



REPUBLIC OF KENYA



Cheche v Brunlehner (Civil Suit 60 of 2010) [2023] KEHC 4134 (KLR) (8 May 2023) (Ruling)

Neutral citation: [2023] KEHC 4134 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA**

CIVIL SUIT 60 OF 2010

OA SEWE, J

MAY 8, 2023

BETWEEN

PHYLLISTER ODINDO CHECHE PLAINTIFF

AND

JOSEPH BRUNLEHNER DEFENDANT

RULING

1. The Notice of Motion dated July 6, 2021 was filed herein by the plaintiff under sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, as well as Order 9 Rule 9 and Order 42 Rule 6 of the *Civil Procedure Rules*, 2010, seeking for orders that:
 - (a) Spent
 - (b) Spent
 - (c) The court do grant the plaintiff a stay of execution of the judgment and orders delivered and made on May 13, 2021 pending the hearing and determination of the appeal filed in respect of this suit.
 - (d) The court do grant prayer [c] above in the interim pending the hearing and determination of the application. (spent)
 - (e) Costs of the application be paid.
2. The application was premised on the grounds that the plaintiff has filed a Notice of Appeal in respect of the judgment of this Court delivered on May 13, 2021; and that having lived in the suit property since 1992 with her two daughters, the plaintiff has nowhere to move to as she has no other residence in Kenya. She further averred that the suit property is not in danger of being wasted and shall be available to whoever succeeds in the appeal; and therefore that it is sufficient security in itself for the due performance of the decree. Thus, the plaintiff asserted that it is in the interest of justice that stay



- of execution of the court's judgment and decree be granted pending the hearing and determination of the appeal.
3. The application was supported by the affidavit sworn on July 6, 2021 by Mr. Yusuf M. Aboubakar, Advocate, to which he annexed a copy of the Notice of Appeal dated May 26, 2021 and a draft Memorandum of Appeal to demonstrate that the plaintiff is intent on pursuing an appeal from the judgment dated May 13, 2021 and that the intended appeal raises arguable grounds.
 4. The application was resisted by the defendant, on whose behalf the firm of M/s John Bwire & Associates filed Grounds of Opposition dated February 14, 2022, contending that:
 - (a) The application is incurably defective, bad in law, an afterthought and cannot sustain the prayers sought.
 - (b) Judgment and decree of the court issued on May 13, 2021 was a negative order which cannot be stayed.
 - (c) The plaintiff has not met the threshold for stay of execution of a negative order as established by law.
 - (d) The application is a waste of precious judicial time.
 - (e) The application is an abuse of court process.
 5. The application was urged by way of written submissions, pursuant to the directions given herein on February 14, 2022. Thus, on behalf of the plaintiff, Mr. Aboubakar relied on his written submissions dated May 23, 2022 in which he reiterated his averment that the appeal raises fundamental issues; one of which is the principle of presumption of marriage in the face of facts that the plaintiff cohabited with the defendant for over ten years during which they were blessed with two issues. He also pointed out that the appellate court will be required to consider whether or not the defendant gave the suit property to the plaintiff as a gift and allowed her to live in it for over ten years as her own property. Counsel therefore submitted that the plaintiff stands to suffer substantial loss unless stay of execution is granted. He relied on ELC Appeal No. 32 of 2020: [*Pamela Awuor Ochieng & another v Elisha Odari Ogonny*](#) to buttress his submissions.
 6. On his part, Mr. Bwire relied on his written submissions dated May 14, 2022 in which he proposed a single issue for determination, namely whether there is a decision against which an order of stay can be made. He submitted that it is a settled principle of law that a negative order, such as the impugned judgment and decree passed herein, is not capable of being stayed. Counsel relied on [*Western College of Arts and Applied Sciences v Oranga & others*](#) [1976-80] 1 KLR; [*Bernard Njoroge Kibaki t/a Njowa Njemu Enterprises v Equity Bank Limited & another*](#) [2020] eKLR and [*Catherine Njeri Maranga v Serah Chege & another*](#) [2017] eKLR and urged for the dismissal of the application with costs.
 7. The brief background to the application, as can be gleaned from the supporting affidavit, is that the plaintiff filed the instant suit claiming that she was married to the defendant and therefore entitled to ownership of the suit property, being Plot No. 8713 at English Point. Upon hearing the parties, the court (Hon. Chepkwony, J.) delivered the impugned judgment dated May 13, 2021 by which she dismissed the plaintiff's suit with no order as to costs. Being aggrieved by the said decision, the plaintiff filed a Notice of Appeal dated May 26, 2021 evincing her intention to appeal the judgment. The plaintiff thereafter filed the instant application for stay pending the hearing and determination of her intended appeal. A draft Memorandum of Appeal was also annexed to the supporting affidavit for the court's perusal and consideration.



8. In respect of stay of execution pending appeal, Order 42 Rule 6(2) of the [Civil Procedure Rules](#) provides that: -
- (2) No order for stay of execution shall be made under subrule (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.
9. Thus, the plaintiff was duty bound to satisfy the court that, she stands to suffer substantial loss unless the order for stay of execution is made; that she filed the instant application without unreasonable delay; and finally, that she has provided security for the due performance of the order as may ultimately be made by the Court of Appeal. However, before embarking on a discussion of the conditions and whether they have been met by the plaintiff in this instance, it is imperative for the court to consider the nature of the order sought to be stayed and whether it is amenable to stay.
10. A perusal of the judgment dated May 13, 2021 reveals that the outcome was a negative order in that the plaintiff's suit was dismissed with no order as to costs. Accordingly, there is no positive obligation arising from the judgment and the orders made therein that is capable of being executed. I therefore have no hesitation in holding that the said judgment is not capable of being stayed. In [Cooperative Bank Limited v Banking Insurance & Finance Union Kenya](#) [2015] eKLR, the Court of Appeal made the point thus:
- “An order of 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 presupposed 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 that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order.”
11. The same approach was taken in [William Wambugu Wabome v Registrar of Trade Unions & another](#) [2006] eKLR, thus:
- “By dismissing the Judicial Review Application, the Superior Court did not thereby grant any positive order in favour of the Respondents which is capable of execution. If the order sought is granted, it will have the effect of reviving the dismissed application. This Court cannot undo at this stage what the superior court has done. It can only do so after the hearing of the appeal.”
12. Likewise, in [Kanwal Sarjit singh Dhiman v Keshavji Jivraj Shah](#) [2008] eKLR, the Court of Appeal reiterated its stance thus:
- “The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on December 18, 2006. The order of December 18, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see [Western College of Arts & Applied Sciences v Oranga & others](#) [1976] KLR 63 at page 66 paragraph C)....



The Order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...”

13. In the premises, I take the view that, granted the circumstances presented by the parties in respect of the application dated July 6, 2021, an order of stay would not lie.
 14. In the result, the plaintiff’s application dated July 6, 2021 lacks merit and is hereby dismissed. I am likewise of the view that the circumstances do not lend themselves to an award in costs in favour of the respondent. Accordingly, it is hereby ordered that each party shall bear own costs of the application.
- It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 8TH DAY OF MAY 2023

OLGA SEWE

JUDGE

