

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 4 OF 2019

MUIA KIVONDO MBALUTO.....APPELLANT/RESPONDENT

VERSUS

NZIOKA MUSYOKI NGOMO.....RESPONDENT/APPLICANT

RULING

1. In the Notice of Motion dated 5th November, 2020, the Respondent/Applicant has sought for the following orders:

a. That the ELC Appeal No. 4 of 2019, Machakos lodged herein by the Appellant/Respondent be struck out.

b. That the costs of this Application be in the cause.

2. The Application is premised on the grounds that despite filing the Memorandum of Appeal on 23rd January, 2019, no step has been taken to file the Record of Appeal; that the Appellant has not set down the Appeal for directions and that the failure to file the Record of Appeal is prejudicial to the Respondent.

3. In his Replying Affidavit, the Appellant/Respondent deponed that upon filing the Memorandum of Appeal, he filed a Notice of Motion dated 28th January, 2019 seeking for a stay of execution of the Judgment of the lower court and that a Ruling was delivered on 4th October, 2019.

4. It is the Appellant's/Respondent's case that the court proceedings were not ready until 18th August, 2020; that upon reading the proceedings, he was advised by his advocates that there was a need to amend the Memorandum of Appeal and that the current Application was filed when his advocates were in the process of amending the Memorandum of Appeal.

5. The Appellant/Respondent deponed that he never went to sleep at any one time bearing in mind all the surrounding circumstances including the closure of the courts due to the COVID 19 pandemic and that the current Application was prematurely filed. The parties filed submissions which I have considered.

6. This Appeal was commenced by way of a Memorandum of Appeal which was filed on 23rd January, 2019. The Memorandum of Appeal was filed within the requisite period of thirty (30) days after the delivery of the Judgment by the lower court on 15th January, 2019.

7. The Record shows that together with the Memorandum of Appeal, the Appellant also filed a Notice of Motion dated 28th January, 2019 in which he sought for an order of stay of execution of the Judgment of the lower court. This court allowed the Appellant's Application for a stay of execution on 4th October, 2019.

8. The evidence before me shows that the Appellant's current advocate came on record on 23rd June, 2020 and requested for the proceedings from this court vide his letter dated 19th June, 2020. The Appellant was not given certified proceedings until 18th August, 2020 when the same were certified as true copies.

9. It is not lost to this court that from March, 2020, the COVID 19 pandemic set in, and the court proceedings were interrupted country wide. That being the case, the delay between 18th August, 2020 when the proceedings of this court were certified as true copies and 6th November, 2020 when the current Application to have the Appeal struck out was not inordinate.

10. The Appellant having given a plausible explanation as to why he did not file the Record of Appeal between 18th February, 2020 when the proceedings of this court were ready for collection and 6th November, 2020 when the current Application was filed, it is my finding that the Application dated 5th November, 2020 is not meritorious.

11. The Application dated 5th November, 2020 is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 16TH DAY OF JULY, 2021.

O. A. ANGOTE

JUDGE