



**Maungu v Were (Sued as the administratrix of the Estate of Samwel Were Odera (Deceased)
(Environment & Land Case 26 of 2021) [2023] KEELC 16180 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16180 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT & LAND CASE 26 OF 2021**

**E ASATI, J
MARCH 9, 2023**

BETWEEN

FREDRICK NDONGA MAUNGU PLAINTIFF

AND

**MARGARET OMOLLO WERE (SUED AS THE ADMINISTRATRIX OF THE
ESTATE OF SAMWEL WERE ODERA (DECEASED) DEFENDANT**

RULING

1. This ruling is in respect of the Notice of Motion application dated December 9, 2022 brought by the applicant Fredrick Ndonga Maungu pursuant to the provisions of Order 42 rule 6 (1), (2) and (3) of the *Civil Procedure Rules* and sections 3 and 3A of the *Civil Procedure Act*. The application seeks for orders that there be an order of stay of execution and further execution of the decree and judgement issued herein by way of eviction, blockage of the gate to the appellant's home and or in any way interfering with the appellant's quiet possession of the dispute parcel namely; No. West Bunyore/Ebutanyi/1788 pending the hearing and determination of the appeal filed to the Court of Appeal Kisumu.
2. The grounds upon which the application was brought were that judgement was entered in the case on March 28, 2022 dismissing the plaintiff's claim, that the Plaintiff has filed an appeal at the Court of Appeal, that on 7/12/2022 the Respondent in execution of the judgement blocked the access road to the appellant's home, that if the stay is not granted, the applicant stands to be evicted from the suit land and the appeal will be rendered a mere academic exercise, that the applicant is ready to abide by any conditions set by the court and that the application has been brought promptly and in good faith.
3. The application was supported by the averments contained in the Supporting Affidavit of the applicant sworn on December 9, 2022 and the annexures thereto.
4. The application was opposed vide the grounds contained in the Replying Affidavit sworn by the Respondent on the 7th February 2023.



5. The application was urged orally on February 8, 2023.
6. The grounds for grant of orders of stay of execution of judgements, decrees or orders are provided for in Order 42 rule 6(2) of the [Civil Procedure Rules 2010](#) 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.”

7. Firstly, the court must be satisfied that the Applicant will suffer substantial loss if the order of stay of execution is not granted. Secondly the application must be brought without unreasonable delay and the applicant must give such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant. Substantial loss is the core ground for granting the order of stay of execution. It was been described in the case of [Dr. Daniel Chebutuk Rotich –vs- Morgan Kimaset Chebutuk](#) Nakuru H.C.C.C No.368 of 2001 thus:

“Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an Applicant is likely to suffer if stay of execution is not granted and the Applicant is therefore forced to pay the decretal sum.”

8. The burden of proof lies with the Applicant to prove that substantial loss will result to him if the order sought is not granted. In the case of [Charles Wabome Gethi vs Angela Wairimu Gethi](#) [2008]eKLR the Court of Appeal held-

“...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 execute the decree in this suit against them”

In the case of [Shell Kenya Ltd vs Benjamin Karuga Kibiru & Another](#) [1986] eKLR 410 the court stated that

“if it is shown that execution would render a proposed appeal nugatory then a stay can properly be granted.”

9. In the present case the orders made in the judgement were that the applicant suit was dismissed with no order as to costs. The judgement and consequent decree did not direct any party to undertake any action or refrain from undertaking any action. 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 application.

10. The sole relief sought in the application is an order of stay of execution. In view of the nature of the judgement and the authorities referred to herein, an order of stay is not available to the appellant for there is nothing to stay. The application has also been brought after unreasonable delay as the judgement whose execution is sought to be stayed was entered on March 28, 2022 almost a year ago.
11. In the circumstances I find no merit in the application. I dismiss the application with costs to the Defendant/Respondent.

Orders accordingly.

RULING, DATED AND SIGNED AT VIHIGA, READ VIRTUALLY THIS 9TH DAY OF MARCH 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Ajevi Court Assistant.

No appearance for Advocate for the Plaintiff/Applicant.

Miss Khisa Advocate for the Defendant/Respondent.

