



**Marisin v Naiguta & 4 others (Civil Appeal (Application)
E126 of 2023) [2024] KECA 638 (KLR) (7 June 2024) (Ruling)**

Neutral citation: [2024] KECA 638 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) E126 OF 2023
MA WARSAME, FA OCHIENG & LA ACHODE, JJA
JUNE 7, 2024**

BETWEEN

KIPNGENY MARISIN APPLICANT

AND

MEPOE OLE NAIGUTA 1ST RESPONDENT

THE DISTRICT LAND REGISTRAR, TRANSMARA 2ND RESPONDENT

**DEPUTY COUNTY COMMISSIONER, TRANSMARA WEST 3RD
RESPONDENT**

DIRECTOR OF LAND ADJUDICATION 4TH RESPONDENT

THE ATTORNEY GENERAL OF KENYA 5TH RESPONDENT

*(An application for a stay of implementation of the decision/judgment of
the Deputy Commissioner Transmara West in Land Case No. 268 of 1998)*

RULING

1. By an application dated 9th October 2023, the applicant sought an Order in the following terms:

“That pending the hearing and determination of the appeal the honourable Court may be pleased to grant temporary orders of stay of implementation of the decision/judgment of the Deputy County Commissioner, Transmara West in the Land Appeal to the Minister Case No. 268/1998 to award land parcel number Transmara/olo Sakwana “B”/1117 and 72 to Mepoe Oloisiriri Naiguta (the 1st respondent).”



2. The application is pegged upon 5 grounds; which the applicant has spelt out in the manner following;
 - “ 1. The 1st, 2nd and 4th respondents intend or are likely to implement the decision made by the 2nd respondent before the hearing of the appeal.
 2. That should the appeal succeed, the same shall be rendered useless and is only an academic exercise.
 3. The applicant/appellant stands to suffer irreparable loss because he stands to lose his land and home.
 4. The application is made in good faith.
 5. The order sought shall not prejudice the respondent.”
3. By his supporting affidavit, the applicant reiterated that he stood to lose his land if the respondents implemented the decision of the Minister in Land Appeal No. 268 of 1998.
4. When the application came up for hearing on 27th May 2024, it was heard through the Court’s virtual platform.
5. Mr. Rono represented the applicant, whilst Mr. Shira and Ms. Kerubo represented the 1st and the 2nd to the 5th respondents respectively.
6. It is trite that the principles that govern the grant of stay are now well settled in this Court. In the case of *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others*, Civil Application Nai. 258 of 1999 (unreported), this Court held that:

“The jurisdiction of the Court under Rule 5(2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...” [Emphasis ours]
7. The applicant expressed the view that the Judicial Review Application which he had instituted intending to challenge the decision of the Minister, had been dismissed on a technicality. He was therefore convinced that the appeal he was lodging before this Court, had high chances of success.
8. The respondents acknowledged that pursuant to Section 29 of the *Land Adjudication Act*, a person aggrieved with the decision of the Minister can only challenge the said decision by way of Judicial Review. A decision on the said Judicial Review is, by virtue of that statutory provision, final.
9. This is what the Court of Appeal held in the case of *Amarnath (Suing on behalf of the Estate of the late Amarnath Gupta) vs Patricia Kazungu & 2 Others*, Civil Appeal No. E033 of 21;

“The Act is clear that any person aggrieved by a decision made under Section 26 of the Act must follow the process under Section 29, and appeal to the Minister. Once the Minister or the panel delegated to, makes a determination, his order is final. That means that the Minister’s decision cannot be appealed, whether under the Act or in Court. The option the appellant had was to pursue the Judicial Review Process provided under Article 47 of the *Constitution* and the *Fair Administrative Action Act...*”



10. In accordance with the statutory provisions, the applicant sought leave to institute Judicial Review; and the court granted him leave to do so in respect to the Minister’s Appeal No. 121 of 1999. It is important to note that the leave was not in respect to the Minister’s Appeal No. 268 of 1998.
11. During the hearing of this application, Mr. Rono, learned advocate for the applicant, conceded that his client never obtained leave to institute Judicial Review in respect to the Minister’s Appeal No. 268 of 1998.
12. Although counsel described the difference between the two cases as an error made by the Judge, we emphasize that this is a Court of Record; and on the record, no leave was granted to the applicant to institute Judicial Review with respect to the Minister’s Appeal No. 268 of 1998.
13. In the circumstances, we find that the applicant had failed to demonstrate that he has an arguable appeal.
14. Secondly, the orders made on 20th June 2023 were negative: the court rejected the application seeking to reinstate the application dated 19th August 2022. Such a rejection of the orders that had been sought, is not capable of being executed.
15. This Court in the case of *Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Millimo, Muthomi & Co. Advocates & 2 others*, (Civil Appeal (Application) E383 of 2021) [2021] KECA 363 (KLR) stated as follows:

“We start by acknowledging the fact that the ruling appealed against was a compounded one dealing with 2 applications, which yielded two different results. The first application, which was made by the applicant, was dismissed. As submitted by learned counsel for the 1st respondent, the position taken by this Court in respect of applications for stay of execution in respect of negative orders is clear. Negative orders cannot be stayed. We reiterate the sentiments of the predecessor of this Court in its decision in *Western College of Arts and Applied Sciences vs Oranga & Others* (1976-80) 1 KLR, where the Court stated in respect of stay of execution as follows:

“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 church 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.”

16. Similarly, in the case of *Gitundu v Wathuku*, (Civil Application E024 of 2021) [2022] KECA 959 (KLR) (26 August 2022) (Ruling), this Court stated:

“Additionally, even if we had the requisite jurisdiction, this Court has said time without number that stay orders cannot issue in respect of negative orders, where the court has not ordered any of the parties to perform any task. See *Western College of Arts and Applied Sciences vs EP Oranga & 3 Others* [1976] eKLR. In this case, the learned Judge merely struck out the applicant’s application. The Court cannot stay that striking out. Contrary to Mr. Amuga’s submission, this Court lacks jurisdiction to stay the decree from the Chief Magistrate’s Court whose fate is yet to be determined before the High Court.”



17. Thirdly, the applicant wished to have an order for a stay of implementation of the Minister's decision which, pursuant to Section 29 of the *Land Adjudication Act*, was final unless it was successfully quashed through an Order made on Judicial Review.
18. As the application for Judicial Review was rejected, it would imply that, currently the finality of the decision of the Minister is not facing any challenge.
19. In the circumstances, we find no legal basis upon which we would order that the implementation of the Minister's decision be stayed.
20. Accordingly, the application before us lacks merit and is therefore dismissed, with costs to the 2nd, 3rd, 4th and 5th respondents.

DATED AND DELIVERED AT NAKURU THIS 7TH DAY OF JUNE, 2024.

M. WARSAME

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

