



**Masakhwe v Anyemba (Environment & Land Case 128 of 2013)
[2022] KEELC 2735 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2735 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 128 OF 2013**

AA OMOLLO, J

JUNE 30, 2022

(FORMERLY HCCC NO. 31 OF 2010)

BETWEEN

CHRISPINUS OLOO MASAKHWE APPLICANT

AND

DAVID MAUMO ANYEMBA RESPONDENT

RULING

1. The Applicants brought the present application under Order 42 Rules 6 of the [Civil Procedure Rules](#) on the 17th of January, 2021 for orders that:
 - a) Spent;
 - b) This Honourable Court be pleased to stay execution pending the outcome of the Applicant's appeal; and
 - c) The costs of the application be provided for.
2. The Application was supported by the affidavit of Chrispinus Oloo Masakhwe dated 17th January, 2022 and the following grounds;
 - a) That, the appeal has been filed;
 - b) That, the Appellant has an arguable ground of appeal;
 - c) That, the Respondent has embarked on wanton destruction of the suit property including burning standing sugarcane;
 - d) That, it will be in the interest of justice and won't prejudice any party if the orders are granted.



3. The Respondent filed his Replying Affidavit on the 23rd of January, 2022. He deposed that he is in the process of presenting a bill of costs for taxation and that the Appellant has not satisfied the conditions for the grant of a stay of execution pending hearing and determination of an appeal. He denied the Applicant's allegations that he has burnt sugarcane and noted that that being a criminal offence, he had not been presented before any court over the alleged wanton destruction of the applicant's property.
4. During the hearing of the application on the 26th of January, 2022 parties agreed to canvass the application by way of written submissions. The Applicant filed their submissions on the 16th February, 2022 and submitted that he has preferred an appeal against the judgement of this court before the Court of Appeal in Kisumu. He listed several grounds of appeal and submitted that the said grounds and the fact that the Respondent is in the process of alienating the suit land buttress the fact that his appeal is arguable hence making the present application tenable. He urged this Court to find in favour for his application.
5. The Respondent filed his submissions on the 15th of February, 2022. He submitted that the judgement appealed was simply dismissing the Plaintiff's suit and did not order for anything be done or not as such there is nothing to execute. While relying on the Case of Raymond M. Ombonga vs. Austine Pyan Maranga Kisii HCCA No. 15 of 2010 the Respondent submitted the decree amounted to a negative order that cannot be stayed. The Respondent submitted further that the issue of costs is the only issue that can be stayed but even then the Applicant had not met the requirements set out under Order 42 Rule 6. The Respondent also cited the Case of *Kenya Shell Limited vs. Benjamin Karuga Kibiru & another* (1986) eKLR, where the Court of Appeal stated thus;

“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 was prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money”.

6. The Respondent submitted that the Applicant had not proved that substantial loss would occur if the said order was not granted as he did not provide any evidence to confirm the allegations that the Respondent has embarked on wanton destruction of the suit property including burning sugarcane. He submits further that the Applicant had failed to make an offer of security for the due performance of any decree or order that may ultimately be binding upon him. He sought to rely on the case of *Wycliffe Sikuku Walusaka vs. Philip Kaita Wekesa* (2020) eKLR where Olao J held thus;

“The offer for security must of course come from the Applicant himself as a sign of good faith to demonstrate that the application for stay of execution pending appeal is being pursued in the interests of justice and not merely as a decoy to obstruct and delay the Respondent's right to enjoy the fruits of his judgment. The Applicant has been silent on this crucial requirement”.

7. In *Milcab Jeruto t/a Milcab Faith Enterprises v Fina Bank Limited & Another* (2013) eKLR the court relied on *Ndungu Kinyanjui vs Kibichoi Kugeria Services & Another* Civil Application No. NAI 79 Of 2007 (unreported) cited in the Civil Application No. NAI 219 of 2007 (134/2007 UR) *Sonalux*



Limited & Another vs Barclays Bank of Kenya Limited & others (unreported) 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.”

The Court of Appeal 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.”

8. For an order to be negative, none of the parties should have any orders to do or abstain from doing anything. The Court awarded costs to the Respondent which costs were yet to be taxed at the time this application was heard meaning they did not form part of the grounds for seeking stay of execution. Consequently, on the basis that the Applicant has a negative decree, there is nothing to stay as the decree returns the parties to the position they were in before the suit was filed. He has other options to obtain restraining orders but stay is not one of them, I will thus not delve on the issue whether or not there is proof of substantial loss.
9. In conclusion, the application for stay of execution dated the 17th of January be and is hereby dismissed with costs to the Respondent

DATED, SIGNED & DELIVERED AT BUSIA THIS 30TH DAY OF JUNE, 2022.

A. OMOLLO
JUDGE

