



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC MISC APPL. NO. 2 OF 2019

PARMATANTE OLE KITERE.....APPLICANT

-VERSUS-

MATIKO OLE SADERA.....RESPONDENT

RULING

By a Notice of Motion dated 16th January, 2019 the Applicant herein sought for orders that pending the hearing and determination of the application there be a stay of execution restraining the respondent from executing the decree arising from the Judgement of the court in Narok SPMCC No. 41 of 2002, that leave be granted to the proposed appellant to file and lodge a memorandum and record of appeal out of time against the judgment of the court delivered on 15th April, 2003. The Application was based on the grounds that Judgement was delivered in the absence of the Defendant /Applicant and that he was not present or represented during the entire proceedings and he came to know about it in 2014 and when he filed an application to set aside the said Judgement it was also dismissed. the appellant further contended that the trial court did not consider the evidence on record and His failure to file the memorandum of appeal out of time was not intentional.

The application was supported by the applicant's own affidavit in which he deponed that the matter was heard exparte and he was sick and went to seek herbal treatment in Tanzania from 2014 to 2018 and that he was not given any chance to defend the suit against him. The Applicant further averred that after the suit was dismissed he now filed a Notice to have the same set aside but the application was dismissed and he now seeks the court's intervention to allow him to file his application out of time.

The application was opposed by the Respondent by way of grounds of opposition in which he contends that the application has been overtaken by events as the judgment was already executed and the suit land sub divided and the suit land is no longer in existence. The respondent further contended that the application to file the appeal out of time was not brought in reasonable time and no plausible explanation was given.

I have considered the application before me and the submissions filed by the parties. The applicant seeks the court to exercise its judicial discretion as the respondent will not suffer any prejudice in the spirit of Article 159 (2) of the constitution.

The Respondent on his part has submitted that the application herein is time barred and the same is an abuse of the court process and the action to recover the suit land is extinguished. It is the respondent's contention that the application was over taken by events and no plausible explanation was given by the applicant as to why the application was filed late.

Having considered the application and the submissions filed, what is there for the court to determine is whether the applicant has met the grounds for the court to exercise its discretion and grant a stay of execution and enlarge time to file an appeal out of time.

From the pleading it is not disputed that judgment in the trial court was delivered way back in 2003. The applicant stated that he was away to Tanzania from 2014 to 2018 seeking treatment. However, no tangible evidence has been placed before the court to ascertain their claim. Furthermore, the applicant had filed an application to set aside the judgement in 2013 which application was dismissed and he took no further action to appeal against the aforesaid ruling or to file an appeal against the original judgment.

This is an application that does not meet the basic threshold for the court to exercise its discretion in granting a stay of execution in that same was filed very late and since the averments by the Respondent that the suit land no longer exists, which argument has not been controverted, I find that there is nothing for the court to stay.

The upshot of the above is that the application lacks merit and I thus dismiss the same with costs.

DATED, SIGNED and DELIVERED in open court at **NAROK** on this **4TH** day of **MARCH, 2020**

Mohammed Kullow

Judge

4/3/2020

In the presence of:-

CA:Chuma/Kimiriny

Ms Obondo holding brief for Onduso for the applicant

N/A for the respondent

Mohammed Kullow

Judge

4/3/2020