



**Kimitei (Suing as herself and also as the Administrator of the Estate of Nyongio Kimitei) v Talam & 2 others (Environment & Land Case 84 of 2018) [2022] KEELC 12575 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12575 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 84 OF 2018  
SM KIBUNJA, J  
SEPTEMBER 23, 2022**

**BETWEEN**

**ANNA KIMITEI ..... PLAINTIFF  
SUING AS HERSELF AND ALSO AS THE ADMINISTRATOR OF THE ESTATE  
OF NYONGIO KIMITEI**

**AND**

**ISAAC KIPKETER TALAM ..... 1<sup>ST</sup> DEFENDANT  
ISAAC CHEPKENER ..... 2<sup>ND</sup> DEFENDANT  
BERNARD KIPTOO MAINA ..... 3<sup>RD</sup> DEFENDANT**

***([NOTICE OF MOTION DATED 15TH NOVEMBER, 2021])***

**RULING**

1. Before me for determination is the notice of motion dated the November 15, 2021 in which the plaintiff seeks the following orders;
  - a. “Spent.
  - b. Spent.
  - c. That there be stay of execution of the judgment delivered herein on November 10, 2021 pending hearing and determination of the intended appeal.
  - d. That the costs of this application be provided for.”

The application is premised on the eight (8) grounds on its face and supported by the affidavit sworn by Annah Kimitei, the plaintiff, on the November 15, 2021. The plaintiff’s case is that the court delivered



its judgement on November 10, 2021 and being dissatisfied intends to appeal against it. That in the event the judgement is enforced, then she will suffer irreparable loss and damage, yet the appeal is arguable and has high chances of success. The plaintiff has annexed the impugned judgement, notice of appeal, draft memorandum of appeal and a letter requesting for typed proceedings for purposes of appeal to her supporting affidavit.

2. That in opposition to the application, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed the grounds of opposition dated the December 3, 2021 that includes;
  - a. That the application is nonstarter, misconceived, untenable and bad in law, devoid of merit and abuse of court process.
  - b. That the court is functus officio and therefore devoid of jurisdiction to reopen the case.
  - c. That the negative orders dismissing the Plaintiff's claim in its entirety is incapable of being stayed pending appeal.
  - d. That in any event the applicant has not satisfied the threshold to grant of stay pending appeal of envisaged by Order 42 rule 6 of [Civil Procedure Rules 2010](#).
  - e. The only order capable of execution is that of costs which are yet to be assessed.
3. The court issued directions on filing and exchanging submissions on the December 9, 2021 following which the learned counsel for the plaintiff, 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed the submissions dated February 28, 2022 and April 20, 2022 respectively, summarized as follows:
  - a. The plaintiff submitted that she will suffer substantial loss if the orders sought are not granted, while she has an arguable appeal with high chances of success necessitating the grant of stay herein. She urges the court to allow the application and grant stay of execution of the judgment delivered on the November 10, 2021 pending the hearing and disposal of the appeal.
  - b. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants submitted that the application for stay order cannot be granted as the judgement delivered on the November 10, 2021 contains negative orders, that are incapable of being stayed. They cited the decisions in the cases of [Co-operative Bank Limited v Banking Insurance Union](#), Kenya Nairobi Appl No 133 of 2017 cited with approval in [Douglas Oribu Matoke v William Sagini Oribu](#) (2022) eKLR, [Kenya Shell Limited v Kiburu & Another](#), Nairobi Civil Appl No 97 of 1986 and [Richard Muthusi v Patrick Gituma Ngomo & Another](#) (2017) eKLR.
4. The following are the issues for the court's determinations;
  - a. Whether the court is functus officio.
  - b. Whether the court's judgement delivered on the November 10, 2021 contains any orders capable of being stayed pending the hearing and determination of the intended appeal.
  - c. Whether the plaintiff has met the threshold set in Order 42 Rule 6 of the [Civil Procedure Rules](#) for stay of execution order to issue.
  - d. Who pays the costs of the application.
5. The court has carefully considered the grounds on the application and opposition, the affidavit evidence tendered, the submissions filed by the learned counsel, the superior courts decisions cited and come to the following findings;



- a. It is not disputed, and the record confirms that on the November 10, 2021, the court delivered the judgement determining the Plaintiff's suit, by dismissing it in its entirety, in the following terms:

“ 13. That in view of the foregoing, the court finds and orders as follows;

- a. That the plaintiff has failed to prove her claim to the standard required of a balance of probabilities and her suit is hereby dismissed.
- b. That each party to bear his/her own costs.”

The plaintiff came back to court six days later, *vide* the application dated the November 15, 2021, seeking that I stay the very same orders I issued on November 10, 2021 in order for her to pursue the intended appeal. The plaintiff has attached a duly lodged notice of appeal marked AK '2', draft memorandum of appeal marked AK '3' and also a letter requesting for proceedings marked as AK '4'. From the perfunctory look of the application, it is not in doubt that the plaintiff has preferred an appeal before the Court of Appeal. That position has not been contested by the defendants. Therefore, what is in contest in this application is whether this court can grant the stay of execution order sought, and in the alternative, whether the orders issued on November 10, 2021 are positive orders capable of being stayed. The plaintiff is seeking that the orders of November 10, 2021 be stayed for the reason that if executed she and the estate of Nyogio Kimitai will suffer irreparable loss and damage, that may not be recovered, should the intended appeal be successful, hence necessitating the present application for the preservation of the substratum. The plaintiff has at paragraph 8 of her supporting affidavit indicated her willingness to abide by any condition the court may set for granting of the stay orders.

- b. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants have disagreed with the plaintiff taking the position that she has not met any condition for stay of the judgment and alternatively, the orders cannot be stayed for the sole reason that they are negative orders. They have also opposed the application on the grounds that the court is *functus officio*, thus devoid of jurisdiction to reopen this case. They did not however submit on that latter ground. Nonetheless, I will pronounce myself on the issue of the court being *functus officio*. It is worth noting that the doctrine of *functus officio* is a principle of finality. The *Black's Law Dictionary, Ninth Edition* defines *functus officio* as:

“ [having performed his or her office]” (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.” emphasis added.

The Court of Appeal while interpreting the principle of *functus officio* in *Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited)* [2014] eKLR held that:

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.”

“...The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions...”



It is clear that the present case is an application for stay pending an appeal, and not one for reopening of the case. Thus the plaintiff is not after the reopening the suit, but a stay order pending the intended appeal. In other words, what the plaintiff is seeking through the instant application is the preservation of the suit's substratum as envisaged under Order 42 rule 6 [Civil Procedure Rules 2010](#). I therefore find that the objection based on the doctrine of *functus officio* inapplicable in the instant matter because the present application is not a merit based decisional re-engagement of the judgment delivered on the November 10, 2021.

c. Having determined that the application is properly before me and the court therefore is with jurisdiction, I proceed to determine if the plaintiff has satisfied the criterion of grant of orders of stay of execution pending appeal. The main issue before me is whether or not, in the circumstances, I ought to grant stay of execution of the order arising from the judgment issued on November 10, 2021 by this court, pending the hearing of the intended appeal. The applicable provision of law is Order 42 rule 6 of the [Civil Procedure Rules 2010](#), that provides as follows:

- (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.”

From the above provision of the law, it is clear that an applicant must satisfy this court that there exists a sufficient cause to grant a stay. An intended appeal is not an automatic ground for grant of stay of execution of the judgment. The two conditions as provided under Order 42 rule 6 which must be considered are: whether the court is satisfied that the applicant will suffer substantial loss if the order is not made; and secondly, that the applicant is willing to give such security for the due performance of the decree or order in issue. The plaintiff has submitted that she has indeed demonstrated that substantial loss will occasion if the orders of stay sought are not granted, as they will lose more than 13.5 acres, which the 1<sup>st</sup> defendant claimed to have purchased. She further contends that the alleged purchase price of shillings ten million, which was a colossal sum was not paid by the 1<sup>st</sup> defendant. Though I find the above statement to be an attempt to demonstrate the substantial loss, it is however insufficient as it does not show how execution of the judgment will result to such a loss. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants submitted that the plaintiff has not demonstrated substantial loss, and relied on the case of [Kenya Shell Limited Versus Kiburu & Another](#), Civil Application No 97 of 1986 where it was held that failure to prove substantial loss warrants dismissal of an application for stay.



- d. It is not sufficient for the plaintiff to only state that substantial loss will be incurred. She has to go further and particularize the loss. In this matter, I find that the plaintiff has failed to prove this requirement. In the case of *Charles Wabome Gethi v Angela Wairimu Gethi* [2008] eKLR, the Court of Appeal held that;

“... it is not enough for the applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The applicants must go further and show the substantial loss that the applicants stand to suffer if the respondent executes the decree in this suit against them.”

- e. On the requirement for security of costs, I take note of the court’s position in *Focin Motorcycle Co Limited v Ann Wambui Wangui & another* [2018] eKLR, where it was stated that:

“Where the applicant proposes to provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The applicant has offered to provide security and has therefore satisfied this ground for stay.”

From the foregoing though no costs or security for costs have been deposited by the plaintiff with the court, she has at paragraph 8 of the supporting affidavit indicated that she is “ready and willing to abide by any such conditions as the court may impose as a condition to granting the stay orders.” Though the plaintiff is willing to provide security for costs, she has failed to demonstrate how substantial loss will occur if the stay of execution order is not granted.

- f. Even if the plaintiff had established the ground on substantial loss, the question as to whether the judgment is a positive order capable of being stayed would need to be determined. The orders in the judgement delivered on November 10, 2021 have already been reproduced verbatim above as follows;

1. That the plaintiff has failed to prove her claim to the standard required of a balance of probabilities and her suit is hereby dismissed.
2. That each party bear its own costs.

From the reading of the orders of the court, there is nothing which the court has ordered to be done or to refrain from being done. All the court did is to dismiss the plaintiff’s suit. That the well settled precedents on stay of execution pending appeal are clear that for an order of stay of execution to issue, there must be positive requirements therein which would or could be affected or tampered by the stay. In *Western College of Arts and Applied Sciences v Oranga & Others* (1976-80) 1 KLR, the Court of Appeal for East Africa stated in respect of stay of execution as follows:

“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 *Wilson v Church* the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There



is nothing arising out of the High Court judgment for this Court, in and application for stay, it is so ordered”

Correspondingly, in *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] e KLR the Court of Appeal held as follows:

‘An order for stay of execution [pending appeal] 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. ‘

And in the case of *Raymond M Omboga v Austine Pyan Maranga* Kisii HCCA No 15 of 2010, the court held 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 in 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...”

- g. I have carefully considered the grounds on the application and opposition, the affidavit evidence tendered, the submissions by the learned counsel for the parties, and I am not satisfied that the elements for grant of stay of execution pending appeal have been met. That being the case, the court finds that the plaintiff has failed to prove any sufficient cause to warrant granting of an order of stay of execution pending the intended appeal, as it is clear that the judgment delivered on the November 10, 2021 contains a negative order that is incapable of being stayed.
- h. That though in the judgement of November 10, 2021 the court had directed each party to bear their own costs, in this instant application, I find it is only fair and just that an order be made that the plaintiff do pay the 2<sup>nd</sup> and 3<sup>rd</sup> defendants costs in the application in adherence to section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya.
  - 1. That flowing from the foregoing, the court finds and orders as follows;
    - a. That the plaintiff’s notice of motion dated the November 15, 2021 is lacking in merit and is therefore dismissed.
    - b. That the plaintiff will pay the 2<sup>nd</sup> and 3<sup>rd</sup> defendants costs in the application.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS 23<sup>rd</sup> DAY OF SEPTEMBER, 2022**

**S. M. KIBUNJA, J.**



**ENVIRONMENT & LAND COURT - ELDORET**

In the virtual presence of;

Plaintiff: Absent

Defendant: Absent

Counsel: Absent

Court Assistant: Oniala

**S. M. KIBUNJA, J.**

**ENVIRONMENT & LAND COURT - ELDORET**

