



**Nthiga v Keeru & 2 others (Civil Application 19 of 2020)
[2024] KECA 320 (KLR) (22 March 2024) (Ruling)**

Neutral citation: [2024] KECA 320 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 19 OF 2020
W KARANJA, J MOHAMMED & LK KIMARU, JJA
MARCH 22, 2024**

BETWEEN

GRACE CIANJOKA NTHIGA APPLICANT

AND

IDER KEERU 1ST RESPONDENT

HARRIET KANINI 2ND RESPONDENT

JOSELINE MWIMBI 3RD RESPONDENT

(Application for stay of execution pending the hearing and determination of the appeal filed from the judgment of P.M. Njoroge, J. dated and delivered at Chuka on the 4th December, 2019 in Chuka E.L.C No. 9 of 2018)

RULING

1. The Notice of motion before us was filed on 27th February, 2020 under certificate of urgency. The same was fixed for hearing initially on 22nd June, 2020, but on that date, there was no appearance by any of the parties, nor had they filed submissions. The application was adjourned and fixed for hearing on 3rd July, 2023.
2. On the hearing date only learned counsel for the applicant, Mr. Muthomi, was present. There was no appearance by the respondents inspite of service of the hearing notice on them having been effected on 22nd June, 2023.
3. The Notice of motion which is brought under Rule 5(2)(b) of the Court of Appeal Rules seeks stay of execution of the judgment/decree of the Environment and Land Court (ELC) sitting at Chuka delivered on 4th December, 2019 in Chuka ELC Civil Appeal No. 9 of 2018 pending hearing and determination of the substantive appeal.



4. The appeal from which the application arises is a second appeal to this Court. The matter has a long history with its origin in Succession Cause No. 86 of 1988. In the Succession Cause, the parties agreed that the appellant would hold the suit property in trust for the respondents, who are her daughters, under Meru customary law as some of them were not married.
5. Sometime later, the daughters sued their mother before the Chief Magistrate's Court Chuka in CMCC No. 124 of 2016 for their portions which their mother was holding in trust for them. The learned magistrate allowed the prayers but the mother appealed to the High Court. The learned judge found the appeal devoid of merit and dismissed it.
6. The appellant/applicant, who is said to be 90 years old has now come to this Court challenging the said finding by the learned Judge. In the meantime, she has filed this application seeking to stay the said orders. Her main complaint is that she will be discriminated against and she will suffer prejudice if she complies with the orders of the Chief Magistrate because she will be left with "a very small portion of land".
7. In her affidavit in support of the application sworn on 27th February, 2020 the applicant deposes that she is the mother of the respondents. That the subordinate court ordered that 1.125 acres be hived from her 1.5 acres and be given to the respondents herein and that will be prejudicial to her. She therefore, urges us to stay the said judgment.
8. Learned counsel for the appellant filed submissions in support of the application. He says that the appeal is arguable because the court erred in holding that the appellant held the piece of land in trust for the respondents.
9. On the nugatory aspect, counsel stated that if the land is transferred to the respondents, they might dispose of it and in the event the appeal succeeds, then the it would be rendered nugatory.
10. We have considered the application along with counsel's submissions, which he adopted during the plenary hearing, and the applicable law.
11. We note that there is no replying affidavit. However, that does not absolve the applicant from demonstrating that her application meets the required threshold for applications of this nature to succeed.
12. First and foremost we note that the ELC dismissed the appellant's appeal. The appellant, therefore, seeks to stay a negative order.

What would be the effect of staying the ELC judgment? It would still leave the judgment of the subordinate court intact.

13. This Court has pronounced itself articulately on stay of negative orders. In the appeal before the ELC, the parties were not ordered to do anything or to refrain from doing anything. What was therefore issued 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 vs. Austine Pyan Maranga Kisii HCCA No 15 of 2010, Makhandia, and 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...”

14. Consequently, the prayer for stay of execution must fall by the wayside. We note that the applicant has not prayed for an injunction or any other orders. The entire application, therefore fails and is hereby dismissed with no order as to costs

DELIVERED AND DATED AT NYERI THIS 22ND DAY OF MARCH 2024.

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

