60 days from the date hereof.***

· If the 1st Defendant fails to comply with the above term, the Plaintiffs' will be free to take a judgment date.

From the Court records, the 1st Defendant had failed to attend court on 19th February, 2018 and the matter proceeded for hearing with only the Plaintiffs' case. The 1st Defendant's then advocates sought to set aside the proceedings and orders issued on 19th February, 2018 which application the Court allowed vide its Ruling dated the 25th September, 2028 which is cited above. From the time the Ruling was delivered on 25th September, 2018, the 1st Defendant despite having filed a Counterclaim did not strive to set down the matter for hearing and now claims his erstwhile Advocates did not inform him of the proceedings herein. However, as per the Court Records, On 25th September, 2018, a Ms Makena was present when the aforementioned Ruling was delivered; On 8th April, 2019, a Ms Kwamboka held brief for Mr. Bosire who was on record for the 1st Defendant; Further, on 3rd October, 2019, the 1st Defendant attended Court in person while on 12th November, 2019, one Advocate Mr. Koin informed court that he was filing a Notice of Appointment of Advocate to represent the 1st Defendant culminating in the matter being fixed for mention on 4th December, 2019 on which date no Notice had been filed. From the highlights from the Court record and a reading of the said orders issued, the 1st Defendant who was represented by Counsel was well aware of the terms of the orders and failure of which the Plaintiff was at liberty to take a judgement date. The 1st Defendant after waiting for 520 days and on realizing the matter was scheduled for judgement, hired a new Advocate who filed the instant application. He insists he has a right to fair administrative action and to be heard but admits that he contributed to the delay in the matter. In this instance, I beg to pose a question whether right to fair administrative action and to fair hearing should be granted even if the said rights are infringing on an opposing parties. To my mind and from the court records, I note that the 1st Defendant has been granted several opportunities to proceed with the matter and cannot right now feign illness with unsupported medical records while relying on the Constitutional provisions on right to be heard and right to fair administrative action, so as to be granted more time to comply with an order of the court. Insofar as he has a right to fair hearing and provided court decisions which support these averments, I wish to distinguish the said decisions with the circumstances at hand and noting that he had been previously granted an opportunity of being heard which he disregarded, he cannot come to court over one year to cry foul.

In the case of **Muchanga Investments Limited –v- Safaris Unlimited (Africa)Ltd & 2 Others (2009) eKLR** the Court stated:

"To reinforce the point, abuse of process has been defined in Wikipedia, the free encyclopedia.

"The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice." In Beinosi –v- Wiyley 1973 SA (SCA) at page 734 F.G a south African case heard by the Appeal Court of South Africa, Mohamad CJ, set out the applicable legal principle as follows:

"What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of the process. " It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.

Again the court of Appeal in Abuja, Nigeria in the case of Attahiro –v- Bagudo 1998 3 NWLLPT 545 page 656, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party used the judicial process to the irritation and annoyance of his opponent and the efficient and effective administrative of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it."

In the Nigerian case of Karibu – whytie JSC in Sarak –v- Kotoye (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:

"the concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. It's one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice…."

The same court went on to give the understated circumstances as examples or illustrations of the abuse of the judicial process:

a) "Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds. ""

The Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** has laid down principles which the court may consider in exercise of this discretion as follows:

1. ***Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;***

2. ***A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court***

3. ***Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;***

4. ***Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;***

5. ***Whether there will be any prejudice suffered by the respondents if the extension is granted;***

6. ***Whether the application has been brought without undue delay*****; and**

7. ***Whether in certain cases, like election petitions, public interest should be a consideration for extending time.***

It is my considered view that the 1st Defendant by his actions demonstrate bad faith. I further find that he is guilty of laches and this application actually amounts to an abuse of the court process. As for the Notice of Preliminary Objection regarding the Notice of Appointment of Advocate which was filed by WANAM & SALE Advocates, while relying on Article 159 of the Constitution, I find that the error therein is not fatal as it can be cured by amendment and will dismiss the said Notice of Preliminary Objection. I further opine that extension of time is not a right and a party needs to ably demonstrate that he is deserving of the same to enable the court exercise its discretion in their favour.

Based on the facts before me, and in relying on various legal provisions and associating myself with principles established in the decisions cited above, I find the instant application unmerited and will proceed to dismiss it with costs.

Dated Signed and Delivered at Kajiado this 8th Day of December, 2020.

CHRISTINE OCHIENG

JUDGE