



**Ndambuki v Wambua & 2 others (Environment and Land Case Civil Suit  
120 of 2015) [2025] KEELC 7314 (KLR) (28 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7314 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CASE CIVIL SUIT 120 OF 2015**

**AY KOROSS, J**

**OCTOBER 28, 2025**

**BETWEEN**

**FRANCIS NDAMBUKI ..... PLAINTIFF**

**AND**

**GEORGE MUKONZA WAMBUA ..... 1<sup>ST</sup> DEFENDANT**

**PAUL MUTUA WAMBUA ..... 2<sup>ND</sup> DEFENDANT**

**SAMUEL MUINDI WAMBUA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is a ruling in respect of a post-judgment notice of motion filed by the plaintiff dated 17/12/2024, expressed to have been moved within Sections 1, 1B and 3A of the *Civil Procedure Act* and Order 42 Rule 6 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. He seeks the following reliefs from this court: -
  - a. Spent.
  - b. Spent.
  - c. Pending hearing and determination of the Nairobi Court of Appeal No. E802 of 2023, there be a stay of execution of the ruling on the party and party bill of costs taxed on 24/05/2024 and all subsequent orders arising therein.
  - d. Costs of this motion be provided for.
2. The motion is supported by several grounds on the face thereof and the supporting affidavit of the plaintiff, deposed on 17/12/2024. In a nutshell, the grounds in support of the motion are materially that:



- a) this court delivered a judgment on 26/07/2023 in favour of the defendants who subsequently filed a bill of costs dated 2/08/2023 before the taxing master;
  - b) The taxing master delivered a ruling on the said party and party bill of costs on 24/05/2024 awarding the defendants costs of ksh 512,990/-; and
3. C)Being dissatisfied with the impugned judgment, they lodged an appeal which has high chances of success, and if the orders herein are not granted, the appeal will be rendered nugatory, and D) He is willing to abide by any conditions and terms as to security as the court may deem fit to impose.
  4. This motion is strenuously opposed by the 1<sup>st</sup> defendant's replying affidavit sworn on 3/02/2025, and of significance, he maintains that: a)The motion is laden with half-truths and glaring misrepresentations all in an attempt to mislead this honourable court and the same is frivolous, vexatious and an abuse of the court's due process and ought to be dismissed with costs, b) The plaintiff has not advanced sufficient reasons to warrant the grant of orders sought and the motion does not meet the threshold for grant of stay pending appeal; and
  5. C)They will be highly prejudiced if the orders sought are granted, and, lastly, d) Taxation proceedings are independent, and in this instance, the ruling on party and party bill of costs taxed on 24/05/2024 is not subject to appeal.
  6. In rejoinder, the plaintiff filed a further affidavit sworn on 9/04/2025, and he reiterated the averments of his earlier affidavit and additionally states that, being dissatisfied with the ruling delivered by the deputy registrar on 24/05/2024, he filed a reference before this court through an application dated 30/5/2024 in ELCLMISC/E023/2024 Machakos and a ruling rendered on it on 31/10/2024.
  7. As directed by the court, the motion is canvassed by written submissions filed by the law firms of the parties on record with Ms Maingi Musyimi & Associates for the plaintiff, filing theirs dated 9/04/2025 and B.M. Mung'ata & Co. Advocates for the defendants, filing theirs dated 29/04/2025. Accordingly, having carefully considered the motion, affidavits, as well as the rival submissions, and cited provisions of law and precedents, the main issue for determination is whether, the court having issued negative orders, costs are capable of being stayed.

### **Analysis and Determination**

8. As rightfully submitted by both counsels, when dealing with applications for a stay of execution pending appeal, this court has to satisfy itself that the principles enunciated in Order 42 Rule 6 (2) of the Civil Procedure Rules have been met, and it provides as follows:
 

“No order for stay of execution shall be made under sub rule (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.”  
Emphasis added.
9. In their submissions, both counsels argued on the principles of a stay of execution pending appeal, and rely on the principles that are well established from the decisions of Nicholas Stephen Okaka Waga Wesonga & another v Alfred Waga Wesonga [2022] eKLR, Kenya Shell Limited v Benjamin Karuga



Kibiru & another [1986] KECA 94 (KLR), Nyang'au v Choi & 2 others (Civil Appeal E088 of 2021) [2022] KEHC 3015 (KLR) and Butt vs Rent Restriction Tribunal (1979).

10. Nevertheless, this court is constrained from applying these legal tests of a stay of execution, as this court in its judgment rendered on 26/07/2023 merely dismissed the plaintiff's suit, save on the issue of costs. Put another way, the court merely issued a negative order except for costs. As a result, this court finds there is nothing to be executed or capable of being stayed. Reliance on this is placed on the persuasive decision of Western College Farts and Applied Sciences vs. Oranga & Others [1976] KLR 63.
11. Moreover, in Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others [2021] KECA 465 (KLR), the Court of Appeal held that a negative order cannot be the subject of a stay order and further affirmed the legal position in Western College (Supra) and the decision of Raymond M. Omboga v Austine Pyan Maranga Kisii HCCA No 15 of 2010 in the following manner:-

‘What was therefore issued by the High Court is in the nature of a negative order incapable of execution and as such there is nothing to stay. See Western College of Arts and Applied Sciences v EP Oranga & 3 others [1976] eKLR where the Learned Judges stated thus:

“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.”

Similarly, in Raymond M. Omboga v Austine Pyan Maranga Kisii HCCA No 15 of 2010, Makhandia, J (as he then was) stated thus:

“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...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise...”

Consequently, the prayer for stay of execution must fall by the wayside and the same is hereby dismissed.’

See also the Court of Appeal decisions of Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Millimo, Muthomi & Co. Advocates & 2 others [2022] KECA 491 (KLR), Kaushik Panchamatia & 3 others v Prime Bank Limited & another [2020] KECA 418 (KLR) and Opondo v Onyango (Sued as Administrator of the Estate of Charles Onyango Gucha) [2023] KECA 1076 (KLR), which all affirmed this position of law.

12. Given the above and being guided by the law and judicial precedents, this court need not say more, and it finds the notice of motion dated 17/12/2024 is not merited, and it is hereby dismissed with each party bearing their respective costs.



It is so ordered.

**DELIVERED AND DATED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF OCTOBER, 2025.**

**HON. A. Y. KOROSS**

**JUDGE**

**28.10.2025**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms Kanja Court Assistant.

Mr. Muema holding brief for A.K. Mutua for the respondent.

Miss Wambua for applicant.

