



**Lakepharm Limited v Port Florence Community Hospital (Civil Appeal
E063 of 2023) [2023] KEHC 4007 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4007 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E063 OF 2023**

RE ABURILI, J

MAY 3, 2023

BETWEEN

LAKEPHARM LIMITED APPLICANT

AND

THE PORT FLORENCE COMMUNITY HOSPITAL RESPONDENT

RULING

1. I have perused the application and certificate of urgency dated April 27, 2023. I find no urgency involved. I decline to certify the matter as urgent.
2. Having done so, what orders should this court make? I have perused the Notice of Motion and Affidavit in support thereof and the annexures thereto.
3. I have observed that the application purportedly seeks for stay of execution of the order of this court dated November 3, 2022 issued in favour of the Respondent pending hearing and determination of the application and the appeal.
4. A perusal of the grounds and affidavit in support of the Notice of Motion shows that the orders of November 3, 2022 were for dismissal of the Appellant's/Plaintiff's suit for want of prosecution and that the Respondent has already filed a Bill of Costs and is in the process of fixing the same for assessment and that the Defendant is likely to lose. The applicant then contradicts himself by saying at ground (d) that the Respondent have already taxed their bill and are in their final stages of execution since they have already send auctioneers who have proclaimed the properties of the Appellant hence the prayer for stay.
5. However, I observe that the orders dismissing the suit for want of prosecution are negative orders which cannot be stayed. This principle is now established and need no arguments about it. In *Hon Peter*



Anyang Ngong'o & 2 Others v The Minister for Finance & Another CAPPL No 273 of 2007, the Court of Appeal stated as follows:

“.....where the High Court has merely dismissed the suit with costs, any execution can only be in respect of costs since the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum and therefore there is nothing arising out of the High Court Judgment for the Court of Appeal in an application for stay, to enforce or to restrain by injunction...”

6. The above principle that a negative order cannot be stayed has been upheld in various other decisions. See *Western College of Arts and Applied Sciences v EP Oranga & 3 Others* (1976) eKLR; *Kenya Commercial Bank Ltd v Tamarind Meadows Ltd & 7 Others* (2016) eKLR; *Raymond M Omboga v Augustine Pyan Muranga Kisii HCCA No 15 of 2010* *Kanwal Sarjit Singh Dhiman v Keshaji Jiurah Shah* (2008) eKLR.
7. I therefore need not belabour the point that a negative order dismissing the suit for want of prosecution is incapable of being stayed except in certain cases such as where an injunction was the prayer that was dismissed. The prayers sought by the Applicant/Appellant herein seek for stay of execution of the order of November 3, 2022 dismissing his suit in the lower court (although couched as if it is this court which dismissed the suit) for want of prosecution.
8. This court will not waste judicial time fixing such an application for interpartes hearing when the obvious is that the application is misconceived.
9. For the above reasons, I hereby on the court's own motion proceed to dismiss the application dated April 27, 2023 which seeks to stay negative orders of dismissal of the suit for want of prosecution.
10. I direct the Deputy Registrar to call for the lower court file No Kisumu Chief Magistrate Civil Case No 207 of 2020 to be availed to this court forthwith for consideration of the appeal herein on its merit.
11. Mention of May 23, 2023 to confirm availability of the lower court file.
12. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 3RD DAY OF MAY, 2023

R. E. ABURILI

JUDGE

