



Mauya & another (Suing on Behalf of Ann Kerubo, Joel Karasi, Michelle Gechemba & Abel Omete as Guardians) v Omete & 2 others (Environment and Land Appeal E014 of 2023) [2023] KEELC 20277 (KLR) (27 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20277 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E014 OF 2023
JM KAMAU, J
SEPTEMBER 27, 2023**

BETWEEN

PHILES KWAMBOKA MAUYA 1ST APPLICANT

DORCAS OSEBE OMETE 2ND APPLICANT

**SUING ON BEHALF OF ANN KERUBO, JOEL KARASI, MICHELLE
GECHEMBA & ABEL OMETE AS GUARDIANS**

AND

GEORGE OBIRI OMETE 1ST RESPONDENT

DENNIS NYANGAU MIRANYI 2ND RESPONDENT

LAND REGISTRAR, NYAMIRA 3RD RESPONDENT

(Being an Appeal against the Judgment of Hon. Bethwel Kimutai Matata – Senior Principal Magistrate in Keroka ELC NO. 20 of 2019 dated and delivered on 13th June, 2023)

RULING

1. The Application before court is dated June 29, 2023 seeking for orders that the suit property LR. No. Manga Settlement Scheme/1333 and 1334 both of which are sub-divisions of Manga Settlement Scheme/1257 be conserved till the Hearing and determination of the Appeal herein. The suit in the Lower Court i.e. Keroka ELC NO. 20 of 2019 sought prayers that the suit property be declared to be held in trust by the 1st respondent for the appellants. The same was dismissed hence the Appeal before this court. According to the appellants' Affidavit sworn on 29/06/2023 the appellants depone that the Appeal would be rendered nugatory should the orders of stay not be granted.
2. In their Grounds of opposition dated 07/07/2023 the respondents urge the court to dismiss the Application since this court has no powers to grant the same. This assertion has not been explained.



The respondents also argue that there is no Decree and that the Judgment pronounced in the lower court was a negative one. Finally, they are of the view that the caution in place suffices. I have heard and considered rival Submissions. We are not at this stage concerned about whether the Appeal has high chances of success or not but the consequences of the outcome of the same. The appellant has told the court that there is an issue of trust that is the subject of the Appeal.

3. Having set out the respective parties' positions as above, it is my most considered view that the sole issue for determination is whether or not, in the circumstances, I ought to grant Stay of Execution of the Judgment of the Hon. Bethwel Kimutai Matata – Senior Principal Magistrate in Keroka ELC NO. 20 of 2019 dated and delivered on April 30, 2020 pending the hearing of the Appeal.
4. Matters to do with trust must be taken seriously. Although there is said to be a caution in place over the suit properties, the sustainability of the same is in the hands of the Land Registrar.
5. Section 2 of the *Civil Procedure Act* defines a Decree Holder as any person in whose favour a Decree has been passed or an Order capable of execution has been made, and includes the assignee of such Decree or Order. The definition alludes to an order that is capable of being executed. Bearing that in mind vis-à-vis the facts of this case, there was no Order and subsequent Decree capable of being executed.
6. Coming now to the respondent's contention that the Application is misconceived and incapable of granting since it seeks to stay execution of a negative order which merely dismissed the suit, it is now a settled principle in law that there can be no Stay of a negative order. In the case of *Catherine Njeri Maranga v Serah Chege & another* [2017] e KLR, the court had this to say:-

“...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 before coming to court and therefore the issues of substantial loss that he is likely to suffer and the appeal being rendered nugatory does not arise”

7. In the case of *Kenya Ports Authority Autoexpress Limited & 2 others* [2016 eKLR, the Court observed thus:-

“...there was no jurisdiction to award a relief which had not been sought for by a party to any proceedings... this principle binds both the litigant and the court.”

8. I am further guided by the Court of Appeal decision in the case of *Kaushik Panchamatia & 3 others v Prime Bank Limited & another* [2020] eKLR. As the court reiterated and which I fully adopt;

“...that 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 applicants.”

9. Similarly, in the case of *Western College Farts and Applied Sciences v Oranga & others* [1976] KLR 63, the court whilst considering whether an Order of Stay can be granted in respect of a negative order and which we fully adopt stated inter alia 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. 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.”

10. I am in agreement with the above authorities in totality. Having said so, this court noted that the Judgment the trial court granted was not a positive order. A negative order is incapable of being Stayed as the appellant seeks. Accordingly, there is nothing to stay in the present case.
11. Order 42 Rule 6 of the *Civil Procedure Rules*, 2010 specifies the circumstances under which the court may order Stay of Execution of a Decree or Order pending an Appeal. It provides that an Applicant must demonstrate the following: -
 - a) Substantial loss may result to the applicant unless the order was made;
 - b) The application was made without unreasonable delay; and
 - c) Such security as the court orders for the due performance of such decree or order as may ultimately binding on him has been given by the applicant.
12. From the above provision, it is clear that the court must be satisfied that there is “sufficient cause” to grant a Stay. Evidently, all the three (3) conditions must be met simultaneously. The trial court in the Judgment dated April 30, 2020 merely dismissed the suit with costs. Therefore, the only execution which can flow from the said Judgment is with respect to costs since the trial court did not order any of the parties to do anything or to refrain from doing anything or to pay any sum as Damages. It therefore follows that in light of the above, this court has no mandate to grant a Stay This is however not suggesting that this court cannot issue restraining orders to stop a possible disposal of the subject matter by the respondents. Each case will be considered on its own merit. I have not lost sight of the argument by the applicant that if Stay is not granted, there is a likelihood of the respondents selling his properties. The appellant argued that if this court does not intervene to prevent the respondents from selling the suit properties, its Appeal will subsequently be rendered nugatory.
13. We need to ask ourselves whether it would be useful to proceed with the Appeal without protecting the subject matter of the same. It may turn out to be an academic exercise. I therefore order that the caution in place over the suit properties do remain in force until the Hearing of this Appeal. I further order that the Record of Appeal be served forthwith and that the same be disposed of within the next 30 Days. The costs of this Application shall abide the outcome of this Appeal.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 27TH DAY OF SEPTEMBER 2023.

MUGO KAMAU

JUDGE

In the Presence of:-

Court Assistant: Sibota

Appellant: Mr. Okemwa holding brief for Mr. Nyambati

Respondent: N/A

