



**REPUBLIC OF KENYA**

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

**ELC APPEAL CASE NO. 28 OF 2020**

**TERETHA MUTIMBI NGUTIKU .....1<sup>ST</sup> APPELLANT/APPLICANT**

**GITONGA GIDEON MBURUGU .....2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**M'ITWARUCHIU M'MUGAMBI alias**

**SILAS TUARUCHIU MUGAMBI .....RESPONDENT**

**RULING**

1. Vide the application dated 25.6.2020, applicants are seeking an order of inhibition to be registered against L.R No. Kibirichia/Kibirichia/333 and that there be an order of stay of execution of the decision delivered on 11.5.2020 in Meru – CMCC No. 183 of 2015 pending the hearing and determination of the application and appeal.

(a) The grounds in support of the application are that the appellants/applicants were aggrieved by the decision of the trial court, that the respondent and his sons have brought surveyors to the suit land and have commenced survey work thereon, that there is an need to preserve the suit land, and that the appeal has high chances of success. The applicants contend that the appeal will be rendered nugatory and the applicants will suffer irreparable loss unless the orders sought are granted.

2. The respondent has opposed the application vide a replying affidavit filed on 5.10.2020 where he avers that he is the registered owner of the suit land and that none of the applicants have ever occupied the same. He avers that the applicants claim over the suit land on the basis of trust failed hence this application should be dismissed.

3. To grant or to refuse an application for stay of execution pending appeal is discretionary in that the court when granting a stay, it has to balance the interests of the applicant with those of the respondent. However, it is trite law that stay orders can only be issued in respect of positive orders. See the case of **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR** where Kantai JA stated thus:

***“An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment”.***

4. The Court of Appeal in **Kanwal Sarjit Singh Dhiman v. Keshavji Juvraj Shah [2008] eKLR**, stated as follows on matters stay of execution:

***“The 2nd prayer in the application is for stay of execution.....”***

***By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs.”***

5. In the instant matter, the applicant's suit before the lower court was dismissed. As such, there is nothing to stay, hence even the orders of inhibition are not merited. The application dated 25.6.2020 is dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT MERU THIS 4<sup>TH</sup> DAY OF NOVEMBER, 2020**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 6.10.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**