



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC CAUSE NO. 364 OF 2017

FORMERLY KISII ELC NO. 703 OF 2016

BENSON MORANGA NYACHIO.....PLAINTIFF

-VERSUS-

RAPHAEL MUSYOKA MASILI.....DEFENDANT

RULING

By a Notice of Motion dated 12th February, 2019 the applicant had sought for orders of stay of execution of the judgement and decree of the court dated 31st July, 2017 pending the hearing and determination of his appeal. The application is based on the grounds that that Applicant has filed an appeal against the judgment of the court which has a high chance of success and that in the event that the orders of stay are not granted the appeal would be rendered nugatory. The application was supported by the applicant's affidavit in which he deponed that the respondent had not served him with the hearing notice of the suit and that he had filed a defence and witness statement and the suit proceeded in his absence. He further averred that his appeal raises triable issues and if the orders sought are not granted he will suffer loss as he risks to be evicted from the suit land.

The application was opposed by the Respondent by way of a replying affidavit and he deponed that the applicant was also served with hearing notice but neglected to appear in court and he just wants to delay the execution of the judgment.

I have considered the application before me and the defendant applicant submissions in which the applicants submit that the trial court did not call for evidence from the Narok County Government during the hearing of the suit which would have determined.

From the record the grounds upon which the instant application is based is the fact that the applicant was not served with the hearing notice when the suit came up for hearing and hence the suit proceeded in his absence. However, from the record it is clear that by affidavit of service filed in court on 11/7/2017 the applicant was served at his place of work which is a chemist known as Oltanki Four Pharmaceuticals where he was served in person.

On whether the appeal is arguable and has high chances of success I find that this is a matter to be determined by the court of appeal and at this stage I find no reasons for the court to warrant an order of stay of execution and I consequently find that the notice of motion dated 12th February, 2019 lacks merit and I thus dismiss the same with costs.

DATED, SIGNED and DELIVERED IN OPEN COURT at NAROK on this 6th day of MAY, 2020.

Mohammed Kullow

Judge

6/5/2020

In the presence of:

CA:Chuma

N/A for the parties

Mohammed Kullow

Judge

6/5/2020