



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

MISCELLANEOUS APPLICATION. NO 3 OF 2021

WILFRED NYAMWANGE BONUKE.....PLAINTIFF/APPLICANT

VERSUS

JASON ACHOCHI.....DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. The Plaintiff/Applicant filed a Notice of Motion under Certificate of Urgency dated 1st April, 2021 seeking leave to appeal against the ruling of the learned trial Magistrate Hon. P.K. Mutai delivered on 1st February, 2021 in ELC CASE NO 113 OF 2020 and that the Memorandum of Appeal annexed there to be deemed as duly filed and served upon the Respondent. He also sought an order staying and suspending the execution of the ruling or orders of the court and all consequential orders made thereto pending the hearing and determination of the Appeal.
2. The application is based on the Applicant's affidavit sworn on 1st April, 2021 in which he averred that on 1st February 2021, the court delivered its ruling where it allowed the Respondent's application dated 4th December, 2020 in terms of prayer 3. The Applicant further averred that despite the fact that he was represented by the firm of C.O OKENYE & CO. Advocates he was not aware of the ruling of the court until the 10th March, 2021 when he received the same from the OCS Keumbu Police station. He deponed that when he tried to engage his former advocate, he was assured that the ruling was yet to be delivered. However, further calls to the office of the advocate went unanswered and thus his failure to appeal the orders of the lower court was not deliberate.
3. The Applicant averred that the Respondent was his step brother and the land in dispute was ancestral land which his family has occupied for the last 40 years. He deponed that he has built a permanent house and other structures and carried out a number of extensive developments on the suit property.
4. It was the Applicant's contention that the order issued by the lower court is final in nature as it restrains him and his agents from remaining on the suit property and compelled the OCS Keumbu Police station to enforce it.
5. He lamented that the OCS Keumbu Police station has threatened to execute the impugned orders and unless the stay of execution of the impugned orders is granted, his family will be forcibly evicted from the suit property before the intended Appeal is heard and determined.
6. In response to the application, the Respondent filed a Replying Affidavit sworn on 27th April, 2021. The Respondent averred that the application was incompetent, misconceived, without merit and an abuse of the court's process and hence the same should be dismissed. The Respondent further averred that he had instituted a suit against the Applicant in the lower court vide KISII ELC NO 113 OF 2020 which was heard interpartes and a ruling delivered in his favor on 1st February, 2021. The Respondent further averred that the Applicant was granted 30 days stay to allow him appeal the ruling of the court.
7. It was the Respondent's contention that the Applicant had adequate time to file an appeal. His allegation that he was not aware of the orders of the court was false given that the court record indicates that one Mr. Okenye represented him when the ruling was delivered whereby he sought a 30 days stay of the execution of the ruling pending Appeal. The said application was granted.
8. It was the Respondent's further averment that the Applicant cannot be heard to say that he was not aware of the orders as the actions of an Advocate are binding on their client as they are representatives of the litigants. It was his contention that the failure to appeal was due to indolence on the part of the Applicant which this court cannot aid.
9. The Respondent denied the claim by the Applicant that the order was final in nature and averred that the said order was temporary and

was only intended to preserve the suit property and the fact that the Applicant was still cultivating the same was proof that he was acting in contempt of the Court.

10. The Respondent filed a Further Affidavit sworn on 31st May, 2021 and filed in court on 8th June, 2021 wherein he averred that the Applicant had sought for 30 days stay of execution orders issued on 1st February, 2021 pending appeal, which Appeal was never filed forcing him to commence the execution process. The Respondent further averred that upon execution of the orders of the court, the Applicant proceeded to file an application in the lower court seeking to set aside the ruling. He stated that the Applicant having filed such an application in the lower court, it was only just that the said application be heard and determined before any proceedings commence in this court since the lower court is not yet *functus officio*.

11. The Respondent revealed that the lower court had given directions on the application that parties should proceed to file written submissions by 2nd June, 2021 on which date a ruling date was to be taken. It was therefore the Respondent's belief that the Applicant had deliberately refused to make full disclosure to this court and thus his application should be dismissed on that account.

12. In response to the Respondent's Further Affidavit, the Applicant filed a Further Affidavit on 8th June, 2021 wherein he denied the Respondents claim of there being a similar application pending in the lower court since the application dated 16th March, 2021 had been abandoned during the proceedings. He went on to state that the only application that was pending before the lower court was one for the Amendment of the Defence to include a Counter claim.

13. The court directed that this application be canvassed by way of written submissions. The Applicant filed his written submissions on 28th June 2021 while the Respondent filed his submissions on 6th July, 2021.

ISSUES FOR DETERMINATION

14. Having considered the application, affidavits, documents attached thereto and the written submissions filed by both parties, the issues for determination are;

- i. Whether this court has jurisdiction to hear and determine this application.
- ii. Whether this court should stay the execution of the ruling delivered on 1st February, 2021 and any order issued therein.
- iii. Whether this court should grant the Applicant leave to file an Appeal out of time.

ANALYSIS AND DETERMINATION

15. The jurisdiction of this Court has been questioned by the Respondent in his Further Affidavit filed in this court on 8th June, 2021. In the said Affidavit, the Respondent states that the Applicant had on 16th of March, 2021 filed an application in the lower court seeking similar orders to the ones sought in this court. The Respondent argued that the Applicant having filed such an application in the lower court it was only just that the said application be heard and determined before any legal proceedings in this court commence since the lower court is not yet *functus officio*.

16. In response to this averment, the Applicant stated that he abandoned the application in the lower and went on to attach the submissions filed with regard to the same as evidence to prove so.

17. From the material placed before the court, it is clear that the Applicant did not abandon the application dated 16th March, 2021 in the lower court. This because, the known mode by which a party can be said to have abandoned an application or part of the prayers therein is either through an application to withdraw the application or an application to amend the said application which applications must be allowed by the court. There is no evidence presented before this court to show that the Applicant made such applications nor is there any evidence that the lower court allowed the Applicant to withdraw his application. An application cannot be amended or withdrawn through written submissions.

18. Therefore as matters stand, this court has no jurisdiction to determine an application that is pending or has already been determined by the lower court. This is an outright abuse of the court process that this court cannot countenance.

19. With regard to the prayer for leave to appeal out of time, the Applicant has not given any satisfactory explanation why he failed to file his appeal on time.

20. The upshot is that the application lacks merit and it is hereby dismissed with costs to the Respondent.

Dated, signed and delivered at Kisii this 22nd day of September, 2021.

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J.M ONYANGO

JUDGE