



**Mukuna & 4 others v Wairia & 6 others (Civil Application  
E136 of 2021) [2023] KECA 592 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KECA 592 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E136 OF 2021  
K M'INOTI, HA OMONDI & KI LAIBUTA, JJA  
MAY 26, 2023**

**BETWEEN**

**JOHNSON MAINA MUKUNA ..... 1<sup>ST</sup> APPLICANT  
ERASTUS MARENYE MUKUNA ..... 2<sup>ND</sup> APPLICANT  
WILSON MBOGO MUKUNA ..... 3<sup>RD</sup> APPLICANT  
WILSON WAIRIA MUKUNA ..... 4<sup>TH</sup> APPLICANT  
JOHN MUKUNA WAIRIA ..... 5<sup>TH</sup> APPLICANT**

**AND**

**MATHU WAIRIA ..... 1<sup>ST</sup> RESPONDENT  
JOSEPH D. KIMURA ..... 2<sup>ND</sup> RESPONDENT  
MWANGI ELIJAH ..... 3<sup>RD</sup> RESPONDENT  
JULIUS GACAU KANYIRI ..... 4<sup>TH</sup> RESPONDENT  
SAMUEL MUGO MWANGI ..... 5<sup>TH</sup> RESPONDENT  
KARANJA B. CHEGE ..... 6<sup>TH</sup> RESPONDENT  
JOHN NJOROGE NGUCHITA ..... 7<sup>TH</sup> RESPONDENT**

*(Being an application for stay of execution pending appeal from the Judgment  
and Decree of the Environment and Land Court of Kenya at Nairobi (L.  
Komingoi, J.) delivered on 17th December 2020 in E.L.C Case No. 81 of 1999 (O.S))*



## RULING

1. Before us is the applicants' Notice of Motion dated May 4, 2021 and made pursuant to rules 4, 41 and 47 of the *Court of Appeal Rules* seeking, inter alia, stay of execution of the judgment of the Environment and Land Court at Nairobi (L Komingoi, J) delivered on December 17, 2020 in Nairobi ELC Case No 81 of 1999 (OS) pending appeal. They also prayed that the costs of the application be in the cause. It is apt to observe that the above provisions of the Court of Appeal Rules relate to extension of time. The applicants rather unprocedurally presented an omnibus application seeking both extension of time and stay of execution. The prayer for extension of time was disposed off by a single judge, leaving the prayer for stay of execution which we would have expected to be sought under rule 5(2) (b).
2. It is noteworthy that the scanty record as put to us is comprised only of the Motion, the affidavit in support, two replying affidavits, the impugned judgment, the draft memorandum of appeal, the rival submissions of learned counsel for the applicants and for the respondents, the only documents we can go by. In the circumstances, we are only able to discern the background of the Motion before us from the impugned judgment and the rival depositions in the respective affidavits.
3. Gathering from the impugned judgment, the applicants took out an Originating Summons (the Summons) dated January 15, 1999 and amended on June 16, 2008 claiming to have acquired Parcel Numbers Loc 16/Ndakaini/ 707 – 713 (formerly Title No Loc 16/Ndakaini/ 402, the suit property) by way of adverse possession.
4. Opposing the Summons, the 6<sup>th</sup> respondent, Peter Karanja Ben Chege, testified that he bought the suit property from the 1<sup>st</sup> respondent, Mathu Wairia (now deceased); that following delay in securing their title documents, the 6<sup>th</sup> respondent together with other buyers filed Thika CMCC No 1192 of 1997 against the deceased 1<sup>st</sup> respondent; that the court gave judgment in their favour and, subsequently, they processed and obtained titles to the subdivisions of Loc 16/Ndakaini/402.
5. In her testimony, Jane Kaburu Mathu, the deceased 6<sup>th</sup> respondent's widow, averred that Loc 16/Ndakaini/402 was subdivided into six portions being parcel Nos. Loc 16/Ndakaini/707-713 (the suit properties); that they were unable to occupy the suit properties whose survey and subdivision was violently resisted by the applicants; that her deceased husband filed HCCC No 2435 of 1994 seeking to evict the applicants from the properties, which they were still in occupation; and that her late husband had by then sold the suit properties to the 2<sup>nd</sup> – 7<sup>th</sup> respondents.
6. In her judgment delivered on December 17, 2020 in determination of the Summons, Komingoi, J dismissed the applicants' claim in adverse possession with costs to the respondents. According to the learned Judge, the applicants' occupation of the suit properties was not peaceful. Recounting the applicants' testimonies, the learned Judge stated:

' They themselves told the court that they have refused any attempts for survey to be undertaken in favour of the defendants.'
7. Dissatisfied by the judgment of the trial court, the applicants moved to this Court on appeal faulting the learned Judge for: misdirecting herself that the applicants were claiming a customary trust from the 1<sup>st</sup> respondent; finding that the applicants did not occupy the suit properties peacefully; finding that the applicants occupied the suit properties with the permission of the 1<sup>st</sup> respondent; finding that the applicants did not occupy the suit properties for a continuous period of twelve (12) years; and for dismissing the applicants' claim for adverse possession.



8. The applicants' Notice of Motion dated May 4, 2021 In their written submissions and list of authorities dated May 12, 2023 and filed in support of the Motion, learned counsel for the applicants, M/s Gichachi & Company, cited, among others, this Court's decisions in *Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR*; and *Regnoil Kenya Limited v Winfred Njeri Karanja [2019] eKLR* highlighting the twin principles for grant of orders under rule 5(2) (b) of the Rules of this Court. They urged us to grant stay orders as prayed.
10. The respondents oppose the Motion as is evident from the replying affidavits of Jane Kabura Mathu (the widow of the deceased 1<sup>st</sup> respondent) sworn on May 12, 2021 and of the 6<sup>th</sup> respondent sworn on March 27, 2023. In summary, the two deponents aver that the applicants have not shown any willingness to deposit reasonable security and, therefore, do not satisfy the requirement for stay of execution; that the application is merely intended to deny the respondents the fruits of their judgment; and that the applicants have, after dismissal of their suit, continued to reap benefits from the respondents' premises without paying a single cent, and that they have filed the application for stay of execution to prolong their stay in the suit properties.
11. To bolster her opposition, learned counsel for the 1<sup>st</sup> respondent, M/s Mwaniki Gachoka & Company, filed written submissions and case digest dated May 12, 2021 citing, inter alia, the case of *Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah [2008] eKLR* where, in relation to negative orders, the Court had this to say:
 

' 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.'
12. In addition, Mr Kwengu, learned counsel for the 2<sup>nd</sup> to 7<sup>th</sup> respondents, relied on the replying affidavit sworn by the 6<sup>th</sup> Respondent on March 27, 2023. All in all, learned counsel for the respondents urged us to dismiss the applicants' Motion with costs.
13. With regard to the applicants' prayer for stay of execution of the impugned judgment, we have carefully considered the record and the rival submissions of the parties. The issues for our consideration upon which the application turns are: whether the principles that govern the exercise of this Court's discretionary power in granting the reliefs stipulated in rule 5(2) (b) of the Rules of this Court on which the application is predicated have been met; and whether the Court can order stay of what are essentially negative orders. In summary, the twin principles require an applicant to show that he has an arguable appeal and, further, that the appeal, if successful, shall be rendered nugatory unless stay of execution is granted.
14. It is noteworthy that what is sought to be stayed is an order dismissing the applicants' Summons. To our mind, an order of this nature is incapable of being stayed. The order did not direct anything to be done or restrain anything from being done to the applicant's prejudice.
15. In our considered view, the only question that falls to be determined with regard to the applicants' Motion is whether an order dismissing a suit can be stayed under rule 5(2) (b). If the answer is in the negative, that will dispose of the application.
16. The issue whether dismissal of a suit gives rise to an order that is capable of being stayed by an order under rule 5(2)(b) was considered by this Court in *Western College of Arts and Applied Sciences v Oranga & Others [1976] KLR 63* where a dispute arose between the parties over and concerning money held in a bank account contributed by members of the public for construction of a college of technology called WECO. The appellant filed suit in the High Court seeking a declaration that



the money belonged to WECO, and that WECO was entitled to operate the bank account. The High Court dismissed the suit with costs, whereupon WECO gave notice of appeal and applied for temporary injunction to restrain the respondent from operating the bank account, and for stay of execution until the appeal was determined. At the time, this Court did not have jurisdiction to grant an injunction under the equivalent of rule 5(2) (b), but had jurisdiction to grant stay of execution. The Court, therefore, held that it had no jurisdiction to grant an order for injunction. But with regard to the prayer for stay of execution in respect of which it then, as now, had jurisdiction, the Court held that there was nothing in the order of dismissal of the suit (other than the order for costs) that could be enforced and, accordingly, dismissed the application for stay. In a unanimous decision, the Court stated:

' 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.'

17. Likewise, this Court 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 EA 53* where it was stated that 'the order which dismissed the suit was a negative order which is not capable of execution.'

18. In the same vein, 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.'

19. We adopt the same reasoning as in the afore-cited decisions and hold that, the learned judge having dismissed the applicant's Summons, there is nothing that can be executed out of such an order. It follows, therefore, that this Court cannot grant stay of a negative orders and hereby disallow the applicants' prayer for stay of execution. In conclusion, the applicants' Motion lacks merit and is hereby dismissed with costs to the respondents. It is so ordered.



DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY, 2023.

K. M'INOTI

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JUDGE OF APPEAL

H. OMONDI

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JUDGE OF APPEAL

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DR. K. I. LAIBUTA

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JUDGE OF APPEAL

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

*Signed*

**DEPUTY REGISTRAR**

