



**Ashitiba v Akafwale (Environment and Land Appeal E027 of 2023)  
[2023] KEELC 20731 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20731 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E027 OF 2023  
DO OHUNGO, J  
OCTOBER 17, 2023**

**BETWEEN**

**SAMUEL ASHIKOYE ASHITIBA ..... APPELLANT**

**AND**

**WYCLIFFE OYONDI AKAFWALE ..... RESPONDENT**

*(Being an appeal from the judgment of the Principal Magistrate's  
Court at Butere (Hon. G. Ollimo, Senior Resident Magistrate)  
delivered on 25th May 2023 in Butere MCELC No. E033 of 2022)*

**RULING**

1. By Notice of Motion dated 1<sup>st</sup> August 2023, the appellant is seeking stay of execution of the judgment delivered by the Subordinate Court on 25<sup>th</sup> May 2023 and all consequential orders pending hearing and determination of this appeal.
2. The application is supported by an affidavit sworn by the appellant/applicant. He deposed that execution of the judgment will cause him irreparable loss and damage and that he applied for typed and certified proceedings. He added that he is ready to abide by any conditions that the court may set. The applicant also swore and filed a supplementary affidavit, whose contents I have noted.
3. The respondent opposed the application through his replying affidavit sworn on 31<sup>st</sup> July 2023 and filed on 1<sup>st</sup> August 2023. He deposed that the application is misplaced and that time for review has lapsed.
4. The application was canvassed through written submissions, which both sides duly filed and which I have noted. I have considered the application, the affidavits, and the submissions.



5. The principles that guide this court's exercise of jurisdiction to grant stay of execution pending hearing and determination of an appeal are outlined at Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010 which provide as follows:

6.

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (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.

6. The essence of those provisions is that an applicant seeking stay pending appeal must demonstrate that substantial loss will result to him if stay is not granted, and that the application has been made without unreasonable delay. Such an applicant is further required to give such security as the court may order for the due performance of the decree. See Kenya Power & Lighting Co. Ltd v Kigaita Ngare Unduthu & 36 others [2020] eKLR and Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR. As Platt Ag JA (as he then was) stated in Kenya Shell Limited v Benjamin Karuga Kibiru & another (*supra*), substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. It is virtually impossible for such an application to succeed if an applicant fails to demonstrate that he will suffer substantial loss if stay is not granted.

7. The judgment appealed against was a dismissal of the appellant's suit with no order as to costs. A dismissal is a negative order. Such an order is incapable of execution, with the consequence that there is nothing to stay. See Western College of Arts and Applied Sciences v EP Oranga & 3 others [1976] eKLR and Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others [2021] eKLR.

8. In view of the foregoing discourse, I find no merit in Notice of Motion dated 1<sup>st</sup> August 2023. Consequently, I dismiss the application with costs to the respondent.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 17<sup>TH</sup> DAY OF OCTOBER 2023.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Mr Ogonji holding brief for Mr Obwatinya for the Appellant

Mr Abok holding brief for Mr Ombito for the Respondent

Court Assistant: E. Juma

