



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Omari v Barasa & another (Land Case Appeal E025 of 2024)
[2024] KEELC 6780 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6780 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
LAND CASE APPEAL E025 OF 2024
EC CHERONO, J
OCTOBER 11, 2024**

BETWEEN

JOHN WANJALA OMARI APPELLANT

AND

GETRUDE NEKESA BARASA 1ST RESPONDENT

FELISTUS NANJALA BARASA 2ND RESPONDENT

RULING

1. Before me for determination is a Notice of Motion application dated 28th May, 2024 brought under Section 1A,1B, 3 & 3A of the Civil Procedure Act, Order 40 Rule 1,2,3 of the Civil Procedure Rules, Article 162 of the Constitution and Section 2 of the ELC Act, Land Registration Act 3 of 2017 seeking the following orders;
 - a. Spent.
 - b. Spent.
 - c. That this honourable court be pleased to issue an order against the respondents from interfering with the subject matter of the appeal pending the hearing and determining of this appeal.
 - d. That this honourable court be pleased to grant an order vacating orders of the subordinate court issued on 14th May, 2024 pending the hearing and determination of this appeal.
 - e. That in the alternative this honourable court do issue and order stay of the subordinate court issued on the 14th May, 2024 in Bungoma CMC ELC NO. E025 of 2022 pending hearing and determination of this appeal.
 - f. That costs be provided for.



2. It is the Applicants case that the trial court issued a ruling on 14/5/2025 despite there being a pending ruling in Bungoma High Court Succession Court No. 216 of 2010 wherein conservative orders had been issued on 19/12/2023. It is argued that the orders dated 19/12/2023 were thereafter registered by the Land Registrar on land parcel NO. Bokoli/Chwele/4334, 4335, 4336 and 4337 on 11/1/2024. It was stated that the ruling in Bungoma CMC ELC No. E025 OF 2022 is in direct conflict with the pending ruling which is due on 6/6/2024.
3. Upon service, the Respondents did not file any response. Directions were then issued for parties to canvass the application by way of written submissions.
4. The Applicant filed submissions dated 4th June, 2024 where he submitted that the Appellant is the son of one Omar Kere Masibo-Deceased who is the registered owner of land parcel no. Bokoli/Chwele/404(hereinafter ‘the suit land’) while the Respondents are children of the late Vincent Barasa Kere-deceased who was also a son of the deceased. It was stated that the Applicant had obtained letters of administration for the estate of Omar Kere Masibo but the Respondents secretly objected to the same and were eventually issued with a certificate of grant in their favour. Thereafter, he argued that the Respondents proceeded to subdivide the suit land and were issued with certificates of title. The Respondents are said to have filed Bungoma CM ELC Case no. E025 of 2022 seeking to evict the Applicant from the suit land.
5. It was the Applicants case that vide an application dated 2/11/2023 seeking for an order of stay of execution of the judgment delivered on 4/5/2023 and summons for revocation of the grant issued to the Respondents in the succession court. It is averred that the succession court issued conservative orders and that the Trial Court was made aware of the said position.
6. Upon consideration of the application as well as submissions in support, the main issues for determination are; -
 - a. Whether the Applicant is entitled to stay pending the outcome of this appeal.
 - b. Whether the applicant is entitled to an order vacating the orders issued on 14/5/2024.

Whether the Applicant is entitled to stay pending the outcome of this appeal.

7. The decision in RWW vs. EKW [2019] eKLR is insightful in reminding us of the purpose of an order of stay of execution pending Appeal. In that case, the court held;

“The purpose of an application for stay of execution pending an Appeal is to preserve the subject matter 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 this 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 costs.”
8. The principles guiding the grant of a stay of execution pending Appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules which states 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
9. Further, Courts in deciding whether or not to grant a stay of execution are equally guided by the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act* which should also be taken into consideration.
10. On the first element, the applicant has to prove that the application has been brought without undue delay. The present application was filed on 28/5/2024 while the impugned ruling was delivered on 14/5/2024 which is fourteen (14) days apart. Therefore, I do find that there was no inordinate delay in the filing of this application.
11. The second element the applicant has to prove is that substantial loss will be occasioned if stay is not granted. The question that follow is what comprises substantial loss? In *Silverstein v Chesoni* (2002)1 KLR 867 it was held that;
- “The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.
- Upon consideration of the application, I find that the Applicant has not demonstrated what substantial loss she stands to suffer if orders of stay are not granted.
12. On further consideration of the ruling in question, it emerges that the trial court simply dismissed the Applicants application with costs which is a negative order. No positive/coercive orders were issued in that application. In *Kaushik Panchamatia & 3 Others vs. Prime Bank Limited & Another* (2020) eKLR, the Learned Judge held as follows;
- “We reiterate the position taken by the Court in the above case 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.”
13. What is a Negative order? I find the decision by the Supreme Court of the United States of America in *Rochester Telephone Corporation v United States* (1939), 307 U. S. 125, 59 S. Ct. 754. insightful. This was an Appeal from a decree by a District Court of three Judges. The said decree dismissed, on merits, a bill to review an order of the Federal Communications Commission. The Learned Judge dealt with the doctrine of negative orders and classified them as follows;
- a. Negative orders of the first type include cases wherein the administrative body merely assumes jurisdiction of a party, or issues a finding of fact. This type of order does not compel or forbid any certain conduct, but may be used as a basis for future actions by the administrative body.
- b. Negative orders of the second type include cases wherein the administrative body refuses to grant relief from a statutory command forbidding or compelling conduct on the part of the complainant.
- c. Negative orders of the third type include cases wherein the administrative body refuses to forbid or compel conduct by a third person in respect to the complainant.
14. From the foregoing therefore, the judgement in this matter being a dismissal on merit comprises of a negative order and there is nothing to be stayed.



15. The third element is that the Applicant must furnish security for the due performance of the decree. It is noteworthy that the Applicant in this application has not make any effort to show his willingness or undertaking to provide security for the due performance of the decree/order as may ultimately be binding on him.
16. Therefore, I decline to grant an order of stay pending Appeal for the reason that it will serve no useful purpose. Court orders should not and shall not be granted in vain.

Whether the applicant is entitled to an order vacating the orders issued on 14/5/2024.

17. Having found that the orders the court issued on 14/5/2024 were negative orders, there is nothing for this court to vacate.
18. In the end, I find the application dated 28th May 2024 devoid of merit and the same is hereby dismissed with costs.
19. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 11TH DAY OF OCTOBER, 2024.

HON.E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Otundo for the Appellant

1st Respondent-absent

2nd Respondent-present

Bett C/A

