



**M'ikirichu v Thurania & another (Civil Appeal E015 of 2023)
[2023] KEHC 19099 (KLR) (26 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19099 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E015 OF 2023
EM MURIITHI, J
JUNE 26, 2023**

BETWEEN

M'IKIRIMA M'IKIRICHU APPLICANT

AND

SAMSON THURANIRA 1ST RESPONDENT

JAPHETH KOBLIAH MARANYA 2ND RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 7/3/2023, brought under order 9 rule 9 and order 51 rule 1 of the *Civil Procedure Rules*, Sections 3, 3A, 79G and 95 of the *Civil Procedure Act*, and any other enabling provisions of the law, the Applicant seeks that:
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 2. The Honorable Court be pleased to grant stay of execution of the Judgment and orders given on December 21, 2022 in Meru Chief Magistrate Court, civil suit No 349 of 2015 pending hearing and determination of this application.
 3. The Honorable Court be pleased to grant stay of execution of the Judgment and orders given on December 21, 2022 in Meru Chief Magistrate Court, civil suit No 349 of 2015 pending hearing and determination of the Appeal.
 4. The costs of this application be provided for.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of M'ikirima M'ikirichu, the Applicant herein, sworn on even date. He avers that unless the orders sought are granted, his arguable appeal which has high chances of success will be rendered ineffectual and nugatory.



3. The 1st Respondent did not file any response to the application.
4. The 2nd Respondent has opposed the application vide grounds of opposition filed on 18/4/2023 that,

“The application is a non-starter in view of the fact that an order of execution cannot issue against a dismissal order; The judgment in Meru Chief Magistrate Court Civil Suit No 349 of 2015 dismissed the Appellant’s suit and did not issue any positive order capable of execution; Otherwise the application is an abuse of the process of this Honorable Court and should be dismissed with costs.”

Analysis and Determination

5. The cornerstone consideration for granting stay is substantial loss, which has been espoused by the Court of Appeal (Platt, Ag JA) in *Kenya Shell Limited v Kibiru Another* (1986) eKLR as follows: -

“.....If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondents should be kept out of their money.”
6. It is generally accepted that where there is no positive order capable of being executed, a stay of execution ought not to be issued. As this court said in *Trident Insurance Company v Dennis Mutwiri* [2021] eKLR,

“there is in legal acceptance of the term nothing to stay in a negative order which does not compel or require the doing or the taking of any action.”
7. The Court of Appeal in *AG v James Hoseah Gitau Mwara* [2014] eKLR remarked that in order for a Court to exercise its discretion to grant stay, it must ask itself the question whether there is anything capable of being stayed in the impugned ruling or decision.
8. In dismissing the Appellant’s case, the trial court rendered thus, “The plaintiff failed to prove his case on a balance of probabilities. In sum, I find that the plaintiff failed to prove his case against the defendants on a balance of probabilities. I therefore dismiss this suit with costs to the defendants.” That is the decision sought to be stayed by the Appellant pending his intended appeal, which is said to be arguable with high chances of success.
9. This court finds that the order of the trial court was a negative one incapable of being executed and, therefore, there is nothing to stay.

Orders

10. Accordingly, for the reasons set out above, the Appellant’s application dated March 7, 2023 is dismissed with costs to the 2nd Respondent.

Order accordingly.

DATED AND DELIVERED THIS 26TH DAY OF JUNE, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:



M/S Kimotho Advocate for Appellant.

Mr. Muriuki Advocate for the 1st Respondent.

Mr. Mutembei Advocate for the 2nd Respondent.

