



**Yusuf v Tora & 3 others (Environment & Land Case 216 of 2015)  
[2023] KEELC 16030 (KLR) (3 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16030 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 216 OF 2015**

**MAO ODENY, J  
MARCH 3, 2023**

**BETWEEN**

**MOHAMED DAUDI YUSUF ..... APPLICANT**

**AND**

**RUKIA ISMAIL TORA ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY LAND REGISTRAR, LAMU COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of a notice of motion dated April 27, 2022 by the applicant seeking the following orders: -
  - a. Spent
  - b. That the Honorable court be pleased to order a stay of execution of judgment of Hon Lady Justice Dr MA Odeny delivered on April 20, 2022 and any consequent decree pending the hearing and determination of an intended appeal.
  - c. That *status quo* prevailing as at the date of Judgment be maintained to preserve the subject of the appeal.

**Applicant's Submissions**

2. The application is based on the grounds on the face of the motion and the supporting affidavit by the Applicant who deponed that the suit land is registered in the name of the 1<sup>st</sup> Defendant who may dispose of the suit land which will render the intended appeal nugatory.



3. The Applicant further deponed that he holds immense sentimental value on the suit land which may not be compensated by way of damages and urged the court to allow the application.
4. Counsel for the Applicant cited numerous case law on the definition of an order for status quo in comparison to stay and injunctions and submitted that the purpose of an order of status quo is to preserve the substratum of a suit even where the judgment is a negative one.
5. It was counsel's further submission that the Applicant's right of appeal needs to be protected until all the available legal avenues in pursuit of justice are exhausted.

### **Respondent's Submissions**

6. The 1<sup>st</sup> Respondent opposed the application vide a Replying Affidavit sworn on June 17, 2022 by her advocate, John Gachiri Kariuki who stated that the decree being a negative order, an order for stay of execution cannot be granted and further deponed that the Applicant has not met the criteria for grant of an order of stay.
7. Counsel further submitted on order 42 rule 6 of the Civil Procedure Rules which provides for grant of stay of execution but the court has discretion to grant the same.
8. Counsel relied on the cases of Vishram Ravji Halai v Thornton & Turpin [1990] KLR 365 and Catherine Njeri Maranga v Serah Chege & another [2017] eKLR where the court held that for an order of stay to issue there must be a positive order capable of execution and not a negative order.
9. Mr Kariuki submitted that in the current case the Applicant's case was simply dismissed hence there is no positive order capable of being stayed apart from an order of costs which are yet to be taxed.

### **Analysis And Determination**

10. A brief background of this case is that the Applicant instituted this suit against the Respondents vide an amended plaint dated 20<sup>th</sup> January 2017 seeking to be declared the legal owner of land parcel Lamu/Pate/1401 registered in favour of the 1<sup>st</sup> Respondent.
11. This court dismissed the Plaintiff's case for failure to prove his case to the required standard and the Applicant being aggrieved by the decision, lodged a notice of appeal on May 9, 2022 and this application for stay of execution.
12. The issue for determination is whether the Applicant has met the threshold for grant of stay of execution as provided for under order 42 rule 6 (2) as follows: -
  - (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
    - (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.
13. The Applicant seeks to appeal the judgment of this court which dismissed his case as stated above. I agree with counsel for the 1<sup>st</sup> Respondent that the order of dismissal of the Applicant's suit is a negative order whereby neither the Applicant nor the Respondent was required to do or to refrain from doing anything.



14. In the Court of Appeal decision in *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR where the court held that:

“an order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay- called a “Positive order”- either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in *Mugenyi & Company Advocates V National Insurance Corporation (Civil Appeal No 13 of 1994)* where it was stated: ‘an order for stay of execution must be intended to serve a purpose...”

15. Similarly in the Court of Appeal case of *Ndungu Kinyanjui v Kibichoi Kugeria Services & another* [2007] eKLR relying on its earlier decision in *David Thiong’o T/A Welcome General Stores v Market Fancy Emporium* [2007] eKLR held as follows: -

“This Court has repeatedly stated in previous decisions, among them, *David Thiong’o T/A Welcome General Stores vs Market Fancy Emporium*, Civil Application No NAI 47 of 2007.... that in an application under Rule 5(2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum, there would be nothing arising out of that decision for this court to enforce or to restrain by injunction... the decision of 9th February, 2007 in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. Accordingly, no order of stay can properly issue relating to it.”

16. Had the court granted a positive order in the judgment, the Applicant however, has not even attempted to explain what substantial loss he would suffer if the application is not allowed. The applicant has simply stated that he intends to appeal against the judgement and that if the judgment is not stayed the appeal shall be rendered nugatory.

17. In the case of *Kwamboka Daphney v Kithinji Joy & another* (2021) eKLR the court held that: -

“The applicants in their motion did not specifically elaborate what substantial loss would be suffered by them if stay of execution is denied. It is not enough to make a bare deposition that a party will suffer substantial loss rendering the appeal nugatory. The party must demonstrate how the loss is likely to be suffered.”

18. The upshot is that there is nothing capable of being stayed as the order of the court was a negative one. The application is therefore dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 3<sup>RD</sup> DAY OF MARCH, 2023**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated March 28, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the *Civil Procedure Rules*.

