



**Sasenyi Multipurpose Co-operative Society Ltd v Rukinya Ranching Co Ltd (Civil Appeal (Application) E010 of 2022) [2024] KECA 187 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KECA 187 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) E010 OF 2022  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
FEBRUARY 23, 2024**

**BETWEEN**

**SASENYI MULTIPURPOSE CO-OPERATIVE SOCIETY LTD ..... APPLICANT**

**AND**

**RUKINYA RANCHING CO LTD ..... RESPONDENT**

*(Being an application for stay of execution pending appeal against the Ruling and Orders of the Environment and Land Court of Kenya at Mombasa (N. A. Matheka, J.) dated 7th December 2021 in E.L.C Case No. E168 of 2021)*

**RULING**

1. From the incomplete record as put to us, and which does not contain pleadings in the Environment and Land Court at Mombasa where the applicant sued the respondent in ELC Case No. 168 of 2021, we can only gather from the impugned ruling of N. A. Matheka, J. dated 7<sup>th</sup> December 2021 that the applicant's suit was struck out on the respondent's preliminary objection dated 13th September 2021 on the grounds that it was *sub-judice* Mombasa ELC Case No. 202 of 2016 (OS) filed by the applicant against the respondent. It is also noteworthy that the preliminary objection aforesaid is not part of the record before us.
2. Dissatisfied by the learned Judge's decision to allow the preliminary objection, the applicant moved to this Court on appeal on 7 grounds set out in its memorandum of appeal dated 7<sup>th</sup> February 2022 on which he faults the learned Judge for: striking out the applicant's suit; failing to analyse and appreciate the circumstances of the case, which arose from a contract of sale of land; holding that the suit was "*res judicata*"; concluding that suit No. 32 of 2016 dealt with the same subject matter; failing to consider the applicant's submissions; failing to agree with the applicant that, on the doctrine of legitimate expectation, the applicant expected to receive a good title from the respondent; and for failing to consider other issues raised in the suit, which issues were never raised or determined in any other suit between the parties.



3. By a Notice of Motion dated 15<sup>th</sup> June 2023 and filed under rule 5(2) (b) of the [Court of Appeal Rules, 2022](#) the applicant seeks stay of execution of the ruling of the ELC at Mombasa (N. A. Matheka, J.) dated 7<sup>th</sup> December 2021 in ELC Case No. 168 of 2021 pending hearing and determination of its appeal. The applicant also prays that the costs of its application be provided for.
4. The application is anchored on 10 grounds set out on the face of the Motion, which we need not replicate here, save to observe that, in summary, the applicant is apprehensive that the respondent, having filed a Bill of Costs, he will proceed to execute to recover his costs in the ELC; that execution, if not stayed, will render its appeal nugatory; and that it is in the interest of justice that the application be allowed as prayed.
5. The applicant’s Motion is also supported by the annexed affidavit of Richard Fabian Tolle, the applicant’s Chairman, sworn on 15<sup>th</sup> June 2023, and essentially deposing to the grounds on which the Motion is anchored.
6. Learned counsel for the applicant, M/s. Stephen Odiaga & Company, filed written submissions and list of authorities dated 6<sup>th</sup> October 2023. Counsel cited the cases of [NIC Bank Limited & 2 Others v Mombasa Water Products Limited](#) [2021] eKLR, highlighting the principle that, in determining whether an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties, and that each case has to be determined on its merits; and [Stephen Muna & 2 Others v Edward Njagi Mugo & Another](#) [2019] eKLR for the proposition that the purpose of an application for stay of execution is to preserve the subject matter in dispute.
7. In lieu of a replying affidavit, learned counsel for the respondent filed “Grounds of Opposition” dated 12<sup>th</sup> October 2023 and written submissions of even date. Counsel cited 6 authorities, including [George Ole Sangui & 12 Others v Kedon Ranch Limited](#) [2015] eKLR; and [Peter Gathecha Gachiri v the Attorney General & 4 Others](#) [2014] eKLR, highlighting the twin principles that must be satisfied for grant of orders under rule 5(2) (b) of this [Court’s Rules](#).
8. Counsel also cited the cases of [Osapil v Kaddu](#) [2000] EA p.193; and [Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another](#) [2016] eKLR, highlighting the principle that costs follow the event.
9. From the impugned ruling as reported in the [2021] eKLR, it is clear to our mind that the order striking out the applicant’s suit is incapable of being stayed. It is a negative order by which the learned Judge did not direct that anything be done. The relevant part of the ruling reads:

“... I find this suit is an abuse of the court process and is *subjudice* Mombasa Environment and Land Case Number 202 of 2016. I find this preliminary objection on this issue is merited and I strike out the suit with costs to the Defendant.

It is so ordered.”

10. We call to mind this Court’s decision in [Western College of Arts and Applied Sciences v E. P. Oranga & 3 others](#) [1976] eKLR where the Court had this to say on similar orders:

“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.”

11. In the same vein, the Court of Appeal in *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR held that –

“Following that approach of looking at the nature of the orders even before delving into the said principles in a Rule 5(2) (b) application the Court has identified negative orders as orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order. That was the position in *Executive Estates Limited v Kenya Posts & Anor.* [2005] 1 E.A. 53 where it was stated:

‘... The order which dismissed the suit was a negative order which is not capable of execution...’”

12. Likewise, the Court of Appeal in *George Ole Sangui & 12 others v Kedong Ranch Limited* [2015] eKLR held that:

“20. In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.”

13. As was the case here, the order striking out the applicant’s suit cannot be enforced and is not capable of execution. Neither is it a positive order requiring either party to do or to restrain from doing anything, and does not confer any relief capable of enforcement. Moreover, the act of striking out a suit cannot be stayed. To the extent that the applicant’s Motion seeks stay of the order striking out its suit, it cannot be granted. Accordingly, the Motion fails and is hereby dismissed with costs to the respondent. Those are our orders.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2024.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

.....

**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is a True copy of the original

Signed

**DEPUTY REGISTRAR**

