



**Guto v Ongaki (Environment and Land Miscellaneous Application
E005 of 2021) [2022] KEELC 60 (KLR) (4 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 60 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E005 OF 2021**

JM ONYANGO, J

MAY 4, 2022

BETWEEN

JOHN SAMOITA GUTO APPLICANT

AND

SAMWEL OMBUI ONGAKI RESPONDENT

RULING

1. On the 10th December, 2021 this court dismissed the Applicant's application seeking to challenge an eviction Notice issued to the Applicant in respect of Keumbu Market Plot No. 18A on the grounds that the matter was res judicata.
2. Following the said ruling, the Applicant filed a Notice of Appeal and a Notice of Motion dated December 7, 2021 seeking a stay of execution pending appeal pursuant to sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 42 Rule 6 of the *Civil Procedure Rules*.
3. The application is anchored on the grounds set out on the face of the Notice of Motion and the Applicant's Supporting Affidavit sworn on December 7, 2021. In the said affidavit the Applicant depones that he will suffer irreparable and substantial loss if a stay is not granted. He further depones that if he is evicted from the suit property, his appeal shall be rendered nugatory. He adds that the application has been filed in a timely manner without any unreasonable delay.
4. In response to the application, the Respondent swore a Replying Affidavit dated 21st January, 2021 in which he stated that the order in respect of which the Applicant has filed a Notice of Appeal is a negative order which is incapable of being stayed. He further contended that the appeal has no chances of success as the issue regarding the Applicant's right to the suit property was finally determined by the court on 28th October, 2009 and no Appeal was filed against the said judgment. He thus termed the application an afterthought intended to delay the conclusion of this matter.



5. The court directed that the application be disposed of by way of written submissions and both parties filed their submissions.

Applicant's Submissions

6. In his submissions, learned counsel for the Applicant relied on the case of *In Re Estate of the late Jesang Tabarga Tigo (Deceased)* (2021) eKLR for the proposition that the purpose of an application for stay of execution is to preserve the subject matter so that the appeal is not rendered nugatory.
7. Counsel contended that the Applicant had satisfied the conditions laid down in Order 42 Rule 6 of the *Civil Procedure Rules* as he had demonstrated that he would suffer substantial loss if him and his family members were evicted from the suit property which they had occupied for a period of 40 years. It was his further submission that the application had been filed without unreasonable delay. He argued that since this was not a monetary decree, the issue of security for costs did not arise. He therefore urged the court to grant a stay of execution.

Respondent's Submissions

8. Learned Counsel for the Respondent submitted that the application was *res judicata* as the application seeks to stay the operation of the Respondent's Notice of Eviction dated February 2, 2021. He further contended that the order against which the Applicant seeks to appeal is a negative order which is not capable of being stayed.
9. Lastly, he submitted that the Applicant had not satisfied the conditions for stay pending appeal laid down in Order 42 Rule 6 of the *Civil Procedure Rules*. In particular, he was of the view that the Applicant had not demonstrated the substantial loss he is likely to suffer if the stay is not granted. He relied on the case of *James Wangalwa & another v Agnes Naliaka Cheseto* (2012) eKLR for the proposition that in order to demonstrate substantial loss, the Applicant must establish other factors which show that execution will create a state of affairs that will irreparably affect or negate the very essential case of the Applicant as the successful party in the appeal.
10. He expressed the view that the appeal had no chances of success as the Applicant had not sought leave to appeal yet there was no automatic right of appeal against the order against which he was appealing. He submitted that the Applicant had not shown that he had any legal interest in the suit property and he contended that the Respondent would be prejudiced if the order of stay was granted.

Analysis And Determination

11. The only issue for determination is whether the Applicant is entitled to an order of stay of execution pending appeal.
12. The first question I must determine is whether the ruling delivered on 10th November, 2021 against which the Applicant has appealed is capable of being stayed. By the said ruling this court dismissed the Applicant's application seeking to suspend an eviction notice. The Respondent's contention is that the order dismissing the Applicant's suit is a negative order which is incapable of execution.
13. While considering a similar application in *Cooperative Bank Limited -vs- Banking Insurance & Finance Union Kenya* - Nairobi Application no. 133 of 2017 Justice Kantai 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.”

14. Similarly, in the instant case, the order dismissing the Applicant’s application is a negative order which is incapable of being stayed. On this ground alone, I would dismiss the application.
15. However, even if I was to consider the merits of the application, the Applicant has not satisfied all the conditions set out in Order 42 Rule 6 of the *Civil Procedure Rules* as he has not demonstrated that the Applicants would suffer substantial loss if the order of stay is not granted. It is not enough to merely state that one stands to suffer substantial loss as the Applicant done in his Supporting Affidavit, the nature of such loss must be evident. I note that in the Replying Affidavit, the Respondent stated that the suit property is rented out to tenants who pay the Applicant rent and therefore such loss can easily be quantified.
16. Having considered the application, rival submissions, the applicable law and relevant authorities, I find no merit in the application and I dismiss it with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT KISII THIS 4TH DAY OF MAY, 2022.

J.M ONYANGO

JUDGE

