



**Central Watch Company Limited & another v Embu Gaturi Housing
Co-operative Society Limited (Environment and Land Appeal
E029 of 2023) [2023] KEELC 18684 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18684 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E029 OF 2023**

JO MBOYA, J

JULY 13, 2023

BETWEEN

CENTRAL WATCH COMPANY LIMITED 1ST APPELLANT

SONICA FASHIONS LIMITED 2ND APPELLANT

AND

**EMBU GATURI HOUSING CO-OPERATIVE SOCIETY
LIMITED RESPONDENT**

*(Application for stay of execution of the Order of the Business Premises
Tribunal made on the 27th February, 2023; in Nairobi BPRT Case
no. E467 of 2022 (as consolidated with Case No. E466 of 2022))*

RULING

Background And Introduction

1. The appellants/applicants have approached the Honourable court vide notice of motion application dated March 28, 2023; and in respect of which same have sought for the following reliefs;
 - a.(spent)
 - b. Pending the hearing and determination of this application Inter-partes, there be a stay of execution of the Order of the Business Premises Tribunal made on the 27th February, 2023; in Nairobi BPRT Case no. E467 of 2022 (as consolidated with Case No. E466 of 2022), Central Watch Kenya Limited and Sonica Fashions Limited Vs Embu Gaturi Housing Co-operative Society Limited. For the avoidance of doubt, pending the hearing and determination of this Application inter-partes, no action or steps will be taken by the Respondents or any other



entity to enforce or give effect to the Ruling and Order of the Business Premises Rent Tribunal made on the 27th February 2023.

- c. Pending the hearing and determination of this Appeal, there be a stay of execution of the Order of the Business Premises Tribunal made on the 27th February, 2023; in Nairobi BPRT Case no. E467 of 2022 (as consolidated with Case No. E466 of 2022), Central Watch Kenya Limited and Sonica Fashions Limited Vs Embu Gaturi Housing Co-Operative Society Limited. For the avoidance of doubt, pending the hearing and determination of this Appeal, no action or steps will be taken by the Respondents or any other entity to enforce or give effect to the Ruling and Order of the Business Premises Rent Tribunal made on the 27th February 2023.
 - d. Costs of the Application to abide the outcome of the Appeal.
2. The instant application is premised and anchored on various grounds which have been alluded to or enumerated in the body of the application. Further and in addition, the application is supported by two affidavits sworn by inter-alia Jaytinder Kumar Luthra and Ruth Mburu, sworn on the March 28, 2023, respectively.
 3. Upon being served with the instant application, the respondent filed a replying affidavit sworn by one Jacob Nyagah Gachahu on May 10, 2023; and in respect of which the respondent has disputed the claims and averments contained at the foot of the supporting affidavits sworn on behalf of the appellants/applicants.
 4. Nevertheless and for good measure, upon being served with the replying affidavit by and on behalf of the respondent, the appellants/applicants sought to and obtained Leave to file and serve further/ supplementary affidavits. In this respect, the appellants/applicants thereafter filed further affidavits sworn by Jaytinder Kumar Luthra and Ruth Mburu, respectively.
 5. Subsequently, the instant application came up for hearing on June 7, 2023, whereupon the Advocates for the parties agreed to canvass and dispose of the application by way of written submissions. For clarity, the Advocates for the respective Parties thereafter complied and indeed filed their respective written submissions.

Submissions By Parties

A. Appellants'/applicants' Submissions:

6. The Appellants/Applicants filed two sets of submissions and in respect of which the Appellants/Applicants raised, highlighted and canvassed four (4) pertinent issues for consideration by the Honourable court.
7. Firstly, Learned counsel for the Appellants/Applicants has submitted that the Respondent herein took out and served Notices to alter and/or vary the terms of the Tenancy with the Appellants herein.
8. Further and in addition, Learned counsel has contended that upon being served with the impugned Notices to vary and alter the terms of the tenancy, the Appellants/Applicants proceeded to and filed References before the Business Premises Rent Tribunal, which References were subsequently heard and disposed of vide Ruling of the Tribunal rendered on the 27th February 2023.
9. Be that as it may, Learned counsel for the Appellants, contended that upon delivery of the Ruling which was rendered on the 27th February, 2023, the Appellants/Applicants felt aggrieved and/or dissatisfied and thereafter same filed and lodged an appeal before this court and wherein same are challenging the entirety of the decision by the Tribunal.



10. Premised o have established and laid before the Honourable court sufficient cause and/or basis to warrant the intervention of the court by granting the orders of stay which are being sought.
11. Secondly, Learned counsel for the Appellants/Applicants has also submitted that the Tribunal proceeded to and *inter-alia* dismissed the Reference that had been filed by and or behalf of the Appellants. However, Learned counsel added that other than the dismissal of the Reference, the Tribunal proceeded to and granted certain positive orders, whose import and tenor was to direct the Appellants/Applicants to pay various sums of monies, on account of rents and security deposits, to and in favor of the Respondents.
12. In view of the foregoing, Learned counsel for the Appellants/Applicants has therefore contended that the impugned decision by the Tribunal was therefore not entirely a negative order, either in the manner contended by the Respondent or otherwise.
13. Furthermore, Learned counsel for the Appellants/Applicants have also submitted that the order which was granted and/or issued by the Tribunal has been duly extracted and availed to court by the Respondent's counsel. Consequently, Learned counsel for the Appellants/Applicants has posited that the impugned orders are therefore capable of being stayed vide an order of this court.
14. Thirdly, Learned counsel for the Appellants/Applicants have submitted that the Appellants/Applicants herein are bound and/or exposed to suffer substantial loss, unless the orders sought are granted by the Honourable court.
15. Additionally, Learned counsel has contended that unless the orders are granted, the Appellants/Applicants shall be obliged and obligated to pay the increased rents and the security deposits, in terms of the Orders of the Tribunal; even though the amounts that were decreed by the Tribunal are beyond the market rents that are obtaining over and in respect of premises located in the neighborhood of the suit premises.
16. Other than the foregoing, Learned counsel has also submitted that the amount of rents that were ordered and decreed by the Tribunal are exorbitant and if same are paid to and in favor of the Respondents, there is no guarantee that the Respondent will be able to or in a position to refund the excess rent, if the instant appeal were to succeed.
17. Based on the foregoing, Learned counsel for the Appellants/Applicants has thus contended that the instant Application is meritorious and thus ought to be allowed. For good measure, the Appellants/Applicants have implored the Honourable court to grant and/or decree the order of stay pending the hearing and determination of the instant appeal.
18. To buttress the foregoing submissions, Learned counsel for the Appellants/Applicant has cited and relied on various decisions *inter-alia* [Butt Versus Rent Restriction Tribunal](#) 1979 eKLR, [Kenya Women Microfinance Limited Versus Martha Wangari Kamau](#) 2020 eKLR and [National Bank of Kenya Limited Versus Pipeplastic Samkolit Kenya Limited & another](#) 2001 eKLR respectively.

B. Respondent's Submissions:

19. The Respondent filed written submission dated 12th June 2023; and in respect of which same has raised, highlighted and amplified two issues for determination by the Honourable Court.
20. First and foremost, Learned counsel for the Respondent has submitted that the decision and/or order of the Business Premises Rent Tribunal, which is the subject of the instant proceedings, was an Order which dismissed the Reference that was filed by and on behalf of the Appellants/Applicants herein.



21. To the extent that the Tribunal merely dismissed the Reference filed by and on behalf of the Appellants, Learned counsel for the Respondents has submitted that the resultant orders were orders in the negative, which are thus incapable of being stayed either in the manner sought or at all.
22. In view of the foregoing, Learned counsel for the Respondent has therefore contended that the order of stay of execution pending appeal which has been sought by the Appellants/Applicants herein has therefore been sought in vacuum. In this regard, counsel has contended that the order sought is legally untenable.
23. In support of the submission that a negative order cannot attract an order of stay of execution, either as sought or at all, Learned counsel for the Respondent has cited and relied on inter-alia the holding in the case of *National Transport and Safety Authority Versus Samper Tours Travel* 2022 eKLR, *Registered Trustees, Kenya Railway Staff Retirement Benefits Scheme Versus Milimo, Muthoni and Company Advocates and 2 others* 2021, KCEA 363 (KLR) and *Gifted Hands School Limited Vs Mogul & Another* [2022] KEELC 2770 (KLR), respectively.
24. Secondly, Learned counsel for the Respondents has also submitted that the Appellants/Applicants have neither established nor demonstrated the requisite ingredients to warrant the grant of an order of stay of execution pending the hearing and determination of an Appeal.
25. In particular, Learned counsel for the Respondent has submitted that the Appellants/Applicants herein have neither established nor proved that the same are exposed to suffer substantial loss, unless the orders sought are granted.
26. For good measure, Learned counsel for the Respondent has underscored and reiterated that substantial loss is the cornerstone to granting an order of stay of execution pending an appeal. Consequently, Learned counsel has added that in the absence of evidence and proof of substantial loss, the Appellants/Applicants are not entitled to the orders sought.
27. Further and in addition, Learned counsel for the Respondent has also submitted that the Appellants/Applicants have also failed to provide security for cost which is critical and imperative towards to the granting of order stay of execution pending appeal.
28. In view of the foregoing, Learned counsel for the Respondent has thus contended that the Appellants/Applicants herein are not entitled to the orders of stay pending the hearing and determination of the instant appeal or otherwise.
29. Further and in any event, Learned counsel for the Respondents has submitted that the Appellants/Applicants herein are merely intent on using the court process to deny or deprive the Respondents of her entitlement to rents and rental income derivable from the suit premises.
30. To anchor the foregoing submissions, Learned counsel for the Respondent has relied on various decisions *inter-alia* *Jamii Bora Bank Limited & Another Versus Samuel Wambugu Ndirangu* 2022 eKLR, *Machira T/a Machira & Company Advocates Versus. East African Standard Limited* 2002 KLR, 63, *Christopher Barasa Were & Another Versus Joseph Ndichu Ngige* 2021 eKLR, and *Orix Oil (K) Limited Vs Paul Kabeu & 2 others* 2014 eKLR, respectively.
31. In a nutshell, Learned counsel for the Respondent has thus implored the Honourable court to find and hold that the subject Application is devoid and bereft of merits and that the same ought to be Dismissed.



Issues For Determination

32. Having reviewed the instant Application and the Responses filed thereto and upon taking into consideration the written submission filed by and on behalf of the Parties, the following issues do arise and are thus worthy of determination.
- i. Whether the Appellants/Applicants herein have established and demonstrated the existence of a Sufficient Cause.
 - ii. Whether the Appellants/Applicants have established and demonstrated the likelihood of Substantial Loss arising and or occurring unless the orders sought are granted.
 - iii. Whether the impugned orders issued by the Business Premises Rent Tribunal on 27th February, 2023, were orders in the negative and if so; whether same are capable of being stayed.

Analysis And Determination

Issue Number 1 Whether the Appellants/Applicants herein have established and demonstrated the existence of a Sufficient cause.

33. It is common ground that upon being served with the notice to alter and/or vary the terms of the Tenancy Agreement with the Respondent herein, the Appellants/Applicants took out and filed the requisite Reference in accordance with the provision of Section 6 of *Landlord and Tenant (shops, hotels and catering establishments) Act*, Chapter 301 Laws of Kenya.
34. On the other hand, there is no gainsaying that upon the lodgment of the References, same were subsequently heard and disposed of by the Tribunal *vide* the decision rendered on the 27th February, 2023, wherein the Tribunal proceeded to and indeed dismissed the Reference(s) which were filed by the Appellants/Applicants.
35. Pursuant and arising from the dismissal of the Reference(s) which were filed by the Appellants/Applicants, the Tribunal was by law expected to make a determination on the Notices, which had precipitated the filing of the References. Indeed and for good measure, the Tribunal proceeded to and allowed the notices to vary and alter the terms of the Tenancies, in line with the mandate prescribed by dint of Section 9 of the *Act (supra)*.
36. Arising from the decision of the Tribunal, the Appellants/Applicants herein, felt aggrieved and/or dissatisfied and same have since filed and lodged a Memorandum of appeal dated the 28th March 2023; and in respect of which same have itemized various grounds upon which same (Appellants) intend to impeach the decision of the Tribunal.
37. From the Memorandum of Appeal, there is no gainsaying that the Appellants/Applicants have raised and espoused various pertinent grounds, which same intend to canvass and ventilate before this court. Prima facie, the grounds of appeal which have been enumerated at the foot of the Memorandum of Appeal appear and in any event, exhibit salient issues that are worthy of interrogation and determination by the court, albeit during the hearing of the appeal.
38. Based on the fact that the Appellants/Applicants have since filed and lodged the requisite Memorandum of Appeal and which Memorandum was filed within the prescribed timelines and in accordance with the provisions of Section 15 of the *Landlord and Tenant (shops, hotels and catering establishments) Act*, Chapter 301 Laws of Kenya, it is my humble view that the Appellants/Applicants



have demonstrated a sufficient cause or basis to warrant the invocation of the Jurisdiction of this court for purposes of procuring an order of stay of execution pending appeal.

39. For good measure, it is common ground that any Applicant who is desirous to approach this court and to obtain an order of stay of execution pending the hearing and determination of an appeal, must establish and demonstrate, inter-alia the existence of sufficient cause.
40. In this respect, it is appropriate to take cognizance of the holding of the Court of Appeal of the [*Kenya Women Microfinance Limited Vs Martha Wangari Kamau*](#) 2020 eKLR, where the Court of Appeal held and stated as hereunder:-

29. In *Vishram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the [*Civil Procedure Rules*](#) is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the [*Civil Procedure Act*](#), the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the [*Civil Procedure Act*](#) or in the interpretation of any of its provisions.

According to section 1A(2) of the [*Civil Procedure Act*](#) "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties."

41. Arising from the foregoing, I come to the conclusion that to the extent that the Appellants/Applicants have since filed and lodged the Memorandum of Appeal, same constitutes a sufficient cause and/or basis, towards and in compliance with the provisions of Order 42 Rule 6 (2) (a) of the [*Civil Procedure Rules*](#) 2010.
42. Nevertheless and for the avoidance of doubt, I beg to underscore that proof of a sufficient cause, in terms of the existence of an appeal, per-se does not by itself catapult the Applicant to the grant and issuance of an order of stay of execution. For good measure, proof of sufficient cause is only one of the preliminary ingredients to be established and demonstrated, in the process of procuring an order of stay of execution pending an appeal.
43. Consequently, having found and established that the Applicants herein have demonstrated the existence of sufficient cause, it is incumbent upon the court to venture forward and to interrogate the next critical issue, namely, the likelihood of substantial loss occurring unless the order of stay of execution are granted.
44. In this respect, I shall now venture to consider whether the Appellants/Applicants have demonstrated that substantial loss is likely to arise or accrue if the orders of stay are not granted.



Issue Number 2 Whether the Appellants/Applicants have established and demonstrated the likelihood of Substantial Loss arising and or occurring unless the orders sought are granted.

45. To start with, it is not lost on this court that the Appellants/Applicants herein are indeed tenants of the Respondent, certainly in premises which lawfully belong to and are owned by the Respondent. For good measure, the question as to whether or not the Appellants/Applicants are tenants is not in dispute and or contest, whatsoever.
46. In any event, the Appellants/Applicants herein have vide the contents of the further affidavits sworn on the 5th June 2023, conceded and highlighted that same have been paying rents to and in favor of the Respondents. Consequently, it is common ground that the Respondent herein owns the suit premises.
47. In so far as the Respondent herein owns the suit premises, it is therefore established and beyond peradventure, that the Respondent is no doubt, a body/organization, with known and established properties, inter-alia, the suit premises.
48. Be that as it may, the Appellants/Applicants herein have submitted and contended that if the orders of stay of execution pending appeal are not granted, then the Appellants/Applicants will be obliged and obligated to pay the additional rents and the security deposits, which were decreed by the Tribunal.
49. Further and in addition, the Appellants/Applicants have also contended that if the additional rents and the security deposits are paid to the Respondents herein, then the Respondent herein may not be in a position to refund the additional/excess rents premised on the decision of the Tribunal, if the appeal ultimately succeeds.
50. Other than the foregoing, the Appellants/Applicants have also contended that the rents which were ordered and directed by the Tribunal are exorbitant and excessive taking into account the locality of the suit premises. In this respect, the Appellants/Applicants have added that the business being carried by same are not likely to fetch and/or generate sufficient resources, to enable same to meet inter-alia the exorbitant rents that were decreed by the Tribunal.
51. Based on the foregoing, the Appellants/Applicants have thereafter proceeded to and contended that in the event of failure to meet and/or pay the increased rents, in line with the decision of the Tribunal, then there is a likelihood of the Respondent evicting the Appellants/Applicants from the suit premises.
52. In the premises, the Appellants/Applicants have therefore contended that substantial loss shall therefore arise and/or accrue, if the orders of stay of execution sought at the foot of the current Application are not granted.
53. Before venturing to consider whether or not the Appellants/Applicants have established and demonstrated that substantial loss is bound to arise or accrue, it is imperative to discern and appreciate what therefore is the meaning of substantial loss.
54. In this respect, it is important to appreciate the definition that was applied vide the case of *Century Oil Trading Company Limited Vs Kenya Shell Limited* Milimani HC MCA 1561 OF 2007 (unreported), where Justice Kimaru, J. stated as hereunder;-

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be



stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

55. Further and in addition, the significance of substantial loss in an application for stay of execution pending the hearing and determination of an appeal, was also underscored and elaborated upon by the Court of Appeal in the case of *Kenya Shell Limited Versus Benjamin Karuga Kibiru & Another* 1986 eKLR, where the court stated and observed as hereunder: _

“It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. 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”.

56. Having appreciated and taken cognizance of the importance of substantial loss to an Application of this nature, it is now important to revert back to the matter before hand and to consider whether the Appellants/Applicants have indeed established and demonstrated that substantial loss is likely to arise and occur if the orders sought are not granted.

57. First forward, the Appellants/Applicants herein have stated that if the orders sought are not granted, then the additional rents and the security deposit that was ordered by the Tribunal, would become operational and the Appellants/Applicants would be obliged to pay same to and in favor of the Respondents, during the pendency of the appeal.

58. On the other hand, the Appellants/Applicants have also stated that if the appeal ultimately succeeds then the Respondent herein would not be in a position to refund the additional rents and the security deposits paid to and in favor of the Respondent. Consequently and in this regard, the Appellants/Applicants now impress upon the court to find and hold that substantial loss shall accrue.

59. Notwithstanding the contention by and on behalf of the Appellants/Applicants, it is not lost on this Honourable court that the Respondent herein has been the Landlord of the Appellants/Applicants and in any event, same have hitherto been paying rents to and in favour of the Respondent.

60. Additionally, there is no evidence that the Respondent which is a co-operative society is facing liquidity issues and is thus likely to undergo liquidation or winding up, any time prior and before the hearing and determination of the appeal.

61. To my mind, insofar as the Respondent herein is the registered owner and proprietor of the suit premises, where the Appellants/Applicants are tenants, there is no gainsaying that the Respondent herein is substantially grounded in terms of means and capability. In this regard, it suffices to point out that if the Appellants herein ultimately succeed on the appeal, then the appellants/applicants, can very well seek to attach and alienate the suit premises, for purposes of recovery of any monetary award or otherwise.

62. Other than the foregoing, if by the time the appeal is heard and determined, it is found that the Tribunal made an error, then it is still within the mandate of the appellate court to order and direct that the



additional rents, which were paid in compliance with the orders of the Tribunal, to be spread over and treated as advance rents for a pro-rata period or duration.

63. Surely and to my mind, there is no scintilla or iota of evidence to demonstrate that the Appellants/Applicants shall be disposed to suffer any substantial loss or otherwise. For good measure, it must be remembered that that the execution of court decrees are always bound to generate some loss, discomfort or inconvenience; but it is not every loss, whether monetary or otherwise, that constitute substantial loss.
64. In a nutshell, I come to the conclusion that the Appellants/Applicant herein, who are still tenants of the Respondents, have neither established nor demonstrated that substantial loss shall occur and or arise if the orders sought are not granted.

Issue Number 3 Whether the impugned orders issued by the Business Premises Rent Tribunal on 27th February, 2023, were orders in the Negative and if so; whether same are capable of being stayed.

65. It is the Appellants/Applicants herein who upon being served with the notices to vary and or alter the terms of the Tenancy, proceeded to and filed the statutory Reference and thus invoked the Jurisdiction of the Tribunal.
66. Additionally, the dispute before the Tribunal was provoked and originated by the Reference which was filed by the Appellants/Applicants. Consequently, what the Tribunal was called upon to determine was the Reference which was challenging the terms of the notices which were issued and served at the instance of the Respondent.
67. True to it, the Tribunal proceeded to and adjudicated upon the Reference, and thereafter rendered a decision vide Ruling delivered on 27th February, 2023, whereupon the Tribunal dismissed the Reference. For good measure, it is important to note that the Reference was dismissed.
68. Consequently, and arising from the dismissal of the Reference, there is no gainsaying that the resultant order and or outcome of the decision of the Tribunal, was an order in the Negative.
69. Premised and based on the foregoing, the question that thus arises for determination is whether or not a negative order like the one before hand, is capable of being stayed pending the hearing and determination of an appeal either in the manner sought or otherwise.
70. To my mind, the law as pertains to whether a negative order is capable of being stayed has since crystallized and become trite. In this regard, it is appropriate to recall and reiterate the position of the Court of Appeal in the case of *Western College of Arts and Applied Technology Vs Oranga* 1976 eKLR, where the court stated as hereunder:

“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 *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, 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 a stay, it is so ordered”.



71. Furthermore, the foregoing Legal position was re-visited by the Court of Appeal in the case of *Charles Barongo Nyakeri Vs the County Government of Kisii & another* 2020 eKLR, where the court stated and held as hereunder:-

- “ 11. This Court has also consistently held that a negative order cannot be executed, and that where the trial court in its judgment has dismissed a suit, that is a negative order that is not amenable to grant of any stay. See *Western College Of Arts & Applied Sciences V Oranga & Others* [1976] KLR 63.
12. The applicant’s claim was dismissed by the ELRC. What followed was a negative decree that cannot be executed. The order of stay of execution of the trial court’s judgment pending hearing and determination of the intended appeal sought by the applicant cannot therefore be granted.”

72. Most recently, the Honorable court of Appeal pronounced itself with clarity on the same issue in the case of *Registered Trustees Kenya Railways Staff Retirement Benefit Scheme Vs Milimo, Muthoni & Co. Advocates & 2 others* 2022 KECA where the court stated thus:-

17. We start by acknowledging the fact that the ruling appealed against was a compounded one dealing with 2 applications, which yielded two different results. The first application, which was made by the applicant, was dismissed. As submitted by learned counsel for the 1st respondent, the position taken by this Court in respect of applications for stay of execution in respect of negative orders is clear. Negative orders cannot be stayed. We reiterate the sentiments of the predecessor of this Court in its decision in *Western College of Arts and Applied Sciences vs Oranga & Others* (1976-80) 1 KLR, where the Court stated in respect of stay of execution 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 *Wilson v Church*, the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case, the High Court has not ordered any 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 and application for stay, it is so ordered.”

73. Certainly, even though Learned counsel for the Appellant/Applicants has endeavored to break down the import and tenor of the decision of the Tribunal, it is not lost on this court that the overall decision of the Tribunal, which constituted the decree being appealed against was an order which dismissed the Reference.

74. Consequently and despite the semantics applied and deployed by Learned counsel for the Appellants/Applicants, the bottom line remains that the Tribunal dismissed the Reference, which had been filed/ lodged by the Appellants/Applicants.

75. Premised on the foregoing, there is no debate and/or contest that the resultant order that was made and or handed down by the Tribunal was an order in the negative. Instructively, such an order cannot attract stay of execution, either in the manner sought or at all.



Conclusion And Final Disposition:

76. Having calibrated upon the various issues which were enumerated in the body of the Ruling herein, (whose details are elaborated in the preceding paragraphs) it is evident and apparent that the Appellants/Applicants herein have neither established nor demonstrated the requisite ingredients to warrant the grant of the orders sought.
77. For good measure, it is imperative to reiterate that the burden of proof laid on the shoulders of the Appellants/Applicants, to demonstrate the existence of the ingredients underlined vide Order 42 Rule 6 (2) of the *Civil Procedure Rules* 2010, which are paramount and mandatory. However, the Appellants/Applicants failed to discharge the burden either to the requisite standard or at all.
78. In a nutshell, the Application dated March 28, 2023; is devoid and bereft of merits. Consequently, same be and is hereby Dismissed with costs to the Respondent.
79. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JULY 2023.

OGUTTU MBOYA

JUDGE

In the presence of:

Benson – court assistant

Ms. Diana Ngei H/B for Mr. James Tugee for the Appellants/Applicants.

Ms. Sylvia Mwuiruri holding brief for Mr. Charles Kanjama (SC) for the Respondent.

