



**Opondo v Onyango (Sued as Administrator of the Estate of Charles Onyango Gucha)
(Civil Application E022 of 2023) [2023] KECA 1076 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KECA 1076 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E022 OF 2023
PO KIAGE, M NGUGI & F TUIYOTT, JJA
SEPTEMBER 22, 2023**

BETWEEN

JOSEPH AMBWAYO OPONDO APPLICANT

AND

**ISAIAH CHELUGET ONYANGO (SUED AS ADMINISTRATOR OF THE
ESTATE OF CHARLES ONYANGO GUCHA) RESPONDENT**

*(An application for stay of the Judgment of the Environment and Land Court of Kenya
at Migori (Kullow, J.) dated 18th January, 2023 in ELC Appeal No. E014 of 2020)*

RULING

1. Given the settled principles for the grant of stay of execution under rule 5(2)(b) of the *Rules of this Court*, and the consistent case law that precludes issuance of such an order against a negative order of the court appealed from, the motion dated February 21, 2023 cannot but fail.
2. The motion brought by the applicant Joseph Abwayo Opondo seeks a stay pending the hearing and determination of an appeal from the judgment of the Environment and Land Court at Migori (Kullow, J) delivered on January 18, 2023. That judgment dismissed as lacking in merit the applicant's appeal from a judgment of the Chief Magistrate's Court at Migori that had, on December 14, 2020 allowed the respondent's claim and issued orders of permanent injunction and eviction of the applicant from suit parcel numbers Suna West/Wasimbete/1201, 1202, 1213, 1171, 1135 and 1137.
3. In grounds appearing on the face of the motion and repeated in the applicant's supporting affidavit of even date, it is stated that the applicant has filed a notice of appeal and has an arguable appeal which would be rendered nugatory absent this court's intervention in the interim, as the respondent might apply for, and effect eviction orders against him.
4. In resisting the motion, the respondent casts doubt on the arguability of the applicant's intended appeal and contends that a case has not been made out for the grant of the prayers sought. More critical



to the fate of the motion, the respondent posits that on the authorities, a negative order cannot be stayed. We think, with respect, that the force of this argument is dispositive of the motion before us which seeks a stay of execution of an order that dismissed the appeal to the court below and which did not direct the doing of anything or the taking of any step. It was thus a negative order. This court in *Kenya Commercial Bank Limited Vstamarid Meadows Limited & 7 others*[2016] eKLR dealt with this issue in the following terms, with which we respectfully agree;

"16. In *Kanwal Sarjit Singh Dhiman v Keshavji Juvrai Shah* [2008] eKLR the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

"The end prayer in the application is for stay (of execution) of the order of the superior court made on December 18, 2006. The order of December 18, 2006 merely dismissed the application for setting aside the judgment with costs. 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 (see *Western College of Arts & Applied Sciences vs Oranga & others*[1976] KLR 63 at page 66 paragraph c)"

17. The same reasoning was applied in the case of *Raymond M Mboga vs Austine Pyan Maranga (supra)*, that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the court had to say on the matter:

"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 in is not an order dismissing his application. This is not an 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 does not arise ..."

5. As there is nothing to stay, and while sympathetic that the applicant might have fared better had the prayers sought been more carefully thought out and presented, we come to the inevitable conclusion that the application is without merit.

6. It is accordingly dismissed with costs.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF SEPTEMBER, 2023.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

