



**Semo v Owidhi & another (Environment and Land Appeal
E014 of 2022) [2023] KEELC 18753 (KLR) (18 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18753 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E014 OF 2022**

**E ASATI, J
JULY 18, 2023**

BETWEEN

BAHATI MUSIRA SEMO APPELLANT

AND

CONSOLATA AKINYI OWIDHI 1ST RESPONDENT

GEORGE ODUOR WAYOMBA 2ND RESPONDENT

*(Being an appeal from the judgement dated 4th February
2022 in Kisumu CMC E&L Case No. 472 of 2018)*

RULING

1. The outstanding prayers in the Notice of Motion Application dated May 9, 2023 are prayers 3 and 4 as prayers 1 and 2 were handled ex parte at the first instance. Prayer 3 is a prayer for an order of stay of execution of the orders issued by Kisumu Land and Environment Court vide ELC Appeal Case No E014 of 2022 against the Applicant pending hearing and determination of the Appeal filed herein. Prayer 4 is a prayer that costs of the application be in the cause.
2. The grounds upon which the application is brought are that the court delivered judgement herein on April 27, 2023 dismissing the appeal and thus upholding the lower court decision. That the Respondents have commenced execution of the lower court decision.

That on the other hand, the Applicant has filed a Notice of Appeal of his intention to appeal against the judgement dated 27/4/2023 to the Court of Appeal. That the applicant stands to suffer substantial harm should the execution proceed. That the application is brought in good faith and that it is in the interest of justice and fairness for the application to be allowed. That no prejudice will occasioned to the Respondent if the application is allowed and finally, that the appeal shall be rendered nugatory should stay not be granted.



3. The application was supported by the averments in the Supporting Affidavit of Amena Amendi Advocate sworn on May 9, 2023.
4. When the application came up for directions on May 18, 2023, the court directed that the same be heard on July 17, 2023. This was in the presence of Counsel for the Respondents who sought time to reply to the application. In spite of having been granted 14 days within which to reply to the application, by the time the application came up for hearing on July 17, 2023, the application was still unopposed as there was no response filed by the Respondents. The Respondent did not attend court on July 17, 2023 for the hearing. The hearing proceeded ex parte.
5. The application was argued orally on July 17, 2023. Counsel for the Applicant urged the court to allow the application. Counsel submitted that there is a date already given by the trial court for Notice to Show Cause why the Applicant should not be committed to civil jail for failing to pay the costs. That since the Applicant had filed the suit in his capacity as the Administrator of an estate, he should not be condemned to pay costs of the suit personally.
6. I have considered the application and the submissions made. The Applicant has the burden to prove the grounds for grant of the orders sought. The application seeks for an order of stay of execution of the judgement of this court dated April 27, 2023. The judgement of this court dated April 27, 2023 merely dismissed the appeal and awarded costs to the Respondents. I am guided by case law that such a dismissal is a negative order which is not capable of execution and that in such circumstances, an order of stay of execution is not available. In *Western College of Arts And Applied Sciences Vs Oranga & Others* [1976] KLR 63 the Court of Appeal whilst considering whether an order of stay of execution can be granted in respect of a negative order stated: -

“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. An execution can only be in respect of costs.....”

The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.”

7. Secondly the ground of stay of execution as contained in Order 42 Rule (6) of the *Civil Procedure Rules*, inter alia, a demonstration that the applicant will suffer substantial loss if the order is not granted and giving of security for due performance of such decree or order as may ultimately be binding on the applicant have not been satisfied.
8. I find that the application lacks merit. The application is dismissed.
No orders as to costs.
It is so ordered.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 18TH DAY OF JULY 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

**E. ASATI,
JUDGE.**

In the presence of:

Maureen - Court Assistant.



No appearance for the Appellant/Applicant.

No appearance for the Respondents.

