



REPUBLIC OF KENYA



**Cheruiyot v Chemweno & 3 others (Environment & Land Case
649 of 2012) [2024] KEELC 113 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 113 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 649 OF 2012
EO OBAGA, J
JANUARY 25, 2024**

BETWEEN

STEPHEN KIBIWOTT CHERUIYOT PLAINTIFF

AND

LUKE CHEMWENO 1ST DEFENDANT

PERIS JELAGAT LIMEO 2ND DEFENDANT

CHARLES KIPROTICH TANUI 3RD DEFENDANT

DR. CHOGE BARTUIYOT 4TH DEFENDANT

RULING

1. This is a ruling in respect of a Notice of motion dated 25.9.2023 in which the judgment Debtor/
Applicant seeks the following orders:-
 1. That service of this application be dispensed with in the first instance and the same be certified
as urgent.
 2. That this honorable court do be pleased to stay all the execution proceedings emanating from
the judgment delivered on the 27th of October, 2022 pending the hearing and determination
of this application *inter-partes*.
 3. That the honorable court do be pleased to stay all the execution proceedings emanating from
the judgment delivered on the 27th of October, 2022 pending the hearing and determination
of Eldoret Court of Appeal Civil Appeal No. E051 of 2022.
 4. That cost of this application be provided for.
2. The Applicant contends that judgment in this matter was delivered on 27.10.2022 wherein his suit was
dismissed with costs and the 4th Decree Holder/Respondent's counter-claim was allowed with costs.



He states that costs have since been taxed at Kshs 4,208,758/= and the process of execution has since been put in place.

3. The Applicant further contends that he has since appealed against the judgment in Eldoret Civil Appeal No. E051 of 2022 and that if there is no stay of execution granted, his appeal will be rendered nugatory.
4. The Applicant's application has been opposed by the 1st, 3rd and 4th Defendant/Respondents through grounds of opposition and replying affidavits dated 3.10.2023 and replying affidavits sworn on 6.10.2023 and 11.10.2023 respectively. The Respondents contend that the Applicant's application has been filed after one year after judgment and 5 months after the costs were taxed.
5. The Respondents also contend that the application has been brought solely to scuttle the notice to show cause and prevent the Decree Holders from enjoying the fruits of their judgment. The Respondents also argue that the Applicant has not demonstrated what substantial loss he will suffer if execution was not stayed.
6. I have considered the Applicant's application as well as the opposition to the same by the Respondents. I have also considered the submissions by the parties. The only issue for determination is whether the Applicant has demonstrated that he has grounds to warrant issuance of stay of execution.
7. As I have already stated hereinabove, the Applicant's suit was dismissed with costs. This was a negative order which is incapable of being stayed. The Respondents are only seeking to execute on costs. Execution of costs will not render the Applicant's appeal nugatory. Should he succeed in the appeal, he will be refunded the costs which he would have paid.
8. The Applicant did not state anywhere that should he pay the costs, the Respondents will be incapable of refunding the same incase the appeal succeeds. The burden of proving that the Respondents are incapable of refunding the costs did not shift to the Respondents. Infact the 4th Respondent who was found to be the lawful owner of the suit property stated that he is a medical doctor who also earns rental income from the apartments on the suit property and is capable of refunding the costs incase the Applicant's appeal succeeds.
9. In the case of *Kenya Shell Limited -s- Karuga* 1982 – 88 IKAR, the Court of Appeal held as follows: -

“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 stay.”
10. It is clear from the above analysis that the Applicant's application is devoid of merit. The same is dismissed with costs to the Respondents.

It is so orders.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 25TH DAY OF JANUARY, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Rotich for Mr. Njuguna for 1st Defendant.

Mr. Ogongo for 3rd Defendant.



