

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELCLA NO. E016 OF 2024

**CHARLES
KIMUNDI**APPELLANT

MWONGA

-VERSUS-

**MUKULU
.....**RESPONDENT

KAMUYA

RULING

1. Before this court for determination is the Notice of Motion dated 7th January, 2025 in which the Appellant/Applicant seeks issuance of the following orders:-

- 1) **[SPENT]**
- 2) **[SPENT]**
- 3) **[SPENT]**
- 4) **THAT this Court be pleased to issue an order of stay of execution of the judgment delivered on 12th September, 2024 by Hon. Felix Makoyo at the Principal Magistrates Court Kilungu and all other consequential orders including execution for costs pending the hearing and determination of the appeal.**
- 5) **THAT this Honourable court be pleased to issue a temporary order of injunction against the Respondent restraining her from entering, interfering, trespassing and/or dealing in any way with the Appellant's portion of the suit premises pending the hearing and determination of the Appellant's appeal**
- 6) **THAT costs of this application be provided for.**

2. The application is premised on the grounds appearing on its face in addition to the supporting affidavit sworn by Vincent M. Muia Advocate on even date. The deponent averred that a judgment was delivered by the lower court on 12th September, 2024 in Kilungu MCELC No. E005/2023 dismissing the Applicant's suit with costs. That the said judgment prompted the filing of the present appeal on 12th October, 2024.
3. The deponent averred that the Respondent using the decree and certificate of stated costs instructed auctioneers to execute for costs against the Applicant. He added that the Respondent's auctioneers sent proclamation and attachment warrants of sale of movable property and a fee note to Paul Somba Mwonga via Whatsapp. The deponent averred that the said Paul Somba Mwonga is the Applicant's son who resides and works in Nairobi.
4. The deponent lamented that the execution of costs is being carried out by the Respondent unprocedurally and maliciously and that the Auctioneers' charges are excessive and ought to be taxed. It was further contended that it is grossly unfair for the Applicant to be subjected to pay costs for what is constitutionally his lawful property being a joint registered owner.
5. Opposing the application, the Respondent swore a replying affidavit on 3rd February, 2025. She averred that a copy of the draft decree had been forwarded to the Applicant's advocates for approval on 17/10/2024 eliciting no response. It was further averred that the Applicant had failed to meet the precondition requiring payment of security for the sue performance of the decree as provided under Order 42 Rule 6 of the Civil Procedure Rules, 2010. She urged the court to dismiss the application with costs.
6. The application was canvassed by way of written submissions.
7. In the Applicant's submissions dated 2nd May, 2025, Counsel submitted that the Applicant was aggrieved by the lower court's decision and order for payment of

costs to the Respondent in a dispute over the Applicant's property. Counsel pleaded with the court to grant the orders sought in the application with costs.

8. In the Respondent's submissions dated 19th June, 2025, Counsel contended that the pre-requisite conditions outlined under Order 42 Rule 6 (2) of the Civil Procedure Rules had not been satisfied. It was submitted that the Applicant had not demonstrated substantial loss occurring as a result of the execution process. Counsel submitted that the instant application is a delaying tactic meant to deny the Respondent the opportunity of enjoying the fruits of the judgment delivered on 12/9/2024.
9. Lastly, it was contended that the Applicant has not offered security as required under Order 42 Rule 6 of the Civil Procedure Rules, 2010. Counsel urged the Court to dismiss the application with costs.
10. The sole issue for determination is whether the Applicant has demonstrated merit in his application for the issuance of an order for stay of execution.
11. The Applicant has sought stay of execution on the whole of the judgment delivered on 12th September, 2024 by the lower court. The governing law in an application for stay of execution pending appeal is Order 42 Rule 6 (1) and (2) which provides as follows: -
 1. **No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person**

aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

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.

12. In the case of Kenya Shell Ltd v Kibiru [1986] KLR 416 Platt Ag. J.A. (as he then was) held as follows: -

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented.”

13. Upon perusal of the lower court’s judgment delivered on 12th September, 2024 and annexed as Exhibit “VNM1”, the learned magistrate observed as follows: -

“In the circumstances obtaining in this case, it cannot be said that the Defendant is a trespasser on the suit land. Thankfully for the parties herein, the question of ownership shall soon be determined by the superior court. In the end, the plaintiff has failed to establish his claim as against

the defendant on a balance of probabilities and I do not hesitate in dismissing this suit with costs. It is so ordered.”

14. It is manifestly clear that the dismissal of the Applicant’s suit resulted in a negative order. The above judgment neither required either party to do anything or to refrain from doing anything save for the payment of costs of the suit which the Applicant was condemned to pay.

15. The legal position on the issue of negative orders has been settled over the years by several court decisions. For instance, the Court of Appeal in **Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah [2008] eKLR**, while dealing with a similar application for stay of a negative order aptly held as follows: -

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 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 vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C).”

16. Similarly, in **Western College of Arts and Applied Sciences v EP Oranga & 3 others [1976] eKLR** the Court of Appeal eruditely observed 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 fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the 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 a stay, it is so ordered.”

17. Lastly, in Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Millimo, Muthomi & Co. Advocates & 2 others [2022] KECA 491 (KLR), the Court of Appeal reaffirmed the position 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.”

18. The dismissal of the Applicant’s suit being a negative order incapable of being stayed, execution for costs is not a reason for stay of the same. The Applicant has not shown that if costs are paid to the Respondent he will not recover the same from the Respondent. I therefore find that the Applicant’s application is devoid of merit. The same is dismissed with costs to the Respondent.

It is so ordered.

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HON. E. O. OBAGA
JUDGE

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS
THIS 16TH DAY OF OCTOBER, 2025.**

IN THE PRESENCE OF:

Mr. Muia for Applicant.

Mr. Kiluva for Mr. Makundi for Respondent.

Court assistant – Nelima

ORIGINAL