



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 141 OF 2014

JUDETHEUS KIPLAGAT MALAKWEN.....PLAINTIFF

VERSUS

NORMAN KIBITOK KOGO.....DEFENDANT

RULING

[NOTICE OF MOTION DATED 4TH FEBRUARY, 2021]

1. **Judetheus Kiplagat Malakwen**, the Plaintiff, seeks for review and extension of the stay order of 19th February, 2020 by one year and costs of the application to be provided for. The application is based on the six (6) grounds on its face and supported by his affidavit sworn on the 4th February, 2021. It is the Plaintiff's case that his appeal, whose reference has not been given as the space it should have been inserted at paragraph 2 of the affidavit, and the annexure marked "JKM1" has been left blank, has not been heard due to the limited numbers of Judges in the Court of Appeal, and the Covid-19 Pandemic that is prevailing. That as the one year stay order granted was lapsing on 20th February, 2021 and the need to safeguard the suit property is still there, the stay should be extended by another year.

2. The application is opposed by **Norman Kibitok Kogo**, the defendant, through his replying affidavit sworn on the 8th March, 2021. It is his case that the Court has already rendered itself on the issue and is therefore *functus officio*. That the Plaintiff has had a whole year to prosecute the appeal or to seek for the interlocutory prayers before the Court of Appeal but failed to do so. That directions had been given by the Chief Justice on hearing of court matters during the Covid-19 pandemic and it should not be blamed for the Plaintiff's inordinate and inexcusable delay. That the Plaintiff has not explained why his appeal has not been admitted for over a year.

3. The learned Counsel for the Plaintiff and Defendant filed their written submissions dated the 19th March, 2021, and 6th April, 2021 respectively.

4. The following are the issues for the court's determinations;

(a) Whether the Plaintiff has established a reasonable case for review and extension by one year of the order of stay issue on 19th February, 2020.

(b) Who pays the costs?

5. The Court has carefully considered the grounds on the Motion, the affidavit evidence, learned Counsel's submissions and come to the following determinations;

(a) That in the judgment delivered on the 1st August 2019, the Court found in favour of the Defendant in his counterclaim over two (2) acres of **Nandi/Kebulonik/251** by virtue of adverse possession and directed the Plaintiff to subdivide the said land and transfer the two acres to Defendant. The Court also restrained the Plaintiff from harassing or evicting the Defendant from the two acres he occupies.

(b) That pursuant the Plaintiff's application dated the 6th August 2019, the Court vide its ruling dated 19th February, 2020 granted the Plaintiff conditional stay of execution for one year pending the hearing and determination of the intended appeal. That as can be noted at paragraph 5 (b) of the said ruling, the Court held that "...***That there is no evidence tendered to show that the excision of the two (2) acres, and transfer of the same to the Defendant has been commenced or done. That is the exercise that the Plaintiff seeks to be stayed pending the hearing and determination of the intended appeal. That as the Plaintiff has already filed the Notice of Appeal dated the 1st August, 2019 and proceedings have been typed and a certificate of delay issued on the 20th November 2019, the Court finds no prejudice will be suffered by any of the parties if the process of excising and transferring two (2) acres of the suit land to the Defendant/counterclaimant is stayed for one year to allow the intended appeal to be heard and***

determined, or further directions of the Court of Appeal...”

(c) That from the grounds on the application, the Plaintiff supporting affidavit and his Counsel’s written submissions, there is no evidence to show what else the Plaintiff has done since 19th February, 2020 towards processing his intended appeal or moving the Court of Appeal for further directions. That it would appear that the Plaintiff has done practically nothing about his intended appeal after he got the one year stay while well aware this Court’s role in this matter had come to an end after the ruling of the 19th February, 2020.

(d) That the Court takes judicial notice of the fact that the Court of Appeal has been transacting its usual business, albeit with the few numbers of Judges available since the onset of the Covid-19 pandemic to-date. That the Plaintiff has not availed any evidence of any application filed with the Court of Appeal or any enquiries made to that Court since this Court’s ruling of 19th February, 2020.

(e) That even assuming the Plaintiff’s application had merit, stay order issued on 19th February, 2020 already lapsed in February, 2021 and there is therefore no valid order to extend.

(f) That there being no merit on the Plaintiff’s Motion dated the 4th February 2020, then the Defendant is entitled to costs.

6. That the foregoing shows the Plaintiff’s application dated 4th February, 2021 is without merit and is hereby dismissed with costs.

It is so ordered.

Delivered virtually and dated at Eldoret this 12th day of May, 2021.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiff: Absent.

Defendant: Absent.

Counsel: Mr. Momanyi for the Plaintiff.

Mr. Maritim for Defendant.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.