



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC APPEAL NO. 9 OF 2018

MARTINE OLE KUSAI (alias *MARITINE KUPAI*).....1ST APPELLANT

JACKSON LONGISA NGURUMWA.....2ND APPELLANT

JULIUS TIPATET KOROS.....3RD APPELLANT

VERSUS

NGUGI NDIBII WAMUTUA.....RESPONDENT

RULING

By a notice of motion dated 7th June, 2019 the Respondents Applicants had sought for orders: -

- (1) Spent
- (2) Spent
- (3) That the court be pleased to set aside its orders given on the 7th day of May, 2019
- (4) That consequently the court be pleased to strike out the notice of appeal dated 26th September, 2018 and filed on the 27th September, 2018.
- (5) Costs of this application be borne by the appellant/respondent

The Application was based on the grounds that the intended appeal contravenes the provisions of the law and that orders that were granted pursuant to the said notice are an annuity. The application was further supported by the affidavit of the applicant in which he contends that the respondent had filed a Notice to an application for leave to file their appeal out of time and a stay of proceedings after 8 months and the same was done outside the 30 days' period allowed under the Civil Procedure. The applicant further averred that a Notice of Appeal that was filed by the Respondent is not an appeal at all and hence the application before the court is an irregularity. The application was opposed by the respondents and both parties had filed their submissions.

The applicant in his submissions contend that the instant application contravenes both the provisions of order 42 rule 1 of the Civil Procedure Rules and section 79G of the Civil Procedure Act.

It is the applicants' contention that since Judgement in Narok Chief Magistrate's Court ELC No. 87 of 2008 was delivered on 20/9/2018 and the respondent filed a notice of appeal on 26/9/18 there was no memorandum of appeal on record by the respondents and it is the appellants vies that the contention of the above is fatal and hence the Notice of Appeal and the consequent order issued thereon be struck out.

The respondent in his submissions contends that the court having granted a stay of proceedings and leave the court has become *functio officio* and the applicants remedy relied in the court of appeal and thus the curt is incapable of granting the orders sought in the instant application.

I have considered the application before me and the submissions filed. It is not in dispute that the court had on the 7th day of May, 2019 granted leave to the respondents a stay of proceedings pending the hearing and determination of the respondents' appeal. Having in mind the above order the applicants filed the instant application seeking the setting aside of the orders and the striking out of the respondents appeal and the grounds upon which the orders are sought and that there was no proper appeal record. I have perused the record and I find that indeed it is true that there was no memorandum of appeal which was filed. However, under the provisions and in the spirit of Article 159 (2) (b) of the Constitution of Kenya 2010 it will be hesitant to strike out the appellants intended appeal as the same shall amount to denying the

respondents access to justice on the basis of a technicality and in the circumstances I will exercise my discretion in the spirit Article 159 (2) (b) of the constitution and will disallow the Notice of Motion dated 7/5/2019 and I will also order that each party shall bear its own costs.

Further to the above I do order that the respondent do serve the record of appeal within 21 days of this ruling on the appellants.

DATED, SIGNED and DELIVERED IN OPEN COURT at NAROK on this 10th day of June, 2020.

Mohammed Kullow

Judge

10/6/2020

In the presence of:

CA:Chuma

Mr Kamwaro for the appellants

Ms Karia for the respondent

Mohammed Kullow

Judge

10/6/2020