



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC MISCELLANEOUS APPLICATION NO. 16 OF 2020

EZEKIEL ADUGA VITOLO.....APPLICANT

VERSUS

MWAMBA VALUERS LIMITED.....RESPONDENT

(Being an application for stay of execution of the Judgment of M. MUNYEKENYE (PRINCIPAL MAGISTRATE) in WEBUYE PMCC No 218 of 2017 dated 15th May 2019).

R U L I N G

When the Notice of Motion dated 10th August 2020 was placed before me on 15th February 2021, I declined to certify it as urgent. I however directed that it be canvassed by way of written submissions. The Applicant was to file and serve his submission within 14 days and the Respondent would then have 14 days from the date of service to file and serve his submissions.

As has now become the practice particularly following the **COVID – 19** pandemic, none of the parties complied with the time lines set by the Court. The Applicant filed his submissions on 7th April 2021 and the Respondent did so on 17th February 2021. Whereas I appreciate that both the litigants, Counsel and even the Courts have had challenges with the filing of pleadings and other documents on line, we have no alternative but to embrace this new way of doing things. This is because we are still obliged under **Article 159 (2) (d)** of the **Constitution** not to delay justice. Further, among the overriding objectives of the **Civil Procedure Act** is the requirement for “*the just*” and “*expeditious*” resolution of disputes.

By his Notice of Motion dated 10th August 2020, the Applicant sought the following orders: -

1. Spent
2. That this Honourable Court be pleased to grant leave to the Applicant to file an appeal out of time.
3. Spent
4. That this Honourable Court be please to issue orders of stay of execution of the Judgment entered on 15th May 2019 together with all consequential orders pending the hearing and determination of the appeal.
5. Spent
6. That this Honourable Court be pleased to lift the warrants of arrest issued against the Applicant by the Principal Magistrate’s Court WEBUYE on 5th August 2020.
7. That the costs of the application be provided for.

The application is based on the grounds set out therein and is also supported by the affidavit of **EZEKIEL ADUGA VITOLO** the Applicant herein.

The gist of the application is that **MWAMBA VALUERS LTD** (the Respondent herein) was the plaintiff in **WEBUYE SENIOR PRINCIPAL MAGISTRATE CASE No 218 of 2017** filed against the Applicant in a dispute involving the purchase of a property known as **BOKOLI/KITUNI/2412**. The Applicant did not enter any appearance or file a defence and by a Judgment delivered on 15th May 2019, the trial Magistrate **M. MUNYEKENYE (PRINCIPAL MAGISTRATE)** entered Judgment in favour of the Respondent and ordered the Applicant to sign the transfer forms to facilitate the transfer of the said parcel of land in favour of the Respondent within 45 days and in default, the Executive Officer of the Court would do so on his behalf.

It is the Applicant's case however that having been served with summons and plaint in the matter, he instructed the firm of **J. SIMASI & COMPANY ADVOCATE** who filed a Memorandum of Appearance and defence. However, no hearing notice was served upon his then Counsel and it was only on 16th December 2019 that he learnt from a friend that Judgment had been entered against him. When he enquired from his Counsel, he was informed that no hearing notice had been served upon them. He therefore went to seek for more assistance from the firm of **MICHAEL OKWII ASSOCIATES** who informed him that the trial had proceeded ex – parte and a Judgment delivered. That the process server deliberately failed to serve his Counsel and the affidavit of service sworn by one **GEOFFREY M. NABIBIAH** on 19th July 2019 is full of falsehoods. He therefore instructed the firm of **MICHAEL OKWII & COMPANY ADVOCATES** to file an application to set the Judgment aside but that application was struck out. The Applicant then instructed his current Advocates **KIPROP LUSERIA & COMPANY ADVOCATES** to set aside the Judgment which was again declined. He was then advised to file an appeal and the delay in doing so was occasioned by the hope that the trial Court would set aside the Judgment. It is only fair that he be allowed to defend the suit against him since warrants of arrest have been issued against him and he may be committed to civil jail anytime. That he stands to suffer loss and prejudice unless this application is allowed.

The application is opposed and **BONFACE MUSE** a Director of the Respondent has sworn a replying affidavit dated 23rd February 2021 in which he has averred, inter – alia, that the application is bad in law, frivolous, malicious, res – judicata and only intended to waste this Court's precious time. That the Applicant was committed to civil jail for a period of 30 days on 29th September 2020 for failure to pay costs and on 9th October 2020, the parties filed a consent in the trial Court whereby the Applicant paid the costs and the matter was marked as settled which the Applicant has failed to inform the Court. That the decree has been fully executed and the procedure for filing an appeal as laid down in **Order 42** of the **Civil Procedure Rules** has not been followed. That the Applicant was duly served with hearing notice and cannot complain that he was not accorded an opportunity to be heard. This application should be dismissed with costs for being an abuse of the process of this Court.

The application has been canvassed by way of written submissions which have been filed by the firm of **KIPROP MUSERIA & COMPANY ADVOCATES** for the Applicant and by the firm of **S. NYAKUNDI & CO ADVOCATES** for the Respondent.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions by Counsel.

The application is premised under the provisions of **Order 42 Rule 6** and **Order 36 Rule 10** of the **Civil Procedure Rules** as well as **Sections 3, 3A** and **79 G** of the **Civil Procedure Act** and **Article 159 (2) (d)** of the **Constitution**.

Article 159 (2) (d) of the **Constitution** which I have already referred to above implores this Court to administer justice without delay and as will soon become clearer in this ruling, it is the Applicant who has flouted that requirement, by not approaching the Court timeously. **Order 36 Rule 10** of the **Civil Procedure Rules** is not applicable in these proceedings. **Sections 3** and **3A** of the **Civil Procedure Act** save the inherent powers of this Court to prevent the abuse of its processes.

Section 79 G of the **Civil Procedure Act** provides that: -

“Every appeal from a Subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order. Provided that an appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.”
Emphasis added.

On the other hand, **Order 42 Rule 6(1)** and **(2)** of the **Civil Procedure Rules** reads: -

6(1) “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.”

(2) “No order for stay of execution shall be made under sub rule (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.” Emphasis added.

It is clear from the above provisions that an appeal from the Subordinate Court to this Court shall be filed within a period of 30 days but may nonetheless be admitted out of time for **“good and sufficient cause.”**

Similarly, before an order for stay of execution pending appeal is granted, the applicant must satisfy the Court that: -

(a) He may suffer substantial loss unless the order is granted;

(b) That he has approached the Court without unreasonable delay and;

(c) He has offered security.

The Supreme Court in the case of **NICHOLAS KIPTOO** arap **KORIR SALAT .V. I.E.B.C & OTHERS 2014 eKLR** land down the following principles to guide a Court while considering an application such as this one. These are: -

(a) **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.**

(b) **A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.**

(c) **Whether the Court should exercise its discretion to extend time is a consideration to be made on a case to case basis.**

(d) **Where there is a reason for the delay, it should be explained to the satisfaction of the Court.**

(e) **Whether there will be any prejudice suffered by the Respondent if the extension is granted.**

(f) **Whether the application has been brought without undue delay.**

In **KENYA SHELL .V. BENJAMIN KARUGA KIRIRU & ANOTHER 1986 KLR 410**, the Court of Appeal held that substantial loss is "the cornerstone" for the grant of an order of stay of execution pending appeal.

Taking all the above into account, it is common ground that the Judgment sought to be appealed was delivered on 15th May 2019. The Applicant avers that although he had an advocate on record, neither the said advocate nor himself were served. He adds further that the affidavit of service filed by the process server one **GEOFFREY M. NABIBIAH** on 19th July 2019 is full of falsehoods. That may be so. However, he has gone ahead to confirm in paragraph 7 of his supporting affidavit that he eventually knew about the Judgment on 16th December 2019 when his friend by the name of **PETER** who works in one of the law firms in **WEBUYE** informed him about it. He then rushed to his then Advocates **J. SIMASI & COMPANY ADVOCATES** then to **MICHAEL OKWII & COMPANY ADVOCATES** and finally to his present **ADVOCATES KIPROP LUSERIA & COMPANY ADVOCATES**. This application was subsequently filed on 21st August 2020 some eight (8) months after he became aware of the Judgment. If indeed his previous **ADVOCATE J. SIMASI & COMPANY ADVOCATES** were not served with the hearing notice as alleged, this Court finds it rather strange that they have not supported the case by their former client at least in so far as service was concerned. Nothing would have been easier than for them to confirm that although they were on record for the Applicant, they were not served with a hearing notice. Clearly, the Applicant has been less than candid in explaining the delay of eight (8) months which in my view is "unreasonable". He has also not shown any "good and sufficient cause for not filing the appeal" within the time stipulated in the law. And although in paragraph 21 of his supporting affidavit he avers that he will suffer loss and prejudice, he has not demonstrated what "substantial loss," if any, he will suffer if this application is not granted. It is not enough simply to state that he will suffer loss. He must go further and show what loss he will suffer and that it will be "substantial."

Most significantly, and to demonstrate that the Applicant has not been candid with this Court and has instead approached it with soiled hands, it is clear from paragraph 8 of the replying affidavit by the Respondent that infact the parties herein recorded a consent in the Subordinate Court through which the dispute was marked as settled. That consent was recorded on 9th October 2020 by Counsel for both parties and is annexed to the Respondent's replying affidavit. It reads: -

"CONSENT

Kindly record the following consent of the parties herein on the following terms: -

1: That by consent, the Judgment debtor has paid costs of this suit of Kshs. 120,500 in full.

2: That by consent, the Judgment debtor be and is hereby released from civil jail forthwith and this matter be and is hereby marked as settled.

Dated at Kitale this 9th October 2020.

S. N. NYAKUNDI & CO

ADVOCATES for the plaintiff/Decree Holder.

KIPROP LUSERIA & CO

ADVOCATES for the defendant/Judgment Debtor."

Given the above state of affairs, it is difficult to understand why the Applicant's Counsel can still be submitting as he did in the submissions dated 16th March 2021 and filed on 7th April 2021 that: -

"My Lord, the applicant herein faces an imminent danger of being arrested and committed to civil jail if his application is

dismissed.”

I have also not heard the Applicant rebut the contents of that consent. That can only mean that he agrees with the terms thereof. There is nothing to suggest that the Applicant will be seeking to impugn the above consent on grounds of fraud, error, misrepresentation or any other sufficient reason that would warrant the setting aside of a contract. In the circumstances, the Applicant would face a formidable burden to set aside that consent on appeal given the very clear provisions of **Section 67 (2)** of the **Civil Procedure Act** that: -

“No appeal shall lie from a decree passed by the Court with the consent of the parties.”

The up – shot of all the above is that this Court finds no merit in the Notice of Motion dated 10th August 2020. The application is accordingly dismissed with costs.

BOAZ N. OLAO.

J U D G E

1st July 2021

Ruling dated, signed and delivered at **BUNGOMA** this 1st day of July 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

BOAZ N. OLAO.

J U D G E

1st July 2021