



REPUBLIC OF KENYA



KENYA LAW
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**Ochieng v Okinyi & 2 others (Environment and Land Appeal
E025 of 2021) [2022] KEELC 14963 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14963 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E025 OF 2021**

E ASATI, J

NOVEMBER 24, 2022

BETWEEN

HENRY MICHAEL OCHIENG PLAINTIFF

AND

JOSEPH OKINYI 1ST DEFENDANT

KORU CATHOLIC CHURCH 2ND DEFENDANT

COUNTY REGISTRAR LANDS, KISUMU 3RD DEFENDANT

(Being an appeal from the judgement and decree of the Principal Magistrate's Court(Hon. P. K. Rugut) given at Tamu on 18 th of March 2021 in Tamu PMCCC No. 32 of 2018.)

RULING

1. This ruling is in respect of the appellant/applicant's application dated 24th October 2022. The application seeks for an order of stay of execution of the judgement of this court dated 30th September 2022 and the resultant decree issued on 3rd October 2022 pending hearing of an intended appeal to the Court of Appeal.
2. The application was unopposed. An affidavit of service sworn by Fred Edward Otieno Ambala Advocate on 4th November 2022 shows that the Respondents were served with the application and the Court Order dated 28th October 2022. The hearing date for the application was indicated in the court order. However, as at the hearing date no response to the application had been filed and no attendance in court on behalf of the Respondents. The matter thus proceeded ex parte.
3. The grounds for grant of orders of stay of execution of decree/judgement are provided for in order 42 rule 6(2) of the [Civil Procedure Rules](#) 2010 it provides as follows:

“No order for stay of execution may 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.”
4. An applicant is thus obligated to prove to the satisfaction of the court firstly, that substantial loss will be occasioned to him/her if the order of stay of execution is not granted. Secondly, the application must be brought without unreasonable delay and thirdly the applicant must give security for the due performance of such decree or order as may ultimately be binding upon him/her.
5. The judgement whose execution is sought to be stayed was to the effect that the appeal was dismissed with costs. The judgement and consequent decree did not direct any party to undertake any action or refrain from undertaking any action save for the costs. The judgement was essentially a negative order and the Court of Appeal has held that to such, an order of stay of execution is not available. See case of *Western College of Arts And Applied Sciences Vs Oranga & Others* [1976] KLR 63 the Court of Appeal whilst considering whether an order of stay can be granted in respect of a negative order stated:-

“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 be in respect of costs.....”

The High Court has not ordered any of the 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 an application for stay to enforce or restrain by injunction.”

And in *David Kipruto Chingi & Another vs Director of Public Prosecutions & 2 Others* [2016] eKLR where the court observed that an application seeking stay of execution of a negative order was bound to fail and proceeded to dismiss the same. Also see *Jenifer Akinyi vs Boniface Okumu Osodo & 3 Others* [2021] eKLR.
6. In view of the nature of the judgement and decree whose execution is sought to be stayed and guided by the decisions referred to herein, I find that the grounds for stay of execution pending appeal to the Court of Appeal have not been demonstrated. I dismiss the application. No order as to costs.

Orders accordingly.

RULING DATED AND SIGNED AT KISUMU DELIVERED VIRTUALLY THIS 24TH DAY OF NOVEMBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

E. ASATI

JUDGE

In the presence of:

Maureen: Court Assistant.

Abala advocate for the Appellant

No appearance for the Respondents

E. ASATI

JUDGE.

