



**Mukanda v Kituma (Civil Application E232 of 2023)
[2023] KECA 1387 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1387 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E232 OF 2023
F TUIYOTT, A ALI-ARONI & PM GACHOKA, JJA
NOVEMBER 24, 2023**

BETWEEN

JULIUS MUTHUNGU MUKANDA APPLICANT

AND

MBULUNGA KITUMA RESPONDENT

(Being an application for stay of execution of the Ruling and all subsequent Orders of the ELC court (Mbogo, J.) In ELC. COURT CASE NO. 84 OF 2018)

RULING

1. The application before court is brought pursuant to Section 3A and 3B of the Appellate Jurisdiction Act Cap. 9 and under Rule 41, 42, 43, 44, 45, 48 and 49 of the [Court of Appeal Rules 2022](#) seeking for four prayers, two of which are spent. Remaining are prayers 3 & 4;
 - (1)
 - (2)
3. That pending the hearing and determination of the intended appeal this Honourable Court orders stay of execution of the Ruling and Orders which were made and delivered on 28th January, 2020 together with all consequential Order in [Makueni ELC Court Case No. 84 of 2018](#) and the respondent be restrained from evicting the applicant from the subject land title number Ukia/Utaati/449.
4. That the costs of this application abide with the result of the said appeal.
2. The application is predicated on the grounds on the face of the application which are replicated in the supporting affidavit of the applicant sworn on the 3rd of May, 2023 and a further affidavit sworn 21st June, 2023.



3. The main ground for this application is the impending arrest of the applicant and committal to civil jail for recovery of costs and the likely eviction from the suit premises.
4. It is the applicant's contention that the likely arrest and eviction will render the intended appeal nugatory and will cause the applicant substantial loss.
5. The respondent objected to the application by way of an affidavit dated 8th June 2023, wherein he states that this Court lacks jurisdiction to hear this matter as the issue of stay had been adjudicated in the High Court.
6. Counsel for the applicant in his submissions dated 23rd June, 2023 submits that the applicant had sought for a stay in the high court which was declined; further he has an arguable appeal in that; he faults the trial court for dismissing his suit based on a preliminary objection; he had sued the respondent in his personal capacity and representative over land that had been registered in the name of his deceased father; the court failed to consider the holding in Succession Cause No. 530 of 2008 which found that the applicant had been in possession of the suit property for 34 years; and by failing to find that the applicant was a prima facie and bona fide purchaser.
7. On whether the appeal would be rendered nugatory, counsel made reference to the lower court's judgement in his favour.
8. Rule 5 (2) (b) of this [Courts rules](#) empowers the court where a notice of appeal has been lodged in accordance with rule 77 to grant an order of stay or injunction on terms the court may think just. In other words, the application is rightly before us, and we indeed have jurisdiction to deal with the same.
9. In the High Court the respondent had filed a preliminary objection dated the 26th of October, 2018 challenging the suit against him, which was heard on 29th of October, 2018 and by turn of events the same disposed of the matter leading to the application before us.
10. The preliminary objection raised three grounds;
 1. That the proceedings herein as filed are fatally defective on the ground that the defendant has been sued in his personal capacity and not as a legal representative of the Estate of Kituma Nganda Musau.
 2. That the Makueni District Land Dispute Tribunal lacked capacity to hear any dispute relating to any registered land.
 3. There is absolutely no cause of action established in view of the aforesaid.
11. Counsel in pursuit of the preliminary objection argued that the land subject matter of the suit was still in the name of the applicant's father (deceased) and therefore remains to be part of the deceased's estate.
12. The trial court noted that the applicant had sought cancellation, rectification of title and execution of transfer papers, yet the title remained in the name of Kituma Nganda Musau (deceased). Further that the defendant had been sued in his personal capacity and not as a representative of his father's estate. In the end the court found the suit was defective and struck it out with costs.
13. The trial court by striking out the suit issued a negative order.

In our considered opinion, the court did not issue any order that is to be executed and therefore there is nothing positive capable of being stayed.
14. This Court has pronounced itself on stay being sought on negative orders severally.



In *Western College of Arts and Applied Sciences v EP Oranga & 3 Others* [1976] eKLR this Court stated:

“ 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.”

The above case is on all fours with the application that before us.

15. For the reasons above we find the application devoid of merit and dismiss the same with costs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

F. TUIYOTT

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JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

