



REPUBLIC OF KENYA



KENYA LAW
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**Oongo v Chore & 2 others (Environment & Land Case
54 of 2021) [2023] KEELC 17153 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17153 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 54 OF 2021**

AY KOROSS, J

MAY 4, 2023

BETWEEN

ANTIPA MOLO OONGO PLAINTIFF

AND

PETER OCHIENG' CHORE 1ST DEFENDANT

MAURICE ACHOLA CHORE 2ND DEFENDANT

DANIEL AKOTH CHORE 3RD DEFENDANT

RULING

Plaintiff's case

1. Pursuant to Sections 1A & 3A of the [Civil Procedure Act](#), Order 42 Rule 6 and Order 51 Rule 1 of the [Civil Procedure Rules](#), the plaintiff filed a notice of motion dated 23/12/2022 praying for the following orders:
 - a. Spent.
 - b. That this court grant an order staying execution of the judgment of this court delivered on 17/02/2022 pending the hearing and determination of the appeal.
 - c. Costs be in the cause.
2. The motion was premised on grounds enumerated on its face. It was supported by the plaintiff's supporting affidavit sworn on 23/12/2022.
3. In brief, the plaintiff contended he was aggrieved by this court's decision which was rendered on 17/02/2022. Delay in filing an appeal and instant motion was occasioned by illness. The defendants would not be prejudiced. The appeal raised arguable grounds with overwhelming chances of success. If stay was not granted, the appeal would be rendered nugatory and he would suffer loss.



Defendants' case

4. In response, the defence counsel, M/s. Anuro, filed a replying affidavit dated 23/02/2023.
5. In summary, the court issued a negative order which was incapable of stay; it merely dismissed the plaintiff's case. The only recourse was for the plaintiff to ventilate his intended appeal. The taxed bill costs could not amount to substantial loss. Even in the absence of the plaintiff failing to tender the memorandum of appeal, this court was constrained from considering whether it was arguable. The motion be dismissed.

Plaintiffs submissions

6. The plaintiff filed written submissions dated 20/01/2023. He reiterated the averments made in his motion and supporting affidavit and this court need not rehash them. He cited the case of [*Nicholas Stephen Okaka & another v. Alfred Waga Wesonga*](#) [2022] eKLR where the court stated: -

‘an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.’

Defendants submissions

7. M/s. Anuro, counsel for the defendants, filed written submissions dated 24/02/2023. Counsel identified two issues for determination by this court; (a) whether an order for stay can issue against the judgment of this court; and (b) if the answer to (a) is in the affirmative, whether the conditions for grant of an order for stay had been met.
8. On the 1st issue, counsel rehashed the averments of her supporting which this court need not reiterate. To buttress her position on the import of negative reliefs, counsel placed reliance of a line of decisions that made consistent findings including the Court of Appeal decision of [*George Ole Sangui & 12 others v. Kedong Ranch Limited*](#) [2015] eKLR which stated and found: -

‘The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent... It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.’
9. On the 2nd issue, counsel submitted that within the provisions of Order 42 Rule 6 of the [*Civil Procedure Rules*](#), only three requirements had to be fulfilled before an application for stay could be granted; unreasonable delay, substantial loss and security for costs.
10. According to counsel, the plaintiff's reasons for the delay was unsatisfactory and implausible. His attorney whom he had donated power to had always represented him in the proceedings and this court was constrained from considering the motion since it would be akin to sitting on appeal against its own



decision. To buttress her position counsel cited *Antoine Ndiaye v. African Virtual University* [2015] eKLR which held: -

‘Order 42 Rule 6 of the CPR is not really about the merits of the appeal but rather the loss which will be occasioned by satisfaction of the appeal in the event the appeal succeeds.’

Analysis and determination

11. Having carefully considered the motion, affidavits and rival submissions, I shall be guided by the authorities and provisions of law that have been well cited by the plaintiff and defence counsel and I will adopt the defence counsel’s issues as the issues that fall for determination which are inter alia: -
 - a. Whether an order for stay can issue against the judgment of this court.
 - b. if the answer to (a) is in the affirmative, whether the conditions for grant of an order for stay have been met.

a. Whether an order for stay can issue against the judgment of this court.

12. In its judgement, this court held that the plaintiff did not prove his case to the required standards and dismissed his suit with costs to the defendants.
13. The import of this decision is that parties were not ordered to do anything or refrain from doing anything; the court simply denied to grant the orders sought by the plaintiff. This is the nature of a negative order. The only order capable of execution was on costs which is incapable of stay.
14. I agree with M/s Anuro that a negative order is incapable of being stayed. I also adopt the decision of *George Ole Sangui & 12 others v Kedong Ranch Limited*. I need not say more.
15. Ultimately and in the circumstances, I find no merit in the notice of motion dated 23/12/2022. I hereby dismiss it with costs which shall be borne by the plaintiff.

DELIVERED AND DATED AT SIAYA THIS 4TH DAY OF MAY 2023.

HON. A. Y. KOROSS

JUDGE

04/5/2023

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

M/s Anuro for the defendant

Mr. John Apiyo Agida the plaintiff’s attorney

Court assistant: Ishmael Orwa

