



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC NO. 41 OF 2020**

**CELINA NKIRINA ..... PLAINTIFF**

**VERSUS**

**SUSAN NKATHA ..... 1<sup>ST</sup> DEFENDANT**

**TERESIA KAINZIA THIRINDI ..... 2<sup>ND</sup> DEFENDANT**

**PATRICK KAMENCU ROBERT ..... 3<sup>RD</sup> DEFENDANT**

**MARTHA WANJA GITONGA ..... 4<sup>TH</sup> DEFENDANT**

**DANIEL KIRIMI MUTUA ..... PLAINTIFF**

**VERSUS**

**PATRICK KAMENCU ROBERT ..... 1<sup>ST</sup> DEFENDANT**

**SUSAN NKATHA ..... 2<sup>ND</sup> DEFENDANT**

**TERESIA KAINZIA THIRINDI.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. By an application dated **12<sup>th</sup> May 2021** the plaintiff seeks leave to appeal against an order made on **5.5.2021**. The application is premised under **Section 75 of the Civil Procedure Rules, Order 43 rule 1 (2) and 3 of the Civil Procedure Rules**.
2. It is submitted the order made on **5.5.2021** is not appealable as a matter of right; that the applicant did not orally seek leave at the time the ruling or order was made due to Covid protocols; that the proceedings were not conducive or convenient for the plaintiff to make an oral application and that it is not necessary to have a supporting affidavit to explain the law hence the application is not supported by any affidavit. Lastly the applicant insists the application is made within prescribed statutory timelines and there has been no delay to explain away.
3. **Section 75 (1) of the Civil Procedure Act** provides for orders against which an appeal would lie as of right and or with leave of the court.
4. **Order 43 of the Civil Procedure Rules** on the other hand gives a long list from which an appeal lies as of right. These includes **Orders 1, 2, 3, 7, 8, 10, 15, 19, 22, 23, 24, 25, 26, 28, 34, 35, 40, 42, 50, 52, 53**. Under **Order 43 (2)** it is provided that an appeal shall lie with the leave of court from any other order made under the Rules. This means that unless the order sought to be appealed against falls under the orders which are listed, leave to appeal must be sought and obtained before such an appeal can be lodged.
5. In the instant case the plaintiff brought a notice of motion dated **10<sup>th</sup> September 2020** under **Sections 1A, 3A of the Civil Procedure Rules** and **Order 40 Rules 1, 2 and 10 of the Civil Procedure Rules** seeking for a mandatory injunction. The court considered the said application and rendered its ruling on **5.5.2021** in which it dismissed it since there was a regular order or decree from a court of concurrent jurisdiction – the High Court sitting in a succession cause at Meru.

6. The orders made on 5.5.2021 were therefore made under **Order 40 Rules 1, 2 and 10 of Civil Procedures**. Appeals against the order thereof are appealable as a matter of right. Consequently I find the application dated 12.5.2021 without merit. The same is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 27<sup>TH</sup> DAY OF OCTOBER, 2021**

**In presence of:**

Kimani for S.M. Kimani for plaintiff

Mbubuya holding brief for B.G. Kariuki for defendants

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**