



**Chengo & 5 others v Mwaisaka & 13 others (Environment & Land  
Case 60 of 2020) [2023] KEELC 18456 (KLR) (5 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18456 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 60 OF 2020**

**SM KIBUNJA, J**

**JULY 5, 2023**

**BETWEEN**

**OMAR SALIM CHENGO & 5 OTHERS ..... PLAINTIFF**

**AND**

**PHILOMEN MWAISAKA & 13 OTHERS ..... DEFENDANT**

**RULING**

1. The plaintiffs filed the application dated June 30, 2022 seeking for stay the execution of the orders given on June 7, 2022 pending the hearing and determination of their appeal. The application is premised on nine (9) grounds on its face and supported by the affidavit of Cornel L Shisanya, sworn on June 30, 2022. The plaintiffs' case is that the ruling of April 27, 2022 did not direct them to amend the plaint. That after reading the said ruling, they filed the application dated May 25, 2022 for leave to amend and directions were given and set for inter partes hearing on June 7, 2022. That on that date, he had problems joining the virtual session and he rushed to court but their application was not heard.
2. The application is opposed by the 1<sup>st</sup>, 2<sup>nd</sup> and 11<sup>th</sup> defendants through their grounds of opposition filed on September 16, 2022. They contended that there was no positive order issued by court capable of execution; and that the suit having been dismissed, the court was functus officio. Further counsel argued that the application has not met the legal threshold for the granting an order for stay of execution and that the refusal of the orders sought would not render the intended appeal nugatory.
3. The 12<sup>th</sup> and 13<sup>th</sup> defendants filed their grounds of objection dated September 23, 2022. They maintained that the application was bad in law since the said orders cannot be issued on a suit which was struck out in its entirety on June 7, 2022. That despite filing a notice of appeal, no appellate court has issued orders reinstating the suit, and therefore, the application is a nonstarter, without merit and ought to be dismissed with costs.



4. The 14<sup>th</sup> defendant also opposed the application through the two grounds of opposition dated February 1, 2023 that it was misconceived, frivolous, vexatious and an abuse of the court process since the court already dismissed the suit hence nothing to stay.
5. The issues for the determinations by the court are as follows;
  - a. Whether the plaintiffs have met the threshold for the order of stay of execution pending hearing and determination of the appeal to issue.
  - b. Who pays the costs of the application.
6. The court has carefully considered the grounds on the application, grounds of opposition, affidavit evidence, submissions, the record and come to the following findings;
  - a. That the record confirms that on April 27, 2022, Justice Sila delivered a ruling on an application dated May 27, 2020 where he dismissed the said application with costs. After delivering the said ruling, the court noted that the plaint was defective for failing to disclose the persons said to constitute the 1395 families that were alleged to be parties to the suit; which was a violation of Order 4 Rule 1 (b) of the Civil Procedure Rules, that require the names of the plaintiffs to be in the plaint. The court directed the plaintiffs to in 30 days amend their plaint and disclose all the plaintiffs in the suit. Further the court directed that if they represented those others, then they should file an authority signed by each of them. The court also directed that the copies of the plaintiffs' identity cards to be filed. The court was also clear that in default of the said directions, the court had reserved the discretion to strike out the plaint. When the matter came up for confirmation on 7<sup>th</sup> June 2022 to confirm compliance with the directions of court issued on April 27, 2022, the court noted that the plaintiffs had not complied with the directions given on April 27, 2022. The Court noted that despite it granting the plaintiffs 30 days leave to amend the plaint, they had neither disclosed the names of all the parties in the suit nor filed their signed authority. The court found the plaint defective for failing to comply with Order 4 Rule 1 (b) of the Civil Procedure Rules and proceeded to strike out the suit with costs to the defendants.
  - b. That what the plaintiffs are seeking to stay through the instant application is the order issued on June 7, 2022, where the court struck out the suit with costs to the defendants for noncompliance with Order 4 Rule 1 (b) of the *Civil Procedure Rules*. The said order requires each plaintiff to be named and described as well as indicating their place of residence in the plaint. The court had on April 27, 2022 granted leave to the plaintiffs to amend their plaint within 30 days and disclose all the plaintiffs. However, on June 7, 2022 when the matter came up for confirming compliance, the said orders were not complied with, and the court struck out the entire suit with costs for noncompliance.
  - c. In this application, the plaintiffs are effectively asking the court to stay the order striking out their suit with costs. An order of striking out a suit is a negative order that is incapable of execution by the respondents. The said order did not grant any relief to the defendants other than costs, which can only be enforced through taxation of a bill of costs. The Court of Appeal in the case of *George Ole Sangui & 12 others v Kedong Ranch Limited* [2015] eKLR, held that: -

“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. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. 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.”

Further, in the case of *Douglas Oribu Matoke v William Sagini Oribu* [2022] eKLR, it was held that:

“Furthermore, in *Co-operative Bank Limited v Banking Insurance & Finance Union Kenya - Nairobi* Application No. 133 of 2017 Kantai J held that “an order for stay of execution 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...the Court has identified negative orders as orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order. That was the position in *Executive Estates Limited vs. Kenya Posts & Anor.* [2005] 1 E.A. 53 where it was stated that “..... The order which dismissed the suit was a negative order which is not capable of execution.”

I concur with the above decisions and hold that the dismissal of the Applicant’s suit is a negative order which is not capable of being stayed. In any event the issue of injunction is not the subject of the appeal as the appeal is against the decision of the court dismissing the Plaintiff’s suit, where he sought an order compelling the Defendant to transfer a portion of land measuring 70ft by 120ft comprised in land parcels number Wnajare/Bogiakumu/2004 and 6245 to him. It is trite law that stay of execution pending appeal can only be granted against the order being appealed against. Put differently, an order for stay of execution pending appeal cannot be granted if the intended appeal is not against the order sought to be stayed.”

In the instant suit, the effect of the orders issued on 7<sup>th</sup> June 2022 did not require any party to do or abstain from doing anything. The court merely struck out the suit with costs to the defendants. There was nothing positive emanating from the said order that is capable of being stayed. For the above reasons and with the guidance of the superior court decisions cited herein above, this court finds the plaintiffs have failed to meet the threshold for stay of execution pending appeal application to be entertained.

d. That as the plaintiffs have failed in their application, then pursuant to section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, they should pay the defendants’ costs.

7. The upshot of the foregoing is that the plaintiffs’ application dated June 30, 2022 is without merit and is dismissed with costs to the defendants.

It is so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 5<sup>th</sup> DAY OF JULY 2023.**

**S M Kibunja, J**

**ELC MOMBASA.**

**In The Presence Of;**

**Plaintiffs : Absent**

**Defendants : Absent**



**Counsel : Mr Otieino For 1<sup>St</sup>, 2<sup>Nd</sup> And 11<sup>Th</sup> Defendants.**

**M/s Amina For 12<sup>Th</sup> And 13<sup>Th</sup> Defendants**

**M/s Jedi For Tehe 7<sup>Th</sup> Defendant**

**Wilson – Court Assistant.**

**S M Kibunja, J**

**ELC MOMBASA.**

