



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. 127 OF 2015

WANJALA OJIMBO MUBWEKA.....1ST PLAINTIFF

OJAMBO PETER RODGERS.....2ND PLAINTIFF

= VERSUS =

LEONARD ONGWENI BARASA.....DEFENDANT

RULING

1. The Plaintiff/Applicant has moved this Court under the provisions of Section 3 and 3A of the Civil Procedure Act and Order 42 Rule 6 and 45 of the Civil Procedure Rules in their Notice of Motion dated 5th February 2021. The Applicant in the application prays for the following orders;

(a) That the Honourable Court be pleased to set aside and/or review its order/ruling issued herein on 6th February 2020 and the caution registered on LR. No. Bukhayo/Bugengi/9224 and 9225 removed forthwith.

(b) That costs be provided for.

2. The application is supported by grounds on the face of it inter alia;

(i) That since the Respondent filed a Notice of Intention to Appeal against the judgment and/or decree of this court on the 21st of May 2019, no action has been taken to process the same.

(ii) That the Respondent is guilty of laches.

(iii) That the Respondent has since lost interest in pursuing his intention to appeal against the judgment and yet he continues to enjoy a stay of execution and existence of a caution on the suit land as directed by this Honourable Court.

(iv) That the existence of the stay of execution and caution on the suit land is detrimental to the Applicant as they cannot develop the suit land let alone setting foot there.

(v) That the suit land is going to waste.

(vi) That equity demands that the said order/ruling be set aside and/or reviewed and the caution registered thereon removed forthwith.

3. The application is not opposed by the Respondent who it was submitted as duly served via email and the evidence of such service filed as per the affidavit dated 10th February 2021. The Respondent was also not present at the hearing of the application. The Applicant has prayed that the application be allowed as prayed for.

4. Order 45, rule 1 of the Civil Procedure Rules states;

“1. (1) Any person considering himself aggrieved -

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

5. Therefore, Order 45 of the Civil Procedure Rules, 2010 is very explicit on the grounds upon which a court can review its orders. **The Applicant has stated that the Respondent is enjoying the stay of execution which was issued on 6th February 2020 and as such has neglected to prosecute his appeal before the Court of Appeal. It is on the basis of this reluctance to prosecute the appeal they want this Court to review its ruling which issued the Respondent with a stay of execution pending appeal stating that the suit land is going to waste.**

6. **The question before this court is whether or not the applicant has provided sufficient reason for this court to review and/or set aside the ruling it issued on 6th February 2020 which allowed the suit title to remain restricted. The issue of pendency of the appeal is beyond this court's jurisdiction to determine as this court cannot indulge to investigate the reasons causing the delay in its prosecution. The restriction was left in place to preserve the suit property pending determination of the appeal before the Court of Appeal. Therefore, it is my considered opinion that this court can only review its order of 6th Feb 2020 if there is evidence placed before it showing that the pending appeal has been withdrawn and or determined in whatever manner.**

7. **There is no document annexed to the application to show that the appeal filed by the Respondent is no longer alive. If the applicant is aggrieved by the delay of the appeal before the Court of Appeal, let him present his complaint to that Court. Otherwise for now, the grounds listed in urging this court to review its earlier orders are insufficient. Although the application is not opposed, it is not a bar for me in making a finding that the same is unmerited. Consequently, the application dated 5th February, 2021 is ordered dismissed.**

8. **Since the application was not opposed, each party shall bear their own costs of the application.**

DATED, SIGNED AND DELIVERED AT BUSIA THIS 29TH DAY OF APRIL, 2021.

A. OMOLLO

JUDGE