



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ojwang v Onyango & 4 others (Environment & Land Petition  
3 of 2021) [2022] KEELC 14972 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14972 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND PETITION 3 OF 2021  
AY KOROSS, J  
NOVEMBER 24, 2022**

**BETWEEN**

**JOSEPH MUDAMBA OJWANG ..... PETITIONER**

**AND**

**JOHN OPONDO ONYANGO ..... 1<sup>ST</sup> RESPONDENT**

**LAND ADJUDICATION OFFICER, SIAYA ..... 2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR, SIAYA ..... 3<sup>RD</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. The application that is the subject of this ruling is a notice of motion application by the petitioner against the respondents dated May 24, 2022. The motion has been moved pursuant to the provisions of sections 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 42 Rule 1 of the [Civil Procedure Rules](#). He sought the following reliefs;
  - a. Spent;
  - b. Spent;
  - c. That there be a stay of execution of the judgment of this honourable court delivered on March 10, 2022 pending the hearing and determination of the appeal; and
  - d. Costs be provided for.
2. The motion is based on the grounds set out on its face and on the supporting affidavit of the petitioner Joseph Ojwang Mudamba dated May 24, 2022.



3. He deponed inter alia, he was aggrieved and dissatisfied by the decision of this court and he had an arguable appeal which was founded on good and reasonable grounds. Unless stay was granted, the appeal would be rendered nugatory. He was apprehensive that the respondents would unless restrained by this court, commence execution proceedings with a view of evicting him from Siaya/Nyadorera “B”/1940 ‘the suit property’.

### **Respondents’ case**

4. In opposition, the 1<sup>st</sup> respondent John Opondo Onyango filed a replying affidavit sworn on July 18, 2022. He deponed inter alia, the motion was misconceived, frivolous, vexatious and an abuse of the court process. The appeal did not have chances of success. The petitioner had not established that he would suffer substantial loss if stay was not granted. The court issued a negative order which was not capable of being stayed. The motion was made in bad faith with the intent of delaying him from enjoying the fruits of his judgment. The motion be dismissed with costs.
5. The 2<sup>nd</sup> to 5<sup>th</sup> respondents did not participate in these proceedings.

### **The petitioner’s rebuttal**

6. In rebuttal to the averments made in the replying affidavit, the petitioner filed a further affidavit sworn on August 29, 2022. He amplified the contents of the supporting affidavit, which I have rehashed above in detail and need not reiterate them. Additionally, he deponed inter alia, if evicted from the suit property, he would suffer substantial loss and if stay was not granted, he would suffer irreparable damage.

### **Parties’ submissions**

7. As directed by the court, the petitioner’s Counsel Mr. Mwamu filed his written submissions dated August 16, 2022. Counsel identified 3 issues for this court’s consideration; (i) whether the motion was an abuse of court process (ii) whether the motion was merited and (iii) who shall bear costs.
8. On the 1<sup>st</sup> issue, Counsel submitted that the petitioner had not abused the court process but had merely exercised his constitutional right to challenge the decision of this court. Counsel cited with approval the case of *Chairman, Cooperative Tribunal & 8 others ex parte Management Committee Konza Ranching & Farming Cooperative Society Limited* [2014] eKLR where the court cited with approval the case of *Stephen Somek Takwenyi & another v David Mbutia Githare & 2 others* Nairobi Milimani HCC number 363 of 2009 where Kimaru J stated thus;

‘The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court’.

9. On the 2<sup>nd</sup> issue, it was Counsel’s submission that the petitioner would suffer substantial loss because the judgment was not in tandem with the evidence on record. Counsel contended that the motion had not been filed with unreasonable delay; judgment was rendered on March 10, 2022 and the motion was filed on May 24, 2022. Counsel submitted that the petitioner’s appeal was arguable because the trial court erred in lowering the standard required to prove proprietorship of land. On the 3<sup>rd</sup> issue, Counsel prayed for costs. Counsel relied on the authority of *Chris Munga N Bichage v Richard Nyagaka Tongi & 2 others* [2017] eKLR where the learned judge outlined the principles for stay of execution as thus:

‘The Applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is



not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.’

10. Counsel M/s Omollo for the 1<sup>st</sup> respondent filed written submissions dated July 18, 2022. Counsel identified one issue for determination; whether the petitioner had met the threshold for stay of execution pursuant to the provisions Order 42 Rule 6 (2) of the Civil Procedure Rules which were; proof of substantial loss, unreasonable delay and security.

11. Counsel submitted that the petitioner had not demonstrated that he would suffer substantial loss if stay was not granted. Counsel relied on the case of Machira t/a Machira & Company Advocates v East African Standard [2002] eKLR where Kuloba J expressed himself as follows:

‘In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars...where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant stay.’

12. Further, Counsel submitted that the petitioner had not furnished security for costs and he placed reliance on the case of Equity Bank Limited v Taiga Adams Company Limited [2006] eKLR which stated that:

‘of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought...let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order for stay.’

13. Counsel submitted that this court had dismissed the petitioner’s case and an order for stay could not be granted where a negative order had been issued. Counsel prayed for costs and cited the case of Joseph Muthuri & 32 others v Cooperative Bank Limited & 15 others [2018] eKLR that cited with approval the case of Raymond M Omboga v Austine Pyan Maranga Kisii HCCA Number 15 of 2010 where the court expressed itself thus:

‘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.’

### **Analysis and determination**

14. I have carefully considered the motion, its grounds, affidavits and respective parties’ rival submissions and the issues falling for determination are;

- a. Whether the motion is merited;
- b. What orders ought to be issued; and
- c. Who shall bear costs?

15. My invitation to intervene on behalf of the petitioner was invoked by the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules which provides as follows:

‘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.”  
Emphasis added.
16. By this rule, an applicant who seeks stay of execution pending appeal has to satisfy that;(i) he will suffer substantial loss (ii)he has moved the court without unreasonable delay and (iii)furnish security for due performance. See also the authorities cited by the parties of *Chris Munga N Bichage v Richard Nyagaka Tongi & 2 others* (supra), *Machira t/a Machira & Company Advocates v East African Standard* (supra) and *Equity Bank Limited v Taiga Adams Company Limited* (supra) where the courts settled the principles for stay of execution.
17. It is not in doubt the instant motion was filed timeously. Mr Mwamu did not address this court on security. Be that as it may, just as the case of *Joseph Muthuri & 32 others v Cooperative Bank Limited & 15 others* (supra), this court by its judgment dismissed the petition with costs to the respondents. Save for costs, it did not compel any party to do anything or refrain them from performing anything.
18. The import of the judgement is that parties were to remain in the same position they were in, prior to the suit being filed. Substantial loss and the appeal being rendered nugatory could not suffice. I agree with M/s Omollo that a negative order is incapable of being executed or stayed. If at all there is an order capable of execution, it would only be on costs which in my considered view, is not capable of being stayed. It is on this basis that I find the motion not merited. I am persuaded by the decision of *Raymond M. Omboga v Austine Pyan Maranga* Kisii HCCA No 15 of 2010, where Makhandia, J (as he then was) stated thus:
- “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.
19. Before I issue my disposal orders, it is paramount to address whether the motion was misconceived, frivolous, vexatious and an abuse of the court. The case of *Dev Surinder Kumar Bij v Agility Logistics Limited* Civil Suit No. 311 of 2013[2014] eKLR was cited with approval in the case of *Transcend Media Group Limited v Independent Electoral and Boundaries Commission* [2015] eKLR (Supra) where the court held, inter alia, that:
- “For a pleading to be dismissed pursuant to the provisions of Order 2 rule 15(1), it should be made clear and obvious that the issues raised by the plaintiff can neither be substantiated, nor disclose any reasonable or justifiable an action as against the defendant.”
20. The 1<sup>st</sup> respondent failed to substantiate his assertion that the petitioner’s motion was misconceived, frivolous, vexatious or an abuse of the court process. I have scrutinized the motion and I am at a loss to establish the basis upon which the 1<sup>st</sup> respondent made such a serious allegation. Subject to the proviso of section 75 of the *Civil Procedure Act*, the petitioner had a right to appeal against the decision of this court. Within the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*, this court has jurisdiction to grant an order for stay of execution pending appeal.
- This court takes cognisance that striking out a party’s pleadings is not only drastic but draconian and courts of law are called upon to issue such orders sparingly.



21. Ultimately, the motion dated May 24, 2022 is hereby dismissed with costs to the 1<sup>st</sup> respondent.

**DELIVERED AND DATED AT SIAYA THIS 24<sup>TH</sup> DAY OF NOVEMBER 2022.**

**HON. A. Y. KOROSS**

**JUDGE**

**24/11/2022**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:**

Ms Machaka for the petitioner

N/A for the respondent

Court assistant: Ishmael Orwa

