



**Maweu v Mbuvi & 2 others (Environment and Land Appeal
E008 of 2022) [2022] KEELC 13824 (KLR) (19 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13824 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E008 OF 2022
TW MURIGI, J
OCTOBER 19, 2022**

BETWEEN

PATRICK MUASYA MAWEU APPELLANT

AND

HENRY KITONGA MBUVI 1ST RESPONDENT

SALOME KAVULI GICHUHI 2ND RESPONDENT

REGISTRAR MAKUENI LAND REGISTRY 3RD RESPONDENT

RULING

1. By a Notice of Motion dated June 14, 2022 brought pursuant to Article 159 of the *Constitution*, Section 13(7) of the *Environment and Land Act*, Order 42 Rule 6 and 51 Rule 1 of the *Civil Procedure Rules* and Section 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* and all enabling provisions of the law, the Applicant seeks for the following orders: -
 1. Spent.
 2. That this Honourable Court be pleased to grant a stay of Judgment of the trial Court delivered on May 25, 2022 in Makueni ELC No 003 of 2021 and all consequential orders therein pending the hearing and determination of this application.
 3. That this Honourable Court be pleased to grant stay of the judgment of the trial Court delivered on May 25, 2021 and all consequential orders therein against the Appellant/ Applicant pending the hearing and determination of the Appeal ELCA No E08 of 2022.
 4. Any other relief this Honourable Court may deem fit and appropriate to grant.
 5. That the costs of this application be in the cause.



The applicant's case

2. The application is premised on the grounds appearing on its face together with the supporting affidavit of the Applicant sworn on the even date.
3. It is the Applicant's case that on May 25, 2022, the trial Court delivered its judgment in Makueni ELC No 003 of 2021. That being dissatisfied with the judgment of the trial Court, the Applicant preferred an appeal against the whole judgment before this Court. The Applicant averred that he will suffer irreparable loss if the Respondents proceed to implement the judgment and that his Appeal which has high chances of success would be rendered nugatory. The Applicant contends that the Respondents would not suffer any substantial loss if the orders sought are granted.
4. The Applicant further averred that the Respondents intermeddled with his late father's property and fraudulently caused it to be transferred to the 2nd Respondent. The Applicant argued that the trial Court erred in dismissing his claim against the 1st Respondent since he did not tender his evidence in Court.
5. He asserts that the 1st Respondent fraudulently transferred his late father's property and subsequently sold the same to the 2nd Respondent. The Applicant further averred that his appeal has high chances of success since the judgment was littered with irregularities, errors in law and facts. He maintains that an order of stay of the judgment will prevent the Respondents from executing the judgment before the appeal is heard and determined.

The 1st respondent's case

6. Opposing the application, the 1st Respondent filed his replying affidavit on July 13, 2022. He averred that the application is frivolous, vexatious and an abuse of the Court process and it ought to be dismissed with costs. He argued that the trial Court in arriving at its decision, considered the evidence presented by the parties therein. He went on to state that the memorandum of appeal does not raise any new issues or evidence since the averments contained in the supporting affidavit are the same issues that were pleaded by the Appellant in his Plaint.

The 2nd respondent's case

7. In opposing the application, the 2nd Respondent vide her replying affidavit sworn on July 11, 2022 averred that the application is an afterthought and an abuse of the Court process. The 2nd Respondent stated that she is the bonafide registered owner of the suit property having purchased the same from the 1st Respondent vide a sale agreement dated July 19, 2019. She stated that she exercised due diligence while purchasing the suit property by conducting a search and followed the due process by attending the Land Control Board where she was issued with a letter of consent and proceeded to transfer the suit property in her name.
8. The 2nd Respondent argued that the judgment by the trial Court should not be disturbed as the matter was heard and determined on merit. She argued that the Applicant had failed to demonstrate that she was likely to dispose off her property or suffer any loss. The 2nd Respondent urged the Court to dismiss the application.
9. The application was canvassed by way of written submissions.

The submissions

10. The Applicant's submissions were filed on July 23, 2022.



11. Counsel for the Applicant submitted that the only issue for determination was whether the Applicant is entitled to an order of stay of execution of the judgment and all consequential orders arising therefrom entered on May 25, 2022.
12. Counsel submitted that the law governing an application for stay of execution is founded in Order 42 Rule 6 of the [Civil Procedure Rules](#). Counsel submitted that the grant of the orders is discretionary, which discretion must be exercised judiciously and within the confines of the law. Counsel contends that the purpose of an order of stay of execution pending the appeal is to preserve the subject matter of the appeal.
13. Counsel went on to submit that the Appellant filed his appeal within the time prescribed by the law. He argued that the appeal raises arguable issues of law and fact which ought to see the light of the day by way of hearing the appeal.
14. Counsel further submitted that the Applicant is likely to suffer substantial loss as the 2nd Respondent may sell the suit property before the appeal is finalized. Counsel contends that the 1st and 2nd Respondent intermeddled with the Applicant's late father's property and fraudulently caused it to be transferred to the 2nd Respondent. That in the event the court is inclined to dismiss the application, it should be on condition that the applicant surrenders and deposits in court the original title deed together with duly executed transfer forms in favour of the decree holders.
15. To buttress his submissions Counsel relied on several authorities, which were not availed. However, Counsel cited and attached the following authority to buttress his submissions; [Feisal Amin Janmohammed T/A Dunya Forwarders v Shami Trading Co Ltd](#) (2014) eKLR.
16. The 1st Respondent's submissions were filed on August 2, 2022.
17. Counsel for the 1st Respondent submitted that the trial Court delivered its judgment in favour of the 1st Respondent after it considered the evidence presented by the parties therein and the rival submissions. Counsel further submitted that the Applicant has not raised any new issues to warrant the Court to interfere with the judgment or to grant the orders sought. Counsel argued that the Applicant has not satisfied the conditions for the grant of stay of execution of judgment nor provided any security for costs.
18. The 2nd Respondents submissions were filed on August 24, 2022.
19. Counsel for the 2nd Respondent raised the following issues for the Court's determination: -
 - i. Whether or not the orders of stay of judgment should issue.
 - ii. Whether stay of judgment pending hearing and determination of the intended appeal can be granted.
20. With regards to the issue whether the orders of stay of judgment can be granted, Counsel argued that for the Court to grant an order of stay of execution of judgment, the Applicant must satisfy the conditions laid down in Order 42 Rule 6 of the [Civil Procedure Rules](#). Counsel submitted that the conditions share an inextricable bond such that the absence of one will affect the exercise of the discretion in granting the orders for stay of execution.
21. On the condition of delay, Counsel submitted that there was inordinate delay as the present application was filed three weeks after the judgment was delivered.



22. With regards to the second requirement, Counsel contends that the Applicant is not in occupation of the suit property and has not demonstrated the substantial loss that he is likely to suffer if an order of stay is not granted. Counsel argued that the Applicant has failed to demonstrate that the 2nd Respondent was in the process of disposing off the property to a third party. To buttress his submissions on this point, Counsel reliance was placed on the following authorities: -
1. [*Joakim Ngugi Kiarie v GZ Ulyate & Others*](#) (2014) eKLR.
 2. [*James Wangalwa & Another v Agnes Naliaka Cheseto*](#) (2012) eKLR.
23. Counsel further submitted that the Applicant had failed to demonstrate that he has an arguable appeal with high chances of success. Counsel maintains that the intended appeal is brought in bad faith as it is intended to deprive the 2nd Respondent from enjoying the fruits of her judgment.

Analysis and determination*

24. Having considered the application, affidavits, and the rival submissions, I find that the issue for determination is whether the Applicant is entitled to an order of stay of execution of judgment pending the hearing and determination of the appeal.
25. The Applicant has sought for a stay of execution of the judgment delivered on May 25, 2022 pending the hearing and determination of the Appeal. Order 42 Rule 6 (1) and (2) of the [*Civil Procedure Rules*](#) outlines the guiding principles to be met for the grant of stay and provides 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.

6(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

such security of costs for the performance of such decree or order as may ultimately be binding on him has been given by Applicant.

26. Going by the above provisions of the law, it is clear that in an application for stay of execution pending Appeal, the Applicant must satisfy the following three conditions: -
1. The Court is satisfied that substantial loss may result to the Applicant unless the order is made.
 2. The application has been made without unreasonable delay.
 3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the Applicant has been given by the Applicant.



27. In considering an application for stay of execution, I am guided by the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 where the Court of Appeal gave the following guidelines;

“The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

28. The grant of an order of stay of execution is a discretionary one. In the case of *RWW v EKW* (2019) eKLR the Court held that;

“...the purpose of an application for stay of execution pending an appeal is to preserve the subject in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and The appeal if successful is not rendered nugatory. However, in doing so the court should weigh the right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of damages.”

29. The Applicant through a Plaint dated January 25, 2021 sought for the following orders against the Defendants/Respondents: -

- a. A declaration that transactions involving transfer of land known as Konza South Block 5 (Konza) 433 amounted into intermeddling with property of a deceased person and an order do issue for cancellation of the title deed in respect of land known as Konza South Block 5 (Konza) 433 fraudulently to Henry Kitonga Mbuvi on February 19, 2019 and later to Salome Kavuli Gichuhi on September 18, 2019 and another title deed be re-issued in the name of the late John Maweu Mulwa(deceased) pending confirmation of grant in the name of the Plaintiff.
- b. An order of injunction do issue restraining the Defendants by themselves, their agents, nominees and/or servants from transferring and or selling, alienating and/or interfering and/or intermeddling with the parcel of land known as Konza South Block 5(Konza) 433 measuring approximately 4.3396 ha approximately 10.7199 acres or thereabout in any manner whatsoever.
- c. Any other remedy/relief that this Honourable Court deems just in the circumstances.
- d. Costs of this suit.

30. The 1st and 2nd Defendants denied the Plaintiff’s claim vide their statement of defence filed on July 13, 2021 and March 1, 2021 respectively. The matter was heard on merit and subsequently the Court delivered its judgment on May 25, 2022.



31. In considering if the Applicant will suffer substantial loss unless an order of stay of execution is granted, I am guided by the decision of the Court of Appeal in *Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga* (1982-1988) 1 KAR 1018 in which the Court stated as follows:-

“It is usually a good rule to see if Order 41 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 cornerstone of both jurisdictions for granting stay.”

32. The substantial loss contemplated under Order 42 Rule 6 (2) of the *Civil Procedure Rules* should result on the existence of a positive order of the Court, which if executed will result in a loss to the Applicant.

33. In its judgment of May 25, 2022 the Court merely dismissed the Plaintiff’s claim with costs to the 1st and 2nd Defendants.

34. In the case of *Western College Arts and Applied Sciences v Oranga & Others* (1976) KLR 63, the Court whilst considering whether an order for stay can be granted in respect of a negative order stated 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. An execution can only lie in respect of costs.....”

35. Similarly, in the case of *Kaushik Panchamatia & 3 Others v Prime Bank Ltd & Another* (2020) eKLR the Court stated and I fully adopt;

“.....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 by the applicants”. The Court of appeal made it clear that a negative order is not capable of being stayed for costs.”

36. This Court notes that the order sought to be stayed is a decision that dismissed the Plaintiff’s/Applicant’s suit with costs to the Defendants/Respondents. The Court did not issue any positive order capable of being stayed pending the hearing and determination of the Appeal. It is therefore a negative order. It is trite law that a negative order is incapable of being stayed.

37. The Court has no power to stay a negative order or dismissal as was held by the Court of Appeal in the case of *Oliver Collins Wanyama v Engineers Board of Kenya* (2019) eKLR where it held as follows;

“An order of stay is not available to the applicant his application for judicial review having been dismissed, giving rise to a negative order that is incapable of being stayed.”

38. In *Kanwal Sarjit Singh Dhiman v Keshavji Juvraj Shah* [2008] 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 December 18, 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 63 at page 66 paragraph C).”

39. Further in the case of *Milcab Jeruto v Fina Bank Ltd* [2013] eKLR the Court held that an order for stay cannot be granted where a negative order has been issued.
40. Accordingly, there is nothing to stay in the present judgment. The only execution that can flow from the said judgment is costs since the Court did not order any of the parties to do anything or refrain from doing anything or from paying any sum.
41. The upshot of the foregoing is that the application dated June 14, 2022 is devoid of merit and the same is dismissed with costs to the Respondents.

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HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 19TH DAY OF OCTOBER, 2022.

IN THE PRESENCE OF: -

Court assistant – Mr. Kwemboi

Musembi for the Applicant

Odhambo holding brief for Okoth for the 2nd Respondent.

