



REPUBLIC OF KENYA



**KENYA LAW**  
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**Okongo v Odak (Civil Appeal E091 of 2023)  
[2023] KEHC 21864 (KLR) (10 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21864 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E091 OF 2023  
MS SHARIFF, J  
AUGUST 10, 2023**

**BETWEEN**

**MARTIN OLUOCH OKONGO ..... APPELLANT**

**AND**

**SAMUEL ODAK ..... RESPONDENT**

**RULING**

**A. Application**

1. The applicant herein has moved this court *vide* an application dated 19<sup>th</sup> June 2023 in which he seeks the following orders;
  1. Spent.
  2. Spent.
  3. Spent.
  4. That upon prayer 2 herein being granted, this court be pleased to grant the applicant an order of stay of execution of the judgment, decree and any other consequential orders in these(*sic*) matter pending the hearing and determination of the intended appeal.
  5. Costs of this application be provided for.
2. On 19<sup>th</sup> June 2023 the applicant swore an affidavit in support of the application where he deposes that he had instructed the law firm of Peter Warindu & Company to represent him and file this suit against the Respondent and that he had all along been under the impression that his interests were being safeguarded by the said law firm.



3. The applicant depones that judgment had been entered in this matter against him and that he is dissatisfied with the said judgment and instructed the firm of S.O. Madialo & Company to lodge an appeal and he has annexed a draft memorandum of appeal.
4. The applicant submits that unless an order of stay of execution of the said judgment and decree is granted, the Respondent is likely to execute against him in satisfaction of the said judgment in which event his appeal will be rendered nugatory.
5. The applicant states that he is willing to abide by any conditions that this court may impose on him upon being granted the stay orders.
6. The respondent, Samuel Odak opposed the application through a replying affidavit sworn by himself. He deposes that the applicant's application herein is a non-starter as the impugned judgment was a negative judgment wherefore there is nothing to be stayed. He therefore craves for dismissal of this application with costs.

## **B. Submissions**

7. Parties herein were directed to canvass this application by way of written submissions. Both parties complied.

### **B.1 Applicant's/Appellant's submissions**

8. The applicant submits that he has met the threshold for grant for stay orders and or for orders of maintenance of status quo as he has an arguable appeal with high chances of success for reasons that the trial magistrate overlooked the 10 years period of cohabitation between the applicant and the deceased and the fact that they begot issues during the said period of cohabitation. Reliance has been placed on the cases of *Reliance Bank Ltd v Norlake Investments Ltd* (2002)1 EA 227 and *Retreat Villas Ltd v Equatorial Bank Ltd & 2 others*. In the latter case the court held that a stay would ordinarily be granted once an appellant demonstrates that his appeal raises a reasonable question of law that should be determined by the appellate court.
9. The applicant further submits that due to the fact that the substratum of the suit in the subordinate court was the contested burial of Emily Akinyi Oluoch(deceased) whose cadaver is still preserved at Kisumu County Mortuary, it would be prudent to issue orders of maintenance of *status quo* so as to prevent the respondent from burying the deceased, otherwise, his appeal will be rendered nugatory.
10. The applicant posits that all that he craves is not an order of stay of a negative judgment but rather orders of maintenance of *status quo*. Further that he is ready and willing to abide by any conditions that this court may impose on him in the event of grant of orders of maintenance of *status quo*.
11. The applicant has cited the case of *Rental South Africa v Kenyatta International Convention Centre, Cooperative Bank of Kenya & another* (2019) eKLR, for the proposition that orders of stay of execution pending appeal are aimed at benefitting both parties so that non is disadvantaged and substantive justice and fairness is promoted.

### **B.2 Respondent's submissions**

12. The Respondent has identified two issues namely: whether the application meets the threshold for grant of orders of stay of execution and who should shoulder the costs of this application.



13. The respondent submits that the applicant has failed to meet the criteria for the grant of orders of stay of execution as envisaged under Order 42 Rule 6(2) of the Civil Procedure Rules which provides that:

“No order for stay of execution shall be made under subrule (1) unless

- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay;
- and
- b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

14. The Respondent submits that the applicant must demonstrate that he stands to suffer substantial loss in the event of refusal to grant him orders for stay of execution pending appeal. Further that he must satisfy this court of the existence of sufficient cause for grant of the orders for stay of execution and that the mere filing of an appeal in itself is not a guarantee for grant of such orders.

15. It is submitted on behalf of the respondent that for an order of stay of execution to lie, there must exist positive requirements which would be affected by such orders. The respondent posits that the impugned judgment was a negative judgment wherein the subordinate court dismissed the applicant’s case for failure to prove it on a preponderance of evidence. The respondent buttresses his submission with the precedent of Western College of Arts & Applied Sciences v Oranga & others (1976)1 KL wherein the East African Court of Appeal rendered itself as follows:

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs....In this instance the High Court has not ordered any party to do anything, or refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court to stay in an application for stay, it is so ordered.”

16. The respondent further places reliance on the case of Kanwal Sarjit Singh Dhima v Keshavji Juvraj Shah (2008) eKLR where the Court of Appeal encountered an application for stay pending appeal against a negative order and held that:

“The second prayer in the application is for stay of execution of an order of the superior court made on 18<sup>th</sup> December, 2006....the order...merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.”

17. The respondent invites this court to also be guided by the holding in Raymond M Omboga v Austine Pyan Maraga: Kisii HCCA No 15 of 2010 where the court held as follows:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order.....The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the



situation he was in before coming to court and therefore the issue of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise....”

18. Lastly the respondent urges this court not to allow the applicant abuse the court process by seeking a stay of execution of a negative order.

### C. Analysis and determination.

19. It is trite law that parties are bound by their own pleadings and so is the court. In the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR it was held that:

“It is now very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

20. In yet another case of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3, the learned judges quoted with approval from an article by Sir Jack Jacob entitled “The Present Importance of Pleadings” the same was published in [1960] Current Legal Problems at p 174 whereof the author had stated:-

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. More over in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

21. The applicant’s prayers No 3 and No 4 crave for stay of execution of the judgment, decree and any other consequential orders in “these matter” pending inter parte hearing and pending the hearing and determination of the intended appeal. This then begs the question of which are these undisclosed matter(s) that the applicant seeks for orders of stay of execution pending appeal. The applicant has deponed in paragraph 4 and 5 of his supporting affidavit as follows:

4. That judgment had been entered in this matter against me in this matter and I am dissatisfied with the said judgment.
5. That being dissatisfied with the decision of this court in this matter have(*sic*) instructed the firm of S.O.Madialo & Co Advocates to lodge an appeal on my behalf-.....”



22. This court had never been seized of this matter prior to the lodging of this appeal by the applicant/appellant and consequently save for the interim orders of stay of execution, this court has never rendered any judgment against the applicant.
23. This court has therefore not been moved properly by the applicant who craves for grant of orders of stay of execution of an unknown judgment. It is not the business of this court to commence a discovery process on behalf of an applicant. The applicant must draw and file specific and precise pleadings. It is noteworthy that the applicant has not annexed the purported impugned judgment that he deposes that was made by this court. The applicant is inviting this court to grant him orders for stay of execution from a point of ignorance. Sadly, that is an invitation that this court cannot accept.
24. This court finds that the submissions by the applicant that he is seeking for orders of maintenance of the status quo are a complete departure from his prayers in his application and the same are an afterthought. The applicant has deponed in paragraph 7 of his supporting affidavit that if orders for stay of execution are not issued, the respondent is likely to execute against him in satisfaction of the judgment. No iota of evidence has been laid by the applicant to demonstrate the loss that he stands to suffer if stay orders are not granted. I understand from the respondent's response and submissions that there is no monetary award that was made by the subordinate court so it's dumbfounding for the applicant to submit that the respondent is likely to execution in satisfaction of the judgment and decree.
25. The respondent has on his part deponed and submitted that the impugned judgment is a negative judgment that dismissed the applicant's suit in the subordinate in Kisumu CMCC No E091/2023: *Martin Oluoch Okongo v Samuel Odak*, wherefore there is nothing to stay and the applicant does not stand to suffer any loss. I am persuaded by the Respondent's position. In any event there is no property in a corpse wherefore the applicant does not stand to suffer any loss. On the contrary, respondent is incurring daily mortuary costs.
26. Whereas the applicant has expressed his readiness to comply with any condition that this court might impose on him, he has so far not demonstrated to this court that he has made any payment on account of the mortuary fees.
27. On the balance the applicant's application herein is devoid of merit and is fatally defective. The same is thus dismissed with costs to the respondent assessed at Ksh 6000.

**DELIVERED, DATED AND SIGNED AT KISUMU THIS 10<sup>TH</sup> DAY OF AUGUST 2023**

**MWANAISHA. S. SHARIFF**

**JUDGE**

**In the presence of:**

Mr Dick Osala for the applicant/appellant

N/A by Respondent

