



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**

**Civil Appeal 96 of 2008**

**JAMES PIUS NJERU.....APPELLANT**

**VERSUS**

**HOSEA MWAI KITHIRI.....RESPONDENT**

*(Arising out of Kerugoya SRM.'s Civil Suit No. 318 of 2005)*

**RULING**

Pursuant to the provisions of order XXI rule 22 of the Civil Procedure Rules, James Pius Njeru, the appellant/applicant herein, applied for an order of stay of execution of the order dated 13<sup>th</sup> November 2009 pending the hearing and determination of the intended appeal. The summons is supported by the affidavit of the applicant sworn on the 18<sup>th</sup> December 2009. Hosea Mwai Kithiri, the Respondent herein, filed grounds of opposition to resist the summons.

It is the submission of Mr. Mahan, learned advocate for the applicant that unless the orders of stay are granted, the applicant is likely to suffer substantial loss in that the land known as L.R. No. Inoi/Kerugoya/2366 will have been transferred to the Respondent before the intended appeal is heard and determined. It is alleged that there is a pending application before the subordinate court in which the Respondent has sought to have the suit land transferred dated 1<sup>st</sup> September 2008. It is argued that the intended appeal has good chances of success.

Mr. Kagio, learned counsel for the Respondent, urged this court to dismiss the summons because there is no executory order capable of being stayed. It is further pointed out that the provisions cited relate to a decree which has been sent for execution by another court which is not the case in this application.

I have considered the competing arguments. I have also considered the grounds set out on the face of the summons and the facts deponed in the affidavit filed for and the grounds of opposition against the application. There is no doubt that the decision which provoked the filing of the summons dated 18<sup>th</sup> December 2009, is the judgment delivered on 13<sup>th</sup> November 2009 in which this court dismissed the appeal filed against the order of A.K. Ithuku, issued on 17<sup>th</sup> October 2008 dismissing the application for review dated 5<sup>th</sup> September 2008. With respect, I agree with the submissions of Mr. Kagio, that the judgment of this court delivered on 13<sup>th</sup> November 2009 merely dismissed the appeal against the order of subordinate court which had dismissed the application for review, hence the decree is not an executory one. Even if I grant the order of stay, it will serve no purpose. It is obvious from the averments made in the supporting affidavit of James Pius Njeru, sworn on 18<sup>th</sup> December 2009 that there is an allegation the Respondent has already made an application before the subordinate court in which the Respondent has sought for the suit land to be transferred to him. This confirm the allegation that the judgment of this court cannot in itself lead to the transfer of the suit land.

It has also been argued that the jurisdiction of the court has been wrongly invoked in that the applicant has cited the provisions of order XXI rule 22 which relates to an application for stay of execution of a decree or order sent by another court to be executed by this court. The decree, the application seeks to stay, was issued by this court. With respect, I agree with the submissions of Mr. Kagio, that the court's

jurisdiction has not been properly invoked hence the whole application stands as fatally defective.

In the final analysis I am satisfied that the application should be struck out and dismissed for being incompetent, defective and lacking in merit. Consequently the same is struck out and dismissed with costs to the Respondent.

**Dated and delivered this 17<sup>th</sup> day of March 2010.**

J.K. SERGON

JUDGE

In open court in the presence of Mahan for the appellant and Miss Keli h/b Kagio for Respondent.

J.K. SERGON

JUDGE