



**Njeru v Kamau & another (Environment and Land Appeal
102 of 2021) [2023] KEELC 18820 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18820 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 102 OF 2021**

BM EBOSO, J

JULY 12, 2023

BETWEEN

EDITH MARIGU NJERU APPELLANT

AND

JAMES MUNYUA KAMAU 1ST RESPONDENT

PAUL WAITITU KAHUTHU 2ND RESPONDENT

RULING

1. Through a Judgment rendered in this appeal on 18/11/2022, this court dismissed the appeal on the ground that it lacked merit. On 30/11/2022, the appellant brought a notice of motion dated 29/11/2022, seeking orders of stay of execution framed as follows:
 1. That the honourable court be pleased to stay execution of the judgment and decree made by this honourable court on November 18, 2022 pending the interpartes hearing of this application.
 2. That the honourable court be pleased to stay the execution of the judgment and decree made by this honourable court on November 18, 2022 pending the hearing and determination of the intended appeal.
 3. That the costs of the application be provided for.
2. The above application is the subject of this ruling. It was supported with an affidavit sworn by the appellant on 29/11/2022. Her case is that she has lodged an appeal in the Court of Appeal against the Judgment rendered by this Court on 18/11/2022. She contends that unless a stay of execution of the decree of this court is granted, she stands to be evicted from the suit land and the structures erected by her on the suit land will stand to be demolished.



3. The 1st respondent opposes the application through his replying affidavit sworn on 20/2/2023. His case is that the applicant filed a similar application in the Court of Appeal, namely, Nairobi Civil Application No 454 of 2022, seeking similar orders. He further contends that the application is intended to delay and frustrate him from enjoying the fruits of the Judgment that he has. The 1st respondent adds that the appellant has been occupying the suit premises since December 2017 without paying any rent to him, hence he is undeserving of the stay of execution orders. He urges the Court to dismiss the application. The application was canvassed through oral submissions in the virtual court.
4. I have considered the application, the response to the application, and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. Two key questions fall for determination in the application. The first question is whether the Judgment rendered by this court in exercise of its appellate jurisdiction is capable of attracting execution proceedings that would warrant the specific stay of execution order that the applicant seeks. The second question is whether the application meets the criteria upon which this court exercises jurisdiction to grant orders of stay of execution pending appeal. I will be brief in my analysis and determination.
5. Is the Judgment rendered by this court capable of attracting execution proceedings to warrant grant of the specific stay of execution orders that the applicant seeks? This court exercised appellate jurisdiction in this appeal. It found the appeal unmerited and dismissed it for lack of merit. It did not issue any substantive positive order capable of execution. For avoidance of doubt, the relevant disposal order of this court reads as follows:

“30. The result is that this court does not find merit in this appeal. The appeal is rejected.”

6. The above order cannot attract execution in the context contemplated by the applicant. Similarly, it cannot be the basis of an application for an order of stay of execution in terms of the specific prayers that have been reproduced verbatim in paragraph 1 above.
7. Our courts have umpteen times stated that where a court has not issued positive orders capable of execution, there is nothing to stay, hence an application for an order of stay of execution in relation to the negative orders does not lie. In *Western College of Arts and Applied Sciences v Oranga & others* (1976-80) 1KLR the Court of Appeal outlined this principle as follows:

“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. Any execution can only be in respect of costs. In *Wilson v Church*, the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case, the High Court has not ordered any 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, it is so ordered.”

8. Similarly, in *Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Millimo, Muthomi & Co. Advocates & 2 others* (Civil Appeal (Application) E383 of 2021) [2021] KECA 363 (KLR) the Court of Appeal stated as follows:

“We start by acknowledging the fact that the ruling appealed against was a compounded one dealing with 2 applications, which yielded two different results. The first application, which was made by the applicant, was dismissed. As submitted by learned counsel for the 1st respondent, the position taken by this Court in respect of applications for stay of execution in respect of negative orders is clear. Negative orders cannot be stayed.”



9. This court is alive to the fact that costs of the appeal were awarded to the 1st respondent. It is, however, clear from the notice of motion and from the supporting affidavit that the stay order sought relates to eviction of the appellant and demolition of her structures. This court did not grant eviction orders in its Judgment of 18/11/2022. Other than making a pronouncement on who was to bear costs of the appeal, this court did not issue any substantive positive order capable of attracting execution in the context in which the application dated 29/11/2022 is framed.
10. For the above reasons, this court's finding on the first issue is that the Judgment rendered by this court on 18/11/2022 cannot attract orders of stay of execution in terms of the reliefs that the applicant sought in the application dated 29/11/2022.
11. In my view, the two courts seized of jurisdiction to grant the orders that the applicant seeks are: (i) the Court of Appeal which is now seized of the second appeal; and (ii) the trial court which would ordinarily be seized of execution proceedings relating to the original Judgment. It was deposed in the replying affidavit that the Court of Appeal is seized of a similar application. Having found that there is no substantive positive order to stay in the Judgment of 18/11/2022, I would strike out the notice of motion dated 29/11/2022 without venturing into the second question. I have taken this view because venturing into the second question will involve making pronouncements on questions of merits. That would not be appropriate given that there is a similar application pending in the Court of Appeal.
12. The result is that the notice of motion dated 29/11/2022 is struck out on the ground that in its Judgment rendered on 18/11/2022, this Court did not issue any substantive positive disposal order capable of attracting execution proceedings relating to eviction nor demolition of the structures. The appellant/applicant shall bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 12TH DAY OF JULY 2023

B M EBOSO

JUDGE

In the Presence of: -

Mr Allan Kasabuli for the Appellant

Ms Chepkurui for the Respondents

Court Assistant: Hinga

