



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC APEAL NO. 9 OF 2019

OLEKIMPASO SAITOTI PETER NKOLOPE...RESPONDENT

-VERSUS-

EMMANUEL LEKAKENY KAYO.....APPELLANT

RULING

By a Notice of Motion dated 17th May, 2020 the applicant had sought for the following orders: -

- i. Spent
- ii. That the applicant be granted leave to amend the notice of motion dated 10th March, 2020
- iii. That there be stay or execution of decree issued in Kilgoris Principal Magistrate's ELC No. 34 of 2019 pending the hearing and determination of this application inter-parties.
- iv. That there be stay of execution of Decree issued in Kilgoris Principal Magistrate's ELC no. 34 of 2019 pending the hearing and determination of this Appeal.
- v. That there be an order reviewing, varying and/or setting aside the order of trial court directing the appellant from depositing the sum of kshs. 300,000 as a condition of stay
- vi. That the costs of this application be provided for.

The Application was based on the grounds that the appellant has an arguable appeal with probability of success and would be prejudicial if the appeal is heard and that the applicant is ready and willy to give such reasonable security as the court may deem fit to impose.

The application was further supported by the annexed affidavit of the appellant in which he averred that there is a pending appeal before court and that there is need to amend and apply for orders to vary, review and set aside the order of the trial court made on 30th January, 2020 as the appeal may be rendered nugatory if the application is not allowed.

The application was opposed by way of a replying affidavit in which the respondent contends that the application is incompetent and same be struck out. The respondent contends that in the instant application there is no appeal to the court by the appellant against the conditional stay that was granted by the trial court and thus the court has no jurisdiction to review the order of stay issued by the trial court on 30th January, 2020 as there is no appeal before the court on the same.

I have considered the application before me and the replying affidavit in support of the same. I have also considered the submissions filed by the parties herein. This is an application for stay of execution of a decree pending the hearing of the appeal. The trial court had an application by the appellant/applicant herein before the trial court sought for a stay of execution and the court had granted a conditional stay of execution on 30th January, 2020 in the terms that the appellant do deposit the sum of kshs. 300,000 within 45 days of the grant of the order. The appellant rather than comply with the order filed the instant application seeking for review and variation of the terms of the conditional stay. The respondent herein stated that this court lacks jurisdiction to entertain the application as no appeal exists with regard to the orders issued by the court. I have looked at the memorandum of appeal filed by the appellant and I find the same relates to the Judgment by the trial court and not against the orders issued on 30th January, 2020. There is no dispute by the parties that indeed there were the orders that the instant application.

However, in the absence of a substantive appeal against those orders I find that the trial court had conclusively dealt with the matter and this court can only interfere with the court's finding if there is a specific appeal against the finding and in the absence of the appeal the instant application lacks merit and I thus strike out the same with costs.

DATED, SIGNED and DELIVERED in open court at **NAROK** on this **27th day of October, 2020**

Mohammed N. Kullow

Judge

27/10/2020

In the presence of: -

CA:Chuma

Mr. Tanyasis for Mukoya for the appellant

N/A for the respondent