



**Mwanthii & 2 others v Mukami (Civil Appeal (Application)
E124 of 2024) [2024] KECA 624 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 624 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E124 OF 2024
DK MUSINGA, MSA MAKHANDIA & S OLE KANTAI, JJA
MAY 24, 2024**

BETWEEN

STEPHEN NZUE MWANTHII 1ST APPLICANT

JOSEPH KARIUKI KWERI 2ND APPLICANT

BENSON MUKAMI 3RD APPLICANT

AND

ELIZABETH MUKAMI RESPONDENT

(Being an application for stay of execution from the whole Ruling and Order of the High Court of Kenya at Kiambu (Chepkwony, J.) dated 16th January 2024 in HCCC No. E006 OF 2021)

RULING

1. Before us is a Notice of Motion dated 18th March 2024, filed pursuant to rule 5 (2) (b) of this Court's Rules. The applicants seek stay of execution of the ruling and order issued in Kiambu HCCC No. E006 of 2021 on 16th January 2024, pending the hearing and determination of this application and their intended appeal. By the said ruling, Chepkwony, J. dismissed the application that had been filed by the applicants that sought to reinstate a suit that had been dismissed.
2. When the application came up for inter partes hearing on 6th May 2024, Mr. Tumu, learned counsel for the applicants, indicated that he wished to rely solely on his written submissions dated 3rd April 2024, and the further affidavit of the even date filed with leave of the Court.
3. At this juncture, the Court sought to confirm from counsel whether the ruling and order of the High Court the applicants intend to appeal against was in the nature of a dismissal order and therefore a negative order. In other words, was the application giving rise to the intended appeal dismissed or allowed? Counsel confirmed that indeed the application in the High Court was dismissed. It was also pointed out to counsel that the consistent jurisprudence of this Court on the issue is that a dismissal



and or a negative order is incapable of being stayed. Given the foregoing, counsel was asked whether he would wish to reconsider the application. Counsel was of the view that there were some positive aspects in the ruling and order capable of being stayed. However, he was unable to point out those aspects. Pressed further, he opted to leave the matter to court.

4. Ms. Wanjiku, learned counsel for the respondent, also confirmed that indeed, the application in the High Court had been dismissed. To that extent, the order sought to be stayed was in the nature of a negative order, incapable of being stayed.
5. From the record, it is quite clear that the application in the High Court was dismissed. It is this order of dismissal that the applicants intend to appeal against. As already stated, the jurisprudence of this Court on applications for stay of execution pending appeal is now settled. The position taken by this Court in respect of such applications for stay of execution of negative orders is that they cannot be stayed. In other words, for an order of stay of execution to lie, the order or decree sought to be stayed must be positive in nature. In *Western College of Arts and Applied Sciences v Oranga & Others* [1976-80] 1 KLR 63, the Court of Appeal for East Africa stated thus on the issue:

“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 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.”

6. In the application before us, just as in the above case, there is nothing which the learned Judge ordered to be done or to refrain from being done. All that she did was to dismiss an application for reinstatement. We also revert to the case of *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR where this Court held as follows:

“An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in *Mugenyi & Co. Advocates v National Insurance Corporation* (Civil Appeal No. 13 of 1984) where it was stated: ‘..... an order for stay of execution must be intended to serve a purpose’”

7. In light of the above authorities, there is nothing to stay in the present matter, and the application is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MAY, 2024.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

