



**Sifuna (Suing as a legal representative of the Estate of Arneo Sifuna) v Urandu & another (Environment and Land Appeal E015 of 2023) [2023] KEELC 20737 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20737 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E015 OF 2023  
DO OHUNGO, J  
OCTOBER 17, 2023**

**BETWEEN**

**KEVIN WESONGA SIFUNA (SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF ARNEO SIFUNA) ..... APPELLANT**

**AND**

**WILBERFORCE URANDU ..... 1<sup>ST</sup> RESPONDENT**

**STEPHEN AMBETSA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the ruling and order of the Chief Magistrate's Court at Kakamega (Hon. A. A. Odawo, Principal Magistrate) delivered on 9th August 2023 in Kakamega MCELC No. 68 of 2020)*

**RULING**

1. The appellant filed this appeal on August 10, 2023. Together with the Memorandum of Appeal, the appellant filed notice of motion dated August 9, 2023, which is the subject of this ruling. The following orders are sought in the application:
  - A. [Spent]
  - B. [Spent]
  - C. The Honourable Court be pleased to stay of execution (sic) of a ruling that was delivered by the Lower court on 9<sup>th</sup> August, 2023 pending an appeal.
  - D. The Honourable Court orders that burial of one Felix Urandu Nyongesa should not take place on the suit properties Bunyala/Sidikho 2041 & Bunyala/Sidikho 2042 (originally Bunyala/Sidikho 1756).



- E. The Honourable Court orders that the Ruling delivered on 9<sup>th</sup> August, 2023 by Honourable Odawo in the Lower Court case number: MCLE Case No. 68/2020: Kevin Wesonga Sifuna (Suing as the Legal representative of the Estate of Arneo Sifuna Deceased) -versus - Felix Urandu Nyongesa & 2 Others be voided for ambiguity, which ambiguity shall prejudice the Applicant herein if left uncured.
- F. An order be issued to the OCS, Navakholo Police Station. The Chief and Sub-Chief of Kamuli Sublocation to enforce prayer B above.
2. The application is supported by an affidavit sworn by the appellant/applicant. He deposed that Felix Urandu Nyongesa died while a trespasser on land parcel numbers Bunyala/Sidikho 2041 & Bunyala/Sidikho 2042 (originally Bunyala/Sidikho 1756) (suit properties) and that he filed an application before the Subordinate Court seeking an injunction to restrain the respondents herein from burying his remains in the suit properties. That the Subordinate Court delivered its ruling on 9<sup>th</sup> August 2023 allowing the respondents to bury the remains in the suit properties. He added that if the respondents are allowed to bury on the suit properties, it will occasion him irreparable loss since it is a taboo under his beliefs and customs to exhume the remains and the value of the suit properties will be lowered. That equally, such a burial will render the suit before the Subordinate Court an academic exercise. The applicant also swore and filed a supplementary affidavit, whose contents I have noted.
3. The respondents opposed the application through a replying affidavit sworn by the first respondent. He deposed that the remains of the deceased were at the mortuary incurring costs, yet the appellant had not provided any security for such costs. That Felix Urandu Nyongesa (deceased) owned another parcel of land known as Bunyala/Sidikho/1758 and that the respondents have no intention of burying his remains on the suit properties.
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 import 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 applicant contends that burying the deceased's remains on the suit properties will occasion him irreparable loss since it is a taboo under his beliefs and customs to exhume human remains, and that the value of the suit properties will be lowered. A perusal of the ruling and order appealed against however shows that the Subordinate Court simply dismissed the application for injunction. The dismissal was in the nature of 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. Beyond the learned magistrate's opinion on the utility of keeping the body in the mortuary longer, there was no order that the remains of the deceased be buried on the suit property. In any case, I note that the respondents have made it abundantly clear that they have no intention of burying the deceased's remains on the suit properties. In those circumstances, I am at a loss as to why the respondents are keeping the remains in the mortuary, if at all that remains the position or why they are complaining about incurring mortuary costs. In that context, parties should in fact seriously consider a settlement in this appeal, to facilitate progress in the suit before the Subordinate Court.
9. Under prayer D of the application, the applicant urges the court to order that burial of the deceased should not take place on the suit properties. That introduces a new aspect to the application which goes beyond the court's jurisdiction in an application for stay pending appeal. It is a matter to be considered if at all, during the hearing of the appeal.
10. In view of the foregoing discourse, I find no merit in Notice of Motion dated August 9, 2023, and I therefore dismiss it. Costs shall be in the appeal.

**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:**

The Appellant present in person

Mr Ogonji holding brief for Ms Andya for the Respondents

Court Assistant: E. Juma

