



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kanybwe & 3 others v Tsuma & another (Civil Appeal  
4 of 2019) [2022] KEELC 3049 (KLR) (13 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3049 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
CIVIL APPEAL 4 OF 2019**

**MAO ODENY, J  
JUNE 13, 2022**

**BETWEEN**

**MAZERA BOMA ALIAS KANYBWE ..... 1<sup>ST</sup> APPELLANT  
MWACHUPA TSUMA MADZO ..... 2<sup>ND</sup> APPELLANT  
CHARLES TSUMA MULANGO ..... 3<sup>RD</sup> APPELLANT  
BOMA NDURYA TSUMA MADZO ..... 4<sup>TH</sup> APPELLANT**

**AND**

**NYAE MRISA TSUMA ..... 1<sup>ST</sup> RESPONDENT  
ALINGO MBEKO CHAKA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of a notice of motion dated November 1, 2021 by the appellants/applicants are seeking the following orders: -
  - a) Spent.
  - b) Spent.
  - c) That pending the hearing and determination of the intended appeal to the Court of Appeal there be a stay of execution of the judgment of this court delivered on October 19, 2021 and its consequential orders.
  - d) That the costs of this application be provided for.
2. Counsel agreed to canvas the application *vide* written submissions which were duly filed. Counsel relied on the grounds on the face of the application together with the supporting affidavit by the 3<sup>rd</sup> appellant's who deponed that the contempt orders affirmed by this Honourable Court are extreme



and have been unfairly granted in the circumstances and that the court ought to grant stay orders pending appeal.

3. Counsel submitted on the principles of stay of execution pending appeal and stated that the appellant must approach the court timeously, show that the appeal has triable issues and demonstrate the likelihood that he will suffer substantial loss if the order is not granted.
4. Mr Mokuia further submitted that the applicant has met the threshold for grant of the order of stay of execution and that the applicants' liberty, employment, incomes and families are threatened by the orders sought to be stayed pending appeal. Further that the applicant stands to suffer irreparable loss and damage unless the orders are granted.
5. Counsel relied on the cases of Hcca (nbi) No 182 Of 2017 *JMM V PM* [eklr] and *Justus Kariuki Mate & Anor v Hon Martin Wambora* Civil Appeal No 24 of 2014 and urged the court to allow the application as prayed.

### **Respondent's Submissions**

6. Counsel submitted that the application seeks to stay orders of this honourable court dismissing the appeal which had sought to set aside orders of the Magistrate's Court at Mariakani holding the appellant in contempt of the court and therefore the application seeks to set aside a negative order.
7. Mr Anaya submitted that the appellants filed an appeal to this court seeking to stay and overturn the ruling by the Magistrate's Court Mariakani holding the appellants in contempt of court orders of which the court heard and dismissed the same with costs.
8. Counsel relied on the cases of *Philip Kiprotich Tuitoek v Edna Jebiwott Kiplagat & 2 Others* [2021] eKLR and *Electro Watts Limited v Alios Finance Kenya Limited* [2018] eKLR where the court held that an order for stay cannot be granted where a negative order had been issued.
9. Counsel cited the case of *Chris Munga N Bichange V Richard Nyagaka Tongi & 2 Others* [2013] eKLR and submitted that the applicants have not demonstrated that they would suffer any prejudice if the application is not allowed.
10. Further that the appellants have not demonstrated that they have an arguable appeal as they neither annexed any draft memorandum of appeal nor grounds of appeal captured in the notice of appeal and cited the case of *Benedict Ojuo Juma & 10 Others v A J Pereira & Sons Limited* [2016] eKLR where the court held that there is no court which grants stay based on establishment of one limb and where there is no draft memorandum of appeal the court has no way of forming a view on the presence of an arguable appeal.
11. Mr Anaya therefore urged the court to dismiss the application for being an abuse of the court process and the applicant's use of this application to delay obedience of court orders in the lower court.

### **Analysis And Determintion**

12. This is an application for stay of execution of the judgment of this court in an appeal to set aside a ruling of the lower court which found the appellants in contempt of court. The issues for determination are as to whether there is a decision against which an order of stay can be made, whether the applicants have shown that they have an arguable appeal with reasonable prospects of success, whether the applicants will suffer substantial loss and whether the appeal will be rendered nugatory should the stay not be granted.



13. The judgment that the applicants seek to stay dated October 19, 2021 was to the effect that the appeal is dismissed with costs. In the case of *Western College of Arts and Applied Sciences v Oranga* [1976] KLR 63 as quoted in *Peter Anyang' Nyong'o & 2 others v Minister for Finance & another* [2007] eKLR the court declined to grant an injunction or a stay of execution and held that: -

“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. Any execution can only be in respect of costs....in the instant case, the High Court has not ordered any of the parties to do anything or 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 to restrain by injunction.”

14. The applicants filed an appeal at an interlocutory stage when they were aggrieved by the ruling of the Magistrate's court which this court found that the learned Magistrate did not err in the application of the law and fact. The court therefore dismissed the appeal with costs.
15. In the *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others* [2016] eKLR, where the Court of Appeal stated: -

“ 16. In *Kanwal Sarjit Singh Dhimažl v Keshavji Juvraj Shah* 20087 eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on December 18, 2006 The order of 18/7 December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not-order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences v Oranga & Others* [1976] KLR 63at page 66 paragraph C). ”

17. The same reasoning was applied in the case of *Raymond M Omboga v Austine Pyan Maranga* (supra), that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the court had to say on the matter:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order 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 in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise...

16. The order appealed against is a negative order which is incapable of being stayed. This court has rendered itself and if the applicants are aggrieved then they should move to the next level of the court.



In the case of *Kausvik Panchamatia & 3 Other v Prime Bank Limited & Another* [2020] eKLR the Court of Appeal stated that: -

“...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.”

17. I therefore find that the application lacks merit and is dismissed with costs to the respondent.

**DATED AND DELIVERED AT MALINDI THIS 13TH DAY OF JUNE 2022**

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**M.A. ODENY**

**JUDGE**

In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

