



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**E.L.C CASE NO. 186 OF 2016**

**DOUGLAS ORIBU MATOKE (Suing through his attorney)**

**SAMWEL MABEYA.....PLAINTIFF**

**VERSUS**

**WILLIAM SAGINI ORIBU.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. Following the delivery of the judgment in this matter, the Plaintiff/ Applicant filed a Notice of Motion dated 26<sup>th</sup> August, 2021 seeking a temporary injunction restraining the Defendant/Respondent herein by himself or his agents, servants and any person acting for and on his behalf from demolishing the structure standing on plot no. WANJARE BOGIKUMU/2004 and 6245 or in any manner interfering with the said structure pending the hearing and determination of the intended appeal.
2. He also sought a stay of execution of the decree herein pending the hearing and determination of the intended appeal.
3. The application is based on the grounds listed on the face of the Notice of Motion and the Applicant's Supporting Affidavit sworn on the 26<sup>th</sup> August, 2021. In the said affidavit he deponed that he was dissatisfied with the judgment dismissing the Plaintiff's case and he had filed a Notice of Appeal. He further deponed that there is a structure on the suit property which was erected by Daniel Matoke Oribu – deceased and he feared that the Respondent would demolish the said structure before the appeal is heard thus occasioning him substantial loss and damage.
4. The application is opposed by the Respondent through his Replying Affidavit sworn on the 27<sup>th</sup> September 2021, in which he deposed that he had not been served with a Notice of Appeal. He deposed that there was nothing to stay as the Plaintiff's suit had been dismissed. It was his contention that the Applicant was misleading the court as the photograph annexed to his Supporting Affidavit was different from the one he had produced during the hearing of the case. He therefore urged the court to dismiss the application.
5. The court directed that the application be canvassed by way of written submissions and the Applicant filed his submissions on the 18<sup>th</sup> October, 2021 while the Respondent filed his on the 3<sup>rd</sup> November, 2021.
6. In his submissions learned counsel for the Applicant clarified that the Applicant had since filed his appeal and served the Respondent. He submitted that if the orders of injunction and stay of execution were not granted, the appeal would be rendered nugatory and the Applicant would suffer loss and damage. Counsel relied on the case of **National Bank Ltd v Jivraj Raishi and Brothers Ltd & Others Kisumu Civil Application No. 153 of 2002** where the Court of Appeal was of the view that in considering an application for stay pending appeal, the conflicting interests of the parties must be weighed and considered against each other.
7. On his part learned counsel for the Respondent submitted that there was no suit pending before this court and therefore the court could not issue a temporary injunction. It was his contention that the court was *functus officio*. He further argued that even if the court were to hold that it has jurisdiction to grant a temporary injunction, the Applicant has not met the necessary conditions. He argued that dismissal of the Applicant's suit was evidence that he had no prima facie case and he had not demonstrated that he was likely to suffer irreparable loss as he has never been in possession of the suit property.
8. Counsel relied on the case of **East African Excavation Co. Limited v Nutech System & Trading Co. Ltd (2021) eKLR** where the Court held that the order dismissing the application was a negative order which was incapable of execution.

## ISSUES FOR DETERMINATION

9. Having considered the application, Replying Affidavit and rival submissions, the following issues arise for determination;

- i. Whether the Applicant is entitled to an order of injunction
- ii. Whether the Applicant is entitled to an order of stay of execution.

## ANAYSIS AND DETERMINATION

10. With regard to injunction pending appeal, Order 42 rule 6(6) of the Civil Procedure Rules provides that:-

*Order 42 Rule 6(6) “Notwithstanding anything contained in sub-rule (1) of this rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just, provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with”*

11. It is clear from the above provision that where a judgment has already been delivered, this court can only grant an injunction pending an appeal to this court from the subordinate court and not otherwise. In the instant case, the Applicant has filed an appeal in the Court of Appeal and therefore this court has no jurisdiction to issue an injunction pending the said appeal. With regard to the issue of a temporary injunction pending appeal, I am constrained to agree with counsel for the Respondent that the court is *functus officio*.

12. I will now consider whether the Applicant is entitled to the order of stay of execution. The first question I must determine is *whether the judgment delivered on 29<sup>th</sup> July, 2021 against which the Applicant has appealed is capable of being stayed. By the said judgment, this court dismissed the Applicant’s suit. The Respondent’s contention is that the order dismissing the Applicant’s suit is a negative order which is incapable of execution.*

13. While considering a similar application in **Milcah Jeruto T/A Milcah Faith Enterprises v Fina Bank Limited & Another** the court relied on **Ndungu Kinyanjui vs Kibichoi Kugeria Services & Another Civil Application No NAI 79 Of 2007 (unreported)** cited in the **Re Sonalux** case where the Court of Appeal had this to say:-

*“This Court has repeatedly stated in previous decisions... that in an application under Rule 5 (2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to pay any sum there would be nothing arising out of that decision for this court to enforce or to restrain by injunction.”*

14. The court further observed as follows:

*“To further emphasize the point in the **Re Sonalux** case, the Court of Appeal stated that in the matter that was before it, Kasango J in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money.*

*Undoubtedly, the Plaintiff strongly feels that she has an arguable appeal at the Court of Appeal. I am, however, alive to the fact that this court cannot sit on an appeal in a matter that has been handled by a court of similar and competent jurisdiction and give the same orders that such a court had refused to grant and more so when the law does not provide that the same can be granted.*

15. Furthermore, in **Co-operative Bank Limited –vs- Banking Insurance & Finance Union Kenya - Nairobi Application No. 133 of 2017** Kantai J held that “an order for stay of execution is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with...the Court has identified negative orders as orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order. That was the position in **Executive Estates Limited vs. Kenya Posts & Anor. [2005] 1 E.A. 53** where it was stated that “..... The order which dismissed the suit was a negative order which is not capable of execution.”

16. I concur with the above decisions and hold that the dismissal of the Applicant’s suit is a negative order which is not capable of being stayed. In any event the issue of injunction is not the subject of the appeal as the appeal is against the decision of the court dismissing the Plaintiff’s suit, where he sought an order compelling the Defendant to transfer a portion of land measuring 70ft by 120ft comprised in land parcels number WNAJARE/BOGIKUMU/2004 and 6245 to him. It is trite law that stay of execution pending appeal can only be granted against the order being appealed against. Put differently, an order for stay of execution pending appeal cannot be granted if the intended appeal is not against the order sought to be stayed.

17. *Be that as it may, even assuming that the said order could be stayed, the Applicant would have to demonstrate that he has met the conditions for stay pending appeal.*

18. The principles that guide the court in the exercise of its discretion to grant a stay of execution are now well settled. The substantive provision for grant of stay pending appeal is to be found under Order 42 Rule 6 of the Civil Procedure Rules.

Order 42 Rule 6 provides in part 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.

19. In the case of **M.O.M Amin Transporters Limited & Another v Alexander Ndung'u Mbugua & 2 Others [2017] eKLR** the court held that all the three conditions had to be met and satisfied simultaneously in order for the court to exercise its discretion and grant a stay of execution. The court stated as follows: -

***“13. In the cases of Kiplagat Kotut vs Rose Jebor Kipngok [2015] eKLR, Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR and Kenya Shell Limited vs Kibiru (Supra), the common thread was that a stay of execution will not be granted unless the conditions in Order 42 Rule 6 of the Civil Procedure Rules are satisfied.***

20. Furthermore, in the case of **Equity Bank Limited v Taiga Adams Company Limited [2006] eKLR** Mutungi J stated as follows:

*“It is not enough to satisfy 1 or 2 of the requirements under 42 Rule 6. All of the requirements must be met for the court to grant orders of stay pending appeal”.*

21. In the instant suit the Applicant has mentioned in his affidavit that if a stay of execution is not granted, he will suffer substantial loss without expounding on the nature of loss. Even though the application was filed within a month after the Applicant's case was dismissed, the Applicant has not offered any security for costs. In the circumstances he has failed to meet the three conditions in Order 42 Rule 6 of the Civil Procedure Rules.

22. In the premises and more particularly because the order sought to be stayed is a negative order that is incapable of execution, I find no merit in the application and I dismiss it with no order as to costs.

**DATED, SIGNED AND DELIVERED AT KISII THIS 10TH DAY OF FEBRUARY, 2022.**

**J.M ONYANGO**

**JUDGE**