



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC MISCELLANEOUS APPLICATION NO. E040 OF 2021**

**JUSTUS MUGAA M'IMPWI.....APPLICANT**

**VERSUS**

**FRANCIS KAMUTA MTHIRUAINA.....RESPONDENT**

**RULING**

1. The applicant seeks an order of stay of execution of the lower court judgment and a decree in **Tigania PMC ELC No. 28B of 2016** pending hearing and determination of appeal **No. E110 of 2021** filed pursuant to leave granted on 14.10.2021.
2. The application is premised on the sworn affidavit by the appellant on 12.10.2021 on the grounds that the respondent is pursuing execution of the decree which ordered he transfers to the respondent a portion measuring 0.60 acres.
3. Further, it is averred that the respondent's intention is to quickly implement the judgment and dispose of the suit land so as to defeat the appeal. The applicant has expressed willingness to comply on any conditions of stay as may be imposed by the court.
4. The respondent has opposed the application through a replying affidavit sworn on 9.11.2021. The basis of the opposition is that the application is frivolous, vexatious and a waste of court's time since it is overtaken by time, lacks merits and is fatally defective.
5. With leave, parties put in written submissions dated 6.12.2021 and 22.11.2021 respectively.
6. The applicant submits if stay is not granted, he and his family who have extensively invested in the land will suffer grave loss of their livelihood since they will be exposed to adverse dealings by the respondent with third parties hence the substratum of the appeal shall be affected rendering it nugatory.
7. The applicant further submits the delay in filing the application was reasonable and explained by the failure to get court proceedings on time.
8. Lastly, the court is urged to find the applicant to have met the parameters for the grant of stay and relies on **Kiplagat Kotut –vs- Rose Jebor Kipngok [2015] eKLR.**
9. On his part, the respondent submits the application was filed by a law firm without capacity contrary to Order 9 Rule 9 in line with the holding in **John Langat –vs- Kipkemoi Terer & 2 Others [2013] eKLR, Florence Hare Mkaha –vs- Pwani Tawakal Mini Coach & Another [2014] eKLR and S.K. Tarwadi –vs- Veronica Muehlemann [2019] eKLR.**
10. As regards stay orders, it was submitted there has been unexplained delay in filing the application. As a preliminary point, the respondent states the application and the appeal is filed by a law firm without capacity to lodge it since it was filed by different law firm which represented the applicant in the lower court.
11. Appeals are governed by **Sections 65, 71A, 75, 76, 77, 78, 79A, 79B, 79C of the Civil Procedure Act and Order 42 and 43 of the Civil Procedure Rules.** They relate to either an order or a decree which under **Section 2 of the Civil Procedure Act** is defined as a formal expression of an adjudication conclusively determining the rights of parties and the latter which is not a decree.
12. **Order 9 Rule 9 Civil Procedure Rules** governs a notice of change occurring within a suit where a judgment has been passed. It does not refer to an appeal. If the Rules committee would have intended the order to cover appeals, nothing would have been easier than to state so.

13. In my view therefore, an appellant has a constitutional right of an access to justice and fair hearing under **Articles 48 and 50 of the Constitution** which rights and freedoms are only subjected to limitations contemplated in the Constitution.
14. To limit the right of appeal on account of **Order 9 Rule 9 Civil Procedure Rules** in my view ran counter to the values and principles of an open and democratic society based on inter alia freedoms and the spirit and objectives of the Bill of Rights.
15. The authority of this court is to uphold and enforce the bill of rights under **Article 159 of the Constitution** without undue regard to procedural technicalities.
16. The respondent has not demonstrated what prejudice he has suffered with the applicant changing a legal representative at appeal stage.
17. In any event, the mischief and the purpose of **Order 9 Rule 9 Civil Procedure Rules** was to guard the interests of the retiring law firm with regard to a party seeking to change legal representation in so far as the enjoyment of proceeds of the judgment to the detriment of the former law firm who had labored to attain such a judgment.
18. In this instance, there has been no objection by the retired law firm that the applicant has failed to meet his obligations to the said law firm. In the circumstances, I find no merit in the preliminary objection.
19. Coming to the issue of stay of execution, the applicant must demonstrate substantial loss; that there was no delay in filing the application; that an offer for security has been made and that it is in the interest of justice to grant the orders sought.
20. Expounding on the four parameters above, courts have held there must be demonstration of loss over and above the ordinary loss to a litigant who has lost a case since execution is a legal process and there must be balance of the rights of a winning party against those of a losing party who has a constitutional right to appeal. **See Kenya Shell Ltd –vs- Kibiru & Another [1980] KLR 410, James Wangalwa & Another –vs- Agnes Naliaka Cheseto [2002] eKLR, Butt –vs- Rent Restriction Tribunal [1982] KLR 417, Mohammed Salim T/A Choice Butchery –vs- Nasserpuria Memon Jamat [2013] eKLR and Nduhiu Gitahi & Anor. –vs- Ann Wambui Warugongo (1982) 2 KAR**
21. In this case, the applicant has stated the order by the lower court was to the effect that he transfers 0.60 acres of the suit land to the respondent and that he is fearful the respondent intends to quickly dispose of the property once transferred to him so as to defeat the appeal.
22. The respondent on the other hand has not refuted those claims at all in the replying affidavit.
23. In the written submissions, the applicant has alleged he is in occupation of the premises with extensive developments thereon.
24. Courts have held that submissions however forceful or powerful are not pleadings or evidence. **See Fibre Link Ltd. –vs- Star Television Production Ltd [2015] eKLR.**
25. The supporting affidavit does not contain any evidence that the applicant is in occupation and or had made developments which risks being demolished and or gravely interfered with if execution were to occur. **See David Kinyua –vs- Moses Muthuri Mukindia [2021] eKLR.**
26. The applicant has a duty to demonstrate with tangible evidence, the loss he is likely to incur if the stay orders are not granted. Similarly, he has not offered any security other than merely stating he is willing to abide by any conditions the court shall impose. **See Samvir Trustee Ltd –vs- Guardian Bank Ltd [2007] eKLR.**
27. The above notwithstanding and given that the respondent has not expressly denied the implications if stay is not granted, I find it is in the interest of justice to preserve the property pending hearing. The conditions are that the applicant surrenders the original title deed for **L.R No. Athinga/Athinja/3500** before the Deputy Registrar within 14 days from the date hereon.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU  
THIS 23RD DAY OF FEBRUARY, 2022**

**In presence of:**

Kariuki for applicant – present

Rimita – absent

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**