

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC APPEAL CASE NO. 15 OF 2019

(Formerly Narok ELC No. 9 of 2019)

OLELIMPASO SAITOTI NKOLOPE.....APPELLANT

VERSUS

EMMANUEL LEKAKENY KAYO.....RESPONDENT

RULING

By a Notice of Motion dated 22nd March 2021, the appellant applicant sought for the following orders :-

1. Spent;

2. THAT the ruling and order of the Trial Magistrate in Kilgoris Principal Magistrate ELC No 34 of 2019 and dated 4th March 2021 be stayed pending the hearing and determination of the instant application;

3. That the ruling and order of the trial court in Kilgoris PM Case No. 34 of 2019 be stayed pending the hearing the hearing and determination of the appeal herein.

The application is based on the grounds that the order directing the Surveyor to give ten (10) acres of land from land reference No. Transmara/Olomismis/769 enforces the decree in PM ELC No. 34 of 2018 in part without effecting the other order.

The applicant also contends that there is an error apparent on the face of the record as the court acknowledged the pendency of Narok the ELCA 9 of 2019.

The applicant was opposed by the respondent by way of a replying affidavit. He confirmed that Judgment has been entered for him in Kilgoris PMCC No. 34 of 2018 and the applicant had appealed the said decision. He contended that the claim before the Lower Court was in reference to Land reference Transmara/Olomismis/769 and not LR NO. Olomismis 491 and he further stated that the applicant was on 15th June 2019 an issued with and granted a conditional stay upon the applicant depositing the sum of Kshs. 300,000 being surety for costs and the applicant did not comply and later filed another application in the ELC Narok in ELC Appeal No. 9 of 2019 which was also dismissed.

I have considered the application before me, the replying affidavit in opposition to the same and the rival submission filed by the parties and the issue for determination before me is whether the applicant has satisfied the condition for grant of stay of execution. The applicant says are apparent on the record as the order made in PMCC No. 34 of 2018 were precise and clear.

The respondent have stated that this court is functus Officio as the court has already pronounced itself on the issue. The respondent contends that the applicant was granted a conditional stay by the magistrate court on 15/6/2019 to pay the sum of kshs. 300,000 as surety for costs and he is yet to comply. And that he has not disclosed to the court in his pleading about the existence of orders of the condition stay, rather than appeal the appellant conveniently filed his application without even discloses that this very court had dismissed a similar application. From his conduct the appellant seems to be approaching the court with un clean hand. **“He who comes to equity most come with clear hands”**

The applicant failure to disclose material facts with his knowledge will make him not benefit from the discretion of the court and in the circumstance I find the Notice of motion dated 23rd March 2021 as unmerited as the same is an abuse of the court process and I therefore dismiss the same with costs to the respondent.

DATED AND SIGNED AT NAROK THIS 8TH DAY OF NOVEMBER, 2021

MOHAMED N. KULLOW

JUDGE