



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL 74 OF 2021**

**JAPHET MUNENE.....APPELLANT**

**VERSUS**

**DOROTHY GAKII MUNGANIA.....1<sup>ST</sup> RESPONDENT**

**KAJUJU F. MURITHI.....2<sup>ND</sup> RESPONDENT**

**HONESTY KINANU MURIANKI.....3<sup>RD</sup> RESPONDENT**

**HELLEN NKIRANGA MWONGERA.....4<sup>TH</sup> RESPONDENT**

**JANE KANYUA.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. The applicant seeks stay of execution of the judgment delivered on **18.5.2021** in **Githongo ELC No. 81 of 2018** pending the hearing and determination of this appeal.

2. The application is supported by an affidavit sworn on 14.9.2021. The 2<sup>nd</sup> respondents oppose the application through a replying affidavit sworn on 22.10.2021.

3. **Order 42 rule 6** provides an application for stay to satisfy three principles:-

**i. Sufficient loss**

**ii. There has been no inordinate delay**

**iii. Security for due execution of the decree**

4. In expounding the above principles, courts have held execution is a legal process and therefore a party who has lost in a suit and faces execution cannot use that as a basis of substantial loss. He has to demonstrate much more than a mere assertions that there is an impending execution. See **Century Oil Trading Co. Ltd –vs- Kenya Shell Ltd Nairobi**.

5. In **Ezekiel Mule Musembi –vs- H Young Co. (E.A) Ltd [2019] eKLR** the court held that over and above the above grounds, **Sections 1A, 1B and 3A** of the **Civil Procedure Act** on the overriding objective of the court to do justice to the parties must also be taken into consideration.

6. In **Butt –vs- Rent Restriction Tribunal [1979] eKLR**, the court held the power to refuse or grant stay is discretionary in nature exercisable in a way as not to prevent an appeal being rendered nugatory. So long as there are good grounds the court held stay should not be refused.

7. The yard stick is to balance or weigh the scales of justice by ensuring an appeal is not rendered nugatory while at the same time ensuring the successful litigant is not stopped from enjoying the fruits of his judgment. See **Samvir Trustee Ltd. –vs- Guardian Bank Ltd [2007] eKLR**.

8. The appellant states the respondents are married, do not reside on the premises, will suffer no material loss; she is apprehensive they are at the verge of disposing of the suit land hence render him homeless.

9. The appellant does not say he resides on the suit premises. He gives no basis why he thinks there is an impending disposal of the suit property and lastly he has not demonstrated that the execution will create a state of affairs that will irreparably affect him should he succeed in the appeal.

10. The appellant bears the burden to demonstrate substantial loss.

11. On the other hand the 2<sup>nd</sup> respondent denies the allegations that they intend to dispose of the land, and asserts they have been in occupation of the suit land. The 1<sup>st</sup> respondent has clearly given vivid details on the current status of the land unlike the applicant in his supporting affidavit.

12. The decree is clear on what was ordered which is a negative order. In *Milcah Jeruto –vs- Fina Bank Ltd [2013] eKLR* it was held stay cannot be granted where a negative order had been issued; since as per **Section 2** of the **Civil Procedure Act**, such decree is not capable of being executed.

13. The same position was taken by the Court of Appeal in *Cooperative Bank of Kenya Ltd. –vs- Banking Insurance & Finance Union (Kenya) [2015] eKLR* and held as thus:

***“An order for stay of execution is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree. The delay of performance presupposes the existence of a situation called a positive order, either an order that has not been complied with or has partly been complied with.”***

14. The lower court merely dismissed the appellant’s suit with costs. It has not been stated that costs have been assessed and are due for execution against the appellant.

15. Due to the foregoing I am of the view the application lacks merits. The same is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 20<sup>TH</sup> DAY OF DECEMBER, 2021**

**In presence of:**

Mukanguru for appellant

Wambua for respondents

Court Assistant – Kananu

**HON. C.K. NZILI**

**ELC JUDGE**