REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC CAUSE NO. 348 OF 2017

FORMELY KISII ELC CAUSE NO. 726 OF 2016

MOSES LEMASHON KORINKO.....PLAINTIFF

-VERSUS-

DANIEL LEKILABU.....DEFENDANT

RULING

Before me is a Notice of Motion dated 13th November, 2019 in which the Applicant is seeking the following Orders: -

1. That this application be certified urgent and heard on a priority basis.

2. That this Honourable court be pleased to issue an Order for the Stay of Execution of the Judgment Orders given on the 24th July, 2019 including further proceedings with regards to the taxation of the Plaintiff/Respondent pending the hearing and determination of this Application.

3. That this Honourable court be pleased to review, vary, set aside and or rectify the Judgment delivered in this matter on 24th July, 2019 awarding the costs to the Plaintiff/Respondent.

4. That such further and other relief be granted to the Defendant/Applicant as this court deems fit and expedient in the circumstances.

This Application is supported by the Affidavit of the Applicant sworn on 13th November, 2019 in which he avers that this court on 24/7/2019 delivered its Judgement in favour of the Plaintiff and proceeded to award costs to the Plaintiff. That upon advise from his Counsel on record then, he was free to resume his daily duties and was not advised on the issue of costs. That later in the month of October, 2019, he was informed of a Bill of Costs that was filed by the Respondent herein against him. That he sought Counsel from his Advocates who are now on record that he understood the consequences of the Judgment that was entered in favour of the Respondent and he feels aggrieved and is now seeking relief from this court. That the delay experienced before filing this application is unintentional and therefore excusable. The Applicant has annexed a copy of the decree, the Bill of Costs and a Consent to come on record after judgment.

The Respondent filed a Statement of Grounds of Opposition dated 27th November, 2019 in which he contends that the instant application is premature, misconceived and legally untenable. That the application offends Order 9 rule 9 of the Civil Procedure Rules and does not meet the threshold of Order 45 Rule 1 of the Civil Procedure Rules. That this court is now functus officio and cannot sit on an appeal of its own Judgment. That the application does not raise a reasonable cause of action and it is aimed at delaying the due process of recovery of legitimate costs. Finally, that the application is devoid of merits and amounts to abuse of the court process. The Applicant filed a Supplementary Affidavit sworn by himself on 5/12/2019 in which he buttresses his averments as per the Notice of Motion Application and the Supporting Affidavit thereof.

I have carefully analysed the Application, the Replying Affidavit, Supplementary Affidavit and the rival Submissions filed by both parties and the issue for determination is whether the Applicant is entitled to Order for stay of execution and orders for review/varying the judgment and decree.

Order 9, rule 9 of the Civil Procedure Rules provides:- 'When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected **without an order of the court**— (a) upon an application with notice to all the parties; or (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.' **emphasis mine.** The provision of Order 9 rule 9 is express on the procedure to be followed when a party intends to have a change of advocates, in the instant case the Applicant herein filed a Consent to come on record after Judgement on 13/11/2019 the same being without an Order of the court. In my view

the effect of such a misstep results to a fatality of the party's application.

Order 42 rule 6 provides as follows:-

> **(2) No order for stay of execution shall be made under subrule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant**.

The Court of Appeal in ***Butt v Rent Restriction Tribunal [1982] KLR 417*** provides guidance on how a court should exercise discretion and held that:-

> **'1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**
>
> **2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.**
>
> **3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of proceedings.**
>
> **4.The court in exercising its discretion whether to grant(or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount or rent in dispute and the appellant had an undoubted right of appeal.**
>
> **5. The court in exercising its powers under Order XLI rule 4 (2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse'.**

On whether this court is satisfied that the Applicant will suffer substantial loss in the event that stay of execution is not granted, the Applicant has not demonstrated any way he will suffer substantial loss. Rather what is stated is that this court erroneously awarded costs to the Respondent. I have also perused the Applicant's Submissions and it is unfortunate that he has not made any submissions on stay of execution. I would only insist that Equity aids the vigilant and not the indolent.

On whether the Application has been made without unreasonable delay, the Judgment, the subject of this Appeal, was delivered on 24/7/2019 and the instant application filed on 13/11/2019.I do find the reasons for delay in filing this instant application as flimsy and unreasonable since ignorance of the law is no defence.

On whether such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant, I do find that the Applicant has not made any proposal as to how he intends to make any deposits in court pending hearing and determination of this Application.

On whether the Applicant is entitled for prayers of review and or setting aside of the Judgment, **Order 45, rule 1 of the Civil Procedure Rules** provides:- ' 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.' **emphasis mine.** It is the Applicant's contention in paragraph 5 of the Supplementary Affidavit that this court erroneously awarded the costs to the Respondent through mistake. Costs follow event and awarding of costs is a discretionary power exercised by the court as it deems. This is provided in Section 27 (1) of the Civil Procedure Act. This court had the privilege of hearing this matter from the start to conclusion. It is therefore clear that this court did not make a mistake as to award costs to the Respondent as it deemed fit to do so.

Having analysed the facts, laws and case law as stated above, I find that the Notice of Motion dated 13/11/2019 lacks merit and the same is dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KILGORIS ON THIS 29TH DAY OF JUNE, 2021

MOHAMED N. KULLOW

JUDGE

29/6/2021

In the presence of:

CA:Chuma

Mr Mutai for the defendant/applicant

N/A for respondent