



REPUBLIC OF KENYA



**Kabuthia & 10 others v Karanja (Civil Application E030 of 2021)
[2024] KECA 155 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KECA 155 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E030 OF 2021
DK MUSINGA, PO KIAGE & SG KAIRU, JJA
FEBRUARY 23, 2024**

BETWEEN

**BORO KABUTHIA 1ST APPLICANT
MARGARET WAMBUI 2ND APPLICANT
JOSEPH MATHEIR CHEGE 3RD APPLICANT
GEOFFREY GATONYE KARANJA 4TH APPLICANT
GEOFFREY NJAGA GITHUA 5TH APPLICANT
KINYANJUI KAMONDIA 6TH APPLICANT
MOSES KARANJA 7TH APPLICANT
MBURU GITHUA 8TH APPLICANT
MBURU MGURUKO 9TH APPLICANT
NJENGA KAIBUTI 10TH APPLICANT
NJENGA KARIUKI 11TH APPLICANT**

AND

MICHAEL JAMES KARANJA RESPONDENT

(An application for stay of execution of the Ruling of the Environment and Land Court at Nairobi (Eboso, J.) dated 28th June, 2019 in ELC Case No. 323 of 2014)



RULING

1. The applicants by the motion dated 3rd February 2021 brought under, Order 42 rule 6(1), Order 51 rule 1 of the Civil Procedure Rules, 2010, rules 5(2)(b) and 42 of the Court of Appeal Rules, 2010, seek in the main, the following order:
 3. That this Honourable Court be pleased to issue an order staying the execution of the Ruling of Hon. Justice B. M. Eboso made on the 28th June, 2019 in Nairobi ELC Case No. 323 of 2014 pending the hearing and determination of the appellant's present appeal."
2. The motion is founded on grounds on the face of it and is supported by an affidavit sworn by the 1st applicant, Boro Kabuthia, on behalf of himself and the rest of the applicants. He averred that they have filed an appeal being Civil Appeal No. 370 of 2019 against the impugned ruling; the subject matter in dispute is land parcel no. Karai/Lusigeti/T.1038 (the suit land), where the applicants live with their extended families, and have put up residential houses and developments and, if stay is not granted, they are likely to suffer substantial loss and damage; the pending appeal is meritorious and raises several serious issues of law; the respondent filed a Bill of Costs in the High Court and taxation was scheduled to be heard on 15th March 2021; and they stood to suffer substantial loss if the taxed costs of the suit were paid to the respondent as they would have challenges in recovering the same in the event that the appeal succeeds.
3. In a replying affidavit dated 5th March 2021, the respondent gave the chronology of events leading up to this application. He contested the fact that the application was made twenty months after the impugned order was made and seemingly in response to his Bill of Costs dated 22nd November 2019. The respondent deposed that the applicants had already been evicted from the suit land and that, in any event, the orders they sought to stay were negative in nature, hence incapable of being stayed. He further contended that the intended appeal did not raise any triable issue with any chance of success.
4. The applicants lodged written submissions dated 24th February 2021, which generally rehash their averments in the supporting affidavit. The respondent similarly filed written submissions dated 5th March 2021 wherein he reiterated his claims as advanced in the replying affidavit, asserting that the applicants had already been evicted from the suit property.
5. We have given due consideration to the application, the affidavit in support thereof, the respondent's replying affidavit, the contending submissions and the law. It is trite that a stay of execution lies at the discretion of the Court, to be exercised on a case by case basis, with a view to attaining the ends of justice. To merit an order of stay, an applicant must satisfy the Court that:

first, he has an arguable appeal, which means one that raises a bona fide point worthy of consideration, though it need not necessarily succeed and; second, that if the stay is not granted the appeal, if successful, would be rendered nugatory. See, Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013]eKLR and Kieni Plains Co. Ltd & 2 others v Ecobank Kenya Ltd [2018]eKLR.
6. In this matter, it is urged that what the intended appeal seeks to challenge is a negative order that cannot be stayed. Indeed, a perusal of the record shows that the learned judge (Eboso, J.) merely declined to exercise his discretion in favour of the applicants and set aside the default judgement. He did not order the parties to do anything or to desist from doing anything. As such, that order is incapable of execution, and as rightly argued by the respondent, there is nothing to stay. This Court has time



without number restated this position. In *Lake Victoria South Water Service Board v Seline Akoth Oyiengo* [2020] eKLR, the Court reasoned;

"...We note that the applicant filed an application to set aside a default judgment entered against it, which application was dismissed by the court. There was no positive order made against the applicant capable of execution, hence there can be no stay of execution of such an order. This is not an order capable of being stayed. The refusal simply meant that the applicant stays in the situation it was in before coming to court and therefore the issues of substantial loss that it is likely to suffer and or the appeal being rendered nugatory does not arise. In case of *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others* [2016] eKLR, this Court expounded on stay of execution of a negative order, stating thus:

"16. In *Kanwal Sarjit Singh Dhiman v Keshavji Juvraj Shah* [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, 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 v Oranga & Others* [1976] KLR 63 at page 66 paragraph C)."

7. The respondent further averred, and without rebuttal from the applicants, that execution of the impugned decree has already been done to the effect that the applicants have already been evicted from the suit land. Seemingly, at the time when we heard the application, it had already been overtaken by events.
8. The motion is therefore devoid of merit and accordingly fails. It is dismissed with costs to the respondent.
9. We apologise to the parties for the considerable delay in delivering this ruling, which was occasioned by exigencies of work in the Court.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

D. K. MUSINGA (P).

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL



I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

