



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC MISC. APPL. NO. 7 OF 2021

PAUL KIPKORIR RONO.....APPLICANT

VERSUS

BENARD TOILI LUKUYA.....RESPONDENT

RULING

The Application

1. By an application dated **13/5/2021** and filed in court on **17/5/2021** brought under **Sections 79G, 67(1), 63(e), 3 and 3A** of the **Civil Procedure Act, Order 42 Rule 6(1), (2) (a), Order 51 Rule 1** of the **Civil Procedure Rules** and **Article 50 and 159** of the **Constitution**. The applicant seeks the following orders:

(1) ...spent

(2) That the honourable court be pleased to give a temporary stay of execution of the judgment delivered on 8/9/2020 in Kitale Chief Magistrates Court Civil Case No. 259 of 2012 pending hearing and determination of the intended appeal against the said judgment.

(3) That the Honourable court be pleased to allow the applicant to file a Memorandum of Appeal out of time against the judgment delivered by Hon. M.C. Kesse (PM) delivered on 8/9/2020 in Kitale Chief Magistrates Court Civil Case No. 259 of 2012.

(4) That costs of this application be in the cause.

2. The application is supported by sworn affidavit of applicant sworn on **13/5/2021**. The grounds on the face of the application are that the applicant was condemned unheard and contrary to the principles of natural justice and his application to set aside the judgment was declined by the trial court; that the trial court has ordered the arrest of the applicant in execution of the decree; that the legality of the proceedings before the trial court is intended to be challenged on appeal; that the advocate then on record failed to inform the applicant of the judgment in sufficient time; that the applicant came to know of the judgment at the execution stage and that the intended appeal therefore raises triable issues and stands good chances of success.

The Response

3. In his response the respondent filed a replying affidavit sworn on **20/5/2021**. His response is that the application one among many others previously lodged by the applicant in the lower court and is an afterthought calculated to delay execution; that the applicant has also the habit of changing advocates to delay the hearing of the case; that on **5th December 2018** when the matter was scheduled for hearing the applicant failed to appear and to prosecute his defence and the court hence closed his defence case and subsequently entered judgment in favour of the respondent herein; that his advocate thereafter lodged an application dated **20th May 2019** seeking to set aside the judgment which application dragged through the process courtesy of the applicant's unwillingness to prosecute it; that however the application was compromised and the judgment against the applicant was conditionally set aside and the case set down for hearing of the defence evidence on **15/10/2019**; that on the latter date the hearing was adjourned to **5/11/2019** at the instance of the defence; that on the latter date the counsel for the applicant sought time to apply to cease from acting for the applicant citing non-co-operation by the applicant; that upon his counsel's withdrawal from the matter, the same was set down for hearing of the defence case on **10/12/2019** when the defendant failed to present himself and the court closed the defence case yet again and restored the previous judgment that had been set aside earlier; that thereafter the applicant filed yet another setting aside application blaming his advocate for prematurely closing his case; that however the applicant never filed submissions in that application and after some delay the ruling was delivered (presumably dismissing the application) and the execution process commenced once more; that however the applicant pleaded for payment of the taxed costs in instalments and on **6/3/2021**

he was allowed by the respondent's counsel in a written agreement to do so; that pursuant to the agreement on instalments and after the release of his cattle the applicant moved his cattle to a different location and became evasive; that he was then issued with another notice to show cause; that the overall conduct of the applicant disentitles him from the orders sought in the instant application.

Submissions

4. The respondent filed his written submissions on **14/6/2021**. The applicant filed his submissions on **23/6/2021**. I have considered the application, the response and the filed submissions.

Determination

5. The main issues that arise for determination in the instant application are whether stay of execution ought to issue pending an intended appeal and whether the applicant deserves an extension of time to file an appeal against the decision of the trial court delivered on **8/9/2020**.

6. The first observation of this court is that the applicant does not controvert the assertions of the respondent to the effect that he has attempted to delay the conclusion of this matter using a litany of ruses, including failing to attend court and evasion during execution proceedings after a consent for payment in instalments. In this court's view the uncontroverted averments on oath by the respondent, which are the only worthy evidence before court in the instant application regarding the trial proceedings establish that the applicant was granted a hearing and that the court bent over backwards to accommodate him so that he may prosecute his defence yet he failed to do so. That evidence paints the applicant in bad light as a litigant inclined to abuse the court process and delay the conclusion of a suit. Secondly he has not exhibited the judgment or decree intended to be impugned on appeal and this court is unable to assess the potential merits of his assertion that the intended appeal has any chance of success. Thirdly, there is no appeal in place yet and considering points **1-2** inclusive considered hereinbefore in this paragraph, it is clear that the provisions of **Order 42 Rule 6** do not permit the issuance of a stay of execution where there is no appeal pending, and therefore the prayer for a stay of execution is misplaced.

7. Consequently I find that the applicant's application dated **13/5/2021** lacks merit and the same is hereby dismissed with costs to the respondent. For the avoidance of doubt the orders of stay of execution issued by this court on **17/5/2021** while the instant application had not been heard are hereby vacated and the respondent shall be entitled to proceed with execution in the normal manner absent any consent that may in future be entered into between the parties.

Dated, signed and delivered at Kitale via electronic mail on this 5th day of August, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.