



REPUBLIC OF KENYA



**Mudigo v Agui & another (Environment & Land Case 20 of 2022)
[2024] KEELC 1091 (KLR) (28 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1091 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 20 OF 2022
MN MWANYALE, J
FEBRUARY 28, 2024
(FORMERLY ELD ELC CASE 259 OF 2013)**

BETWEEN

BARNABAS OMBIMWA MUDIGO PLAINTIFF

AND

DENNIS KIPTANUI AGUI 1ST DEFENDANT

ANTONY KIMAGUT AGUI 2ND DEFENDANT

RULING

1. The Applicants, Dennis Kiptanui Agui and Anthony Kimagut Agui, took out the Notice of motion dated 19th December, 2023 primarily seeking a stay of execution of Exparte judgment delivered on 14th May 2020 and the consequential decrees pending hearing and determination of Eldoret Civil Appeal No. E036/2023 between Deniss Kiptanui Agui and Anthony Kimagut Agui vs Barnabas Mbiwa Mudigo.
2. They also sought an alternative prayer for of maintenance of status quo prevailing on the register and on the ground in respect of land parcel No. Nandi/Koibarak/667 pending hearing and determination of the stay pending appeal.
3. The grounds in support of the application are that;
 - i. They have preferred an appeal against the entire Ruling and order of the Court dated 25th May 2023 vide Eldoret Court of Appeal Civil Appeal No. E036/2023.
 - ii. They are in occupation of the suit parcel No. Nandi/Koibarak/667
 - iii. They had been served with eviction orders by Respondent and their appeal will be rendered nugatory



4. The application is supported by the supporting affidavit of Denis Kiptanui Agui. Who reiterates the grounds in support of affidavit, and has annexed a copy of authority giving him powers to depone on behalf of co-applicant and has annexed the decree in the suit, as well as a Notice of Appeal in respect of Ruling delivered 25/5/2023 and a Memorandum of Appeal against the said ruling dated and delivered on 25/5/2023.
5. In opposition to the above, a replying affidavit by Barnabas Mbiwa Mudigo was filed who depones that the Memorandum of Appeal does not raise triable issues and that the Application has not met the conditions for grant of the orders sought, since no security have not been furnished and the suit parcel is unoccupied, hence no substantial loss, and that prejudice will be occasioned to him as he will be denied fruits of judgment.
6. The Respondent has annexed two unclear photographs of the suit premises.
7. The Applicant sought and was granted leave to file a supplementary affidavit, where he depones of the existence of two decrees in the matter and that he had no where else to live as he lived on the suit property and that he has complied with the principles set out in order 42 Rule 6 of the *Civil Procedure Rules* and has annexed unclear photographs of the suit property.
8. Parties were directed to argue the application orally, Mr. Kiprono Learned Counsel for the Applicant while quoting this Court decision in Milcah Reueben Isiye and Winnie Saisi and 2 others argued the Court to allow the application, as substantial loss did not need to be a lot of money he submitted the existence of an appeal by virtue of filing the Notice of Appeal on 6/3/2023 and Memorandum of Appeal on 21/6/2023 in respect of the ruling dated 25/5/2023 and placed reliance on Order 47 Rule 6 (2) of the *Civil Procedure Rules*.
9. He submitted on the alternative prayer of maintenance of status quo pending appeal. He stated that the Ruling was delivered on 25/5/2023 and application filed on 8/01/2024 and explained the delay as financial constraints on the part of the Applicant.
10. He further submitted on the issue of security as being discretionally on the part of the Court, noting that the decree herein was not a monetary decree.
11. The Applicant further placed reliance on the decision in *Butt vs Rent* Restriction Tribunal on the principles to be considered in an application for stay.
12. The Court did ask the Plaintiff Advocates to clarify when the Appeal was filed, to which he replied it was filed on 21st June 2023, and the orders appealed from were negative orders.
13. In response, Mr. Ambutsi for the Respondents placed reliance on Order 42 Rule 6 (2) of the *Civil Procedure Rules*, and argued that the application was not made timeously as it was filed 6 months after the ruling was made.
14. The Respondent's Counsel on the issue of security doubted whether the Applicant would afford to give any security, since he could not afford payment, for the current application.
15. On an arguable appeal, the Respondent urged the Court to be cautious not to interrogate the issue since it was a purview of the Appellate Court.
16. He further submitted that there were no positive orders upon which the stay orders could be issued and he stated that it is the Respondent who lived on the suit premises.



17. In a brief rejoinder, Mr. Kiprono argued that Order 42 Rule 6 did not provide for arguability of an appeal, hence the issue of nugatory ought to be left for consideration by the Court of Appeal and not this Court as a Trial Court.
18. At the close of the arguments by both parties, two preliminary issues have arisen, that the Court needs to handle, whose outcome may determine the application in limine.
19. Firstly, from the application, the orders sought to be stayed is the Exparte judgment dated 14th day of May 2020 and consequential decree issued on 26th November 2020.
20. The stay application as drafted in orders 3 and 4 seeks stay of the judgment and the consequentially decree.
21. There was no Notice of Appeal exhibited as having been filed against the judgment and the decree, the Notice of Appeal filed and exhibited related to a Ruling delivered on 25/5/2023.
22. There is thus no substantive appeal filed against the judgment and decree and it is doubtful whether stay of execution orders can issue where there is no appeal filed.
23. The Supreme Court in its decision in the case of *Dr. Wilfreda Arnolda Holondo v Attorney General and 9 others* [2021]eKLR stated as follows; -

“ therefore, in the absence of a substantive appeal on record, we are unable to grant the orders of stay of execution of order on costs in Civil Appeal No. 120 as sought.....” The same principles apply in this matter”
24. The second preliminary issue is whether by its very nature a stay of execution orders can issue against the dismissal orders which are negative in nature.
25. The Ruling dated 25/5/2023, was a ruling that dismissed an application dated 4th October, 2022 hence it was a negative order.
26. Both the Applicant and Respondents Advocates, confirm that a dismissal order is a negative order.
27. In *Kaushik Panchamatia & 3 others vs Prime Bank Limited* the Court of Appeal held that “a negative order is incapable of being stayed because there is nothing to stay. It therefore follows that in light of the above threshold, we have no mandate to grant a stay order in the manner prayed for by the Applicants.”
28. From the above it is clear that there can be no stay of execution over negative orders and/or dismissals.
29. Having found the application not to have passed the two preliminary issues, the same is destined for a dismissal without considering the merits under Order 42 Rule 6, as the application is hereby dismissed with costs to the Respondents.

RULING, DELIVERED AND DATED AT KAPSABET THIS 28TH DAY OF FEBRUARY 2024.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

1. Mr. Wanjohi holding brief for Mr. Serem for the Applicant
2. Ms. Mukamo holding brief for Mr. Ambutsi for the Respondent.

