



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

ELC CASE NO. 450 OF 2017

IN THE MATTER OF REGISTRATION OF TITLE TO LAND BY ADVERSE POSSESSION

AND

IN THE MATTER OF SECTION 38 OF THE LIMITATIONS OF ACTIONS ACT

AND

IN THE MATTER OF LAND PARCEL L.R No. MBOONI/KALAWANI/827

JEREMIAH WAMBUA.....PLAINTIFF/APPLICANT

-VERSUS-

PIUS MBENGEI MUSYOKI.....DEFENDANT/DEFENDANT

R U L I N G

1. The Plaintiff/Applicant herein moved the Court vide his notice of motion application dated 17th June, 2020 and filed in court on 18th June, 2020. He sought the following orders: -

1) Spent.

2) That the firm of MUEMA & ASSOCIATES ADVOCATES be granted leave to come on record in place of J. M. TAMATA & COMPANY ADVOCATES.

3) Spent.

4) Superfluous and spent.

5) That there be a stay of a decision made on 26th May, 2020 made by this Honourable Court pending hearing of the appeal.

6) Costs do abide the application.

2. The application is predicated on the five (5) grounds on its face and is supported by the supporting and supplementary affidavits of Jeremiah Wambua, the Plaintiff/Applicant herein sworn at Machakos on the 16th June, 2020 and 28th July, 2020 respectively.

3. The application is expressed to be brought under Order 12 Rule 7, Order 9 Rules 9 and 10 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 3 and 3A of the Civil Procedure Act.

4. Pius Mbengei Musyoki, the Defendant/Respondent herein, has opposed the application vide his replying and further affidavits sworn at Machakos on 17th July, 2020 and 07th August, 2020.

5. The application was canvassed by way of written submissions.

6. The Plaintiff/Applicant has deposed in paragraphs 2, 3, 4, 5, 10, 11, 12 and 13 of his supporting affidavit that he is aggrieved by the decision made on 26th May, 2020, that being aggrieved by the decision he preferred an appeal, that that application has not been heard to-date, that the application could not be heard because of Corona pandemic, that the appeal will be rendered futile if an order of stay is not issued, that there is a pending application dated 6th February, 2020, that the decision was therefore premature and a serious violation of the law and right to fair hearing, that it is fair that the decision made on 26th May, 2020 be stayed.

7. In his replying affidavit, the Respondent has deposed in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 that the Plaintiff's/Applicant's application dated 17th June, 2020 together with the supporting affidavit therein have been read and well explained to him in Kikamba language that he understands by his advocates on record and having understood the same he replies as follows:- that the application is baseless, frivolous, ill-motivated, made in bad faith, malice actuated, bad in law, a delaying tactic, a waste of time and an abuse of the court process, that there is no ground at all to warrant the staying of the decision made on 26th May, 2020 by this Court, that if the Plaintiff/Applicant was aggrieved by the said decision, then he should have applied for review before this Court or appealed against the same to the Court of Appeal, that the Plaintiff/Applicant only filed a notice of intention to appeal dated 2nd June, 2020 against the decision in issue on 15th June, 2020 before this Court, that a notice of intention to appeal is not an appeal on itself to warrant a stay of a decision, that even if the Plaintiff/Applicant had filed an appeal, it's not an automatic ground for stay orders for there are thresholds the appeal must meet for stay to be granted, that he is advised by his Advocates on record which information he believes to be true that he should not get into the thresholds of an appeal must (sic) meet for stay to be granted since there is no appeal per se, that neither him nor his advocates on record have been served with any appeal thus the allegations by the Plaintiff/Applicant that the same will be decided on 28th April, 2020 is a total lie since the decision in issue was made on 26th May, 2020, that there is no appeal on record to be said will succeed and/or will be rendered futile, that no confusion will be occasioned in anything for there is no appeal at all, that he respects the hierarchy of courts but the Plaintiff/Applicant does not seem to do so since this Court is *functus officio* and cannot reopen this case, that it is meaningless when the Plaintiff/Applicant states that a pronouncement of the main suit shall render appeal futile, that the Plaintiff/Applicant is totally misusing this court process to ensure no justice prevails to the Defendant/Respondent and the other beneficiaries of the estate of the late Musyoki Mwini as per the confirmed grant dated 29th November, 2016 issued on 11th July, 2016, that the Plaintiff/Applicant is misusing the court's process to ensure delays in affecting the confirmed grant dated 29th November, 2016 issued on 11th July, 2016 which has never been challenged by anyone as of to date, that there's no proper ground as to why the orders prayed in the application dated 17th June, 2020 should be granted thus the application must fail.

8. In his supplementary affidavit, the Plaintiff/Applicant has deposed in paragraphs 5, 6, 7, 8 and 9 that he cannot be advised by the Respondent to file for review, that the Respondent has not addressed the issue of pending application (fate) dated 6th February, 2020 which is the basis of their stay orders, that the notice of appeal was filed online in Court of Appeal on 19th June, 2020, that everyone aggrieved by the orders of the court has a right of appeal and he is not in exemption, that he is in the process of fast-tracking Appeal despite challenges on covid 19. As for paragraphs 3 and 5, the Plaintiff/Applicant has not given an indication whether he is versed in law so as to depose on such issues.

9. In his further affidavit, the Respondent has deposed in paragraphs 4, 5, 6, 7, 8 and 9 that he could not address the issue of an alleged pending application dated 6th February, 2020 since the same has never been served upon him nor his advocates on record up to date, that he knows nothing about the alleged pending application dated 6th February, 2020 thus he cannot comment on the same, that furthermore the alleged notice of appeal filed online stated to be annexed as "JW1" per paragraph 7 of the supplementary affidavit has not been annexed to the supplementary affidavit served upon his Advocates on record, that he cannot state anything on the alleged notice of appeal since neither he nor his advocates on record have seen it, that there is no proper ground to allow the application dated 6th February, 2020 for the same is mainly to impede justice, that for all fairness and for the ends of justice, the application dated 6th February, 2020 should be dismissed with costs.

10. In his submissions, the Counsel for the Plaintiff/Applicant pointed out that the main ground in the application arises from the orders of 26th May, 2020 that were issued when there was an application seeking to arrest the ruling of the same date. The Counsel went on to submit that it is a general practice that once an application is filed, it ought to be dispensed with first. The Counsel pointed out that the Respondent stands to suffer nothing if due practice is followed. The Counsel relied on the case of **Equity Bank Ltd vs. West Link Mbo Ltd [2013] eKLR** where the Court of Appeal stated that once a notice of appeal is lawfully filed, an appeal is deemed to be in existence and a litigant can move the Court of Appeal to grant an order of stay under **Rule 5(2) (b) of the Court of Appeal Rules**.

11. On the other hand, the Counsel for the Defendant/Respondent submitted that on the 05th June, 2020, the Plaintiff/Applicant only filed a notice of intention to appeal dated 02nd June, 2020 against the decision in issue. The Counsel submitted that the notice of intention to appeal is not an appeal on itself to warrant the stay of the decision. The Counsel added that even if the Plaintiff/Applicant had filed an appeal, that in itself is not an automatic ground for stay of orders for there are thresholds the appeal must meet for stay orders to be granted. The Counsel added that up to date, no appeal has been served upon them since the Court made its ruling on 26th May, 2020. The Counsel further submitted that even though the Plaintiff/Applicant alleges to have filed a notice of appeal (annexture JW1 to paragraph 7 of the supplementary affidavit) online, the same was not annexed to the supplementary affidavit served upon the Defendant/Respondent. The Counsel added that it is meaningless for the Plaintiff/Applicant to state that a pronouncement of the main suit will render the appeal futile. The Counsel was of the view that there is no proper ground as to why the orders sought must be granted and hence the application must fail. The Counsel submitted that the Plaintiff/Applicant is misusing the court process to ensure that no justice prevails to the Defendants/Respondents and other beneficiaries of the estate of the late Musyoki Mwini as per the confirmed grant dated 29th November, 2016 issued on 11th July, 2016.

12. In response to the Defendant's/Respondent's submissions, the Plaintiff/Applicant in his further submissions stated that this court lacks jurisdiction to determine the validity of notice of appeal.

13. Having read the rival submissions by the Counsel on record for the parties herein, there is no doubt that while ruling in respect of the Defendant's/Respondent's notice of preliminary objection dated 19th November, 2019 was pending, the Plaintiff/Applicant filed the notice of

motion application dated 06th February, 2020 under certificate of urgency. A skeleton file was constructed and the same placed before the ELC Judge in Machakos as I was on leave and had the file with me for purposes of writing the ruling. The gist for the application was to stay the ruling that was scheduled to be delivered on 28th April, 2020. The ruling was not delivered on the said date as was correctly pointed out by the Plaintiff's/Applicant's Counsel that covid 19 pandemic struck Kenya forcing the courts to scale down their operations. Be that as it may, the ruling sought to be stayed was delivered on the 26th May, 2020 without hearing the application filed by the Plaintiff/Applicant. The application to arrest the ruling ought to have been heard first but as observed, the same was not brought to the Court's attention. Be that as it may, the Plaintiff/Applicant herein filed a notice of appeal on 05th June, 2020 the same being dated 02nd June, 2020. As submitted by the Counsel for the Plaintiff/Applicant, it is not for this Court to determine the validity of the said notice of appeal and neither can it determine its threshold as that is within the province of the Court of Appeal. Needless to say, there is no evidence to show that the Plaintiff/Applicant was supplied with the proceedings in the instant suit and failed and/or omitted to prepare appropriate record of appeal. In my view, therefore, the Plaintiff/Applicant is within his right to appeal against this Court's ruling dated 26th May, 2020.

14. In the circumstances therefore, I hereby proceed to grant prayers 2 and 5 of the application dated 17th June, 2020 on condition that the Plaintiff/Applicant files his record of appeal at the Court of Appeal within the next 120 days from the date hereof failure of which the order of stay will lapse. The costs of the application shall be in the cause.

Signed, dated and delivered at Makueni via email this 19th day of November, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: Ms. G. Kwemboi