



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELCA NO. E048 OF 2021**

**ZACHARIA KIBURI M'THARANJU ..... APPELLANT**

**VERSUS**

**JACOB M'MANYARA ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon. G. Sogomo (P.M.) delivered on 18<sup>th</sup> March, 2020, in Tigania P.M. E&L No. 53 of 2017)*

**RULING**

1. The applicant has brought an application dated **28.2.2021** seeking stay of execution of the ruling delivered on **18.3.2021** in **Tigania P.M. E&L 53 of 2017** pending hearing and determination of the appeal lodged on **24.3.2021**.
2. The application is supported by grounds on the face of it and a replying affidavit sworn on **25.3.2021**. The appellant argues the lower court overlooked Meru **HC Succession cause No. 82 of 2002 decision** and went ahead to give orders whose effect was to amend or nullify a confirmed grant.
3. It is the appellant's contention that if the decree or order is implemented, the respondent shall gain more land than on the ground hence prays for stay of execution.
4. The appellant filed written submissions dated **15.10.2021** and stresses the doctrine of **stare decises**.
5. The application is opposed by a replying affidavit sworn on **20<sup>th</sup> April, 2021**. It was the contention the respondent is that the judgment was given on **21.11.2019**. Thereafter the appellant brought an application for review which was dismissed on **18.3.2021**. He maintains he has been in occupation of the suit land since 2002.
6. Further the respondent relies on written submissions dated **15.10.2021** reiterating that there were no substantive orders capable of execution or implementation granted by the court hence the application lacks merit.
7. For an application for stay to succeed, an applicant has to satisfy three conditions, namely substantive loss, no unreasonable delay in bringing the application and lastly offer for security for the due performance of the decree.
8. In **Victory Construction –vs- BM (a minor suing through next friend one PMM (2019) eKLR** the court held that stay may only be granted for sufficient cause and that the overriding objective under **Section 1A, 1B** of the **Civil Procedure Act** and **Article 159 (2) (c) of the Constitution** must also be considered in terms of just determination of proceedings, efficient disposal of suits, prudent use of judicial and administrative resources and timely disposal of suits at a cost effective manner.
9. In **Century Oil Trading Co. Ltd –vs- Kenya Shell Ltd (2008) eKLR** the court held substantial loss must mean something in addition to ordinary loss of a case; and that there must be balance between the interests of the applicant and the successful party. The court further held a party must not merely assert substantial loss, but must also demonstrate it with adequate and proper evidence.
10. The court has gone through the lower court file, the judgment adopting the alternative dispute resolution award made on **21.11.2019** and the review order of **18.3.2021**. It is apparent the appeal herein arises out of an order made under **Order 45 of the Civil Procedure Rules**. Under **Section 75 of the Civil Procedure Act** such an order is only appealable with leave of the court making it.
11. In this file, there is no indication the appellant sought for and obtained leave to appeal to this court. The appellant had initially failed to extract and attach the order or decree to the application for review. If the same had not been extracted then and has not been attached hereto, this court is not convinced, there is imminent danger of execution and or implementation of the lower court decree. The respondent has

submitted that he is in occupation of one acre of the suit land since 2002 with full knowledge of the appellant.

12. Turning to the judgment delivered on **21.11.2019** there is no pending appeal against the said judgment. Guided by the reasoning in **Jaber Mohsen & Another (2014) eKLR**, I find the application has been made late in the day so as to deny the respondent a chance to enjoy fruits of his judgment.

13. Coming to the third aspect of security a successful party is entitled to enjoy fruits of his judgment and if not an applicant for stay of execution must show willingness to give an assurance that there will be due performance of the decree eventually either way the appeal goes; as a mark of good faith. See **Focin Motorcycle Co. Ltd –vs- Ann Wambui Wangui & Another (2018) eKLR**.

14. In the instant case no offer has been made to furnish security.

15. The upshot is that the applicant has failed to meet the criteria to grant the orders of stay. The application dated **28.3.2021** is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2021**

**In presence of:**

Mutisya for respondent

Ndubi for appellant

Court Clerk: Kananu

**HON. C.K. NZILI**

**ELC JUDGE**