



**Mungu & 5 others v County Secretary, Uasin Gishu & 2 others (Environment and Land Appeal E023 of 2022) [2023] KEELC 17288 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17288 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT AND LAND APPEAL E023 OF 2022**

**EO OBAGA, J**

**MAY 11, 2023**

**BETWEEN**

**JOSEPH FREDRICK MUNGU ..... 1<sup>ST</sup> APPELLANT  
EMILY CHEPSIROR ..... 2<sup>ND</sup> APPELLANT  
SALINA KENDAGOR ..... 3<sup>RD</sup> APPELLANT  
SALOMON WANYOIKE KIBITHI ..... 4<sup>TH</sup> APPELLANT  
CLARA JEPKEMOI ARUSEI ..... 5<sup>TH</sup> APPELLANT  
JEREMIAH KOECH ..... 6<sup>TH</sup> APPELLANT**

**AND**

**COUNTY SECRETARY, UASIN GISHU ..... 1<sup>ST</sup> RESPONDENT  
COUNTY SECRETARY LANDS, HOUSING, PHYSICAL PLANNING & URBAN  
DEVELOPMENT ..... 2<sup>ND</sup> RESPONDENT  
COUNTY ATTORNEY ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the ruling of Hon. Naomi Wairimu – Senior Principal Magistrate)*

**RULING**

1. This is a ruling in respect of a notice of motion dated November 22, 2022 in which the Appellants/Applicants seek stay of execution pending appeal. The Applicants contend that they have preferred an appeal to this court against the ruling of Hon Naomi Wairimu delivered on July 22, 2022 dismissing the Applicants suit with costs following a preliminary objection raised by the Respondents.



2. The Applicants contend that if stay of execution is not granted, they will suffer substantial loss and the appeal will be rendered nugatory. They further contend that the Appeal has overwhelming chances of success.
3. The Applicants' application was opposed based on grounds of opposition dated 23/1/2023 and replying affidavit sworn on 23/1/2023. The Respondents contend that there is nothing to stay as what was given vide ruling delivered on 27/7/2021 was a negative order which is incapable of being stayed.
4. The Respondents in the alternative state that the Applicants have not met the threshold for grant of stay pending appeal as there is no demonstration of substantial loss; application has been brought after inordinate delay and no security for the due performance of the decree has been given by the Applicants.
5. The parties were directed to file written submissions. The Applicants filed submissions on 20/3/2023. The Respondents filed their submission on 20/2/2023. I have considered the Applicants' application as well as the opposition to the same by the Respondents. I have also considered the submissions by the parties. There are only two issues to be determined. The first is whether there can be stay of execution in a negative order. The second is whether the Applicants have met the threshold for grant of stay of execution pending appeal.
6. The brief background of this application is that the Applicants had filed a suit against the Respondents in the Chief Magistrate's court following demolition of their structures on LR No Eldoret/ Municipality Block 15/864 for which they had allotment letters. The Respondents raised a preliminary objection on round that the Applicants' suit was statute barred and that they did not have locus standi to bring the suit.
7. The trial magistrate upheld the Preliminary objection and proceeded to dismiss the Applicants' suit with costs. What the trial magistrate gave is a negative order which is not capable of being stayed. In the case of *Kanshik Panchamatia & 3 others v Prime Bank Limited & another* (2020) eKLR the Court of Appeal stated as follows: -
 

“A negative order is incapable of being stayed because there is nothing to stay. It therefore follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by the Applicants.”
8. In *Western College of Arts and Applied Sciences v Oranga & 6 others* (1976) KLR 63, the Court of Appeal held as follows: -
 

“The High Court has merely dismissed the suit with costs... there is nothing arising out of the High Court judgement for this court in an application for stay to enforce or restrain by injunction.”
9. What the court granted was a negative order which is incapable of execution. If any execution was to be granted, it will only be on costs.
10. Notwithstanding the above finding, I will nevertheless consider whether the Applicants have met the threshold for grant of stay of execution pending appeal. There are three conditions which fetter the court's discretion when it comes to considering whether to grant stay pending appeal. First an application must be made without unreasonable delay. Second, there must be demonstration of substantial loss. Third, there has to be security given for the due performance of the decree as my ultimately be binding upon the Applicants.



11. In the instant case, the impugned ruling was delivered on 22/7/2022. There was stay of execution granted for 30 days. The present application was filed on November 23, 2022. The application was filed after four months. There is no explanation given why the applicants did not move to court to file the application in time. In the circumstances of this case, I find that the delay of four months was unreasonable.
12. Demonstration of substantial loss is the cornerstone for grant of stay of execution pending appeal. The Applicants have not demonstrated that they will suffer substantial loss. The worst which can happen is execution for costs which will not render the appeal nugatory.
13. The issue of security will only come in after the Applicants have demonstrated substantial loss. As the Applicants have not demonstrated substantial loss, there is no need to address the issue of security. I therefore find that the applicants' Application is devoid of merit. The same is dismissed with costs to the respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 11<sup>TH</sup> DAY OF MAY, 2023.**

**E. OBAGA**

**JUDGE**

**In the virtual presence of;**

Ms. Kosgey for Mr. Omboto for Applicant.

Ms. Kesei for Respondent.

**Court Assistant –Laban**

**E. O. OBAGA**

**JUDGE**

**11<sup>th</sup> MAY, 2023**

