



REPUBLIC OF KENYA



**Odula v Wanjiku & 2 others (Civil Application E463 of 2023)
[2023] KECA 1672 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1672 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E463 OF 2023
DK MUSINGA, MSA MAKHANDIA & M NGUGI, JJA
DECEMBER 15, 2023**

BETWEEN

DR PAUL ODULA APPLICANT

AND

KAMUYU WANJIKU 1ST RESPONDENT

AVENUE NURSING HOSPITAL 2ND RESPONDENT

DR PETER OLAKHI ODONGO 3RD RESPONDENT

(An application for stay of execution of the judgment of the High Court of Kenya at Nairobi (J. K. Sergon, J.) dated 31st March 2023 in Civil Appeal No. E178 of 2021)

RULING

1. The applicant's notice of motion dated 6th October 2023 brought under rule 5(2)(b) of this [Court's Rules](#) seeks stay of execution of the judgment and decree in High Court Civil Appeal No. E178 of 2021 that upheld the judgment in Chief Magistrates' Civil Suit No. 5696 of 2016, pending hearing and determination of an intended appeal.
2. In the aforesaid suit before the Chief Magistrates' Court, the 1st respondent was awarded Kshs.12,682,119/- against the applicant, the 2nd and 3rd respondents, jointly and severally, for alleged medical negligence following two surgical procedures.
3. Being aggrieved by that judgment, the applicant filed an appeal to the High Court, arguing, inter alia, that the first surgical procedure was carried out by the 2nd respondent; that the applicant was only involved in the second surgical procedure, yet he was held jointly and severally liable without any distinction between the two surgical procedures.



4. As earlier stated, the High Court dismissed the appeal. But pending hearing and determination of that appeal, the applicant, the 2nd and 3rd respondents had deposited in a joint interest earning account the decretal sum as security for the due performance of the decree in the initial suit.
5. In his affidavit in support of the application before this Court, the applicant stated that he has an arguable appeal, and that if stay of execution is not granted, the 1st respondent will take steps to obtain the amount deposited in the joint interest earning account before the intended appeal is heard and determined, and the 1st respondent may not be able to refund it if the appeal is allowed.
6. The 1st respondent opposed the application. In her replying affidavit, she stated, inter alia, that on the advice given to her by her advocate, Prof. Wangai, there is no positive order capable of being executed since the High Court had dismissed the appeal; that the applicant is attempting to stay execution of the trial court judgment and not the High Court judgment; that there is no arguable appeal because the High Court had dealt with the germane issue that the applicant intends to canvass in the proposed appeal; and that she will be greatly prejudiced if the order sought is granted because she needs to utilize the deposited funds for further medical treatment.
7. When the application came up for hearing, Mr. Ondieki, learned counsel for the applicant, was in attendance, and Prof. Wangai, learned counsel, appeared for the 1st respondent. The 3rd respondent was represented by Mr. Ngechu, but there was no appearance for the 2nd respondent.
8. Highlighting his written submissions, Mr. Ondieki reiterated that the applicant has an arguable appeal, and that unless this Court grants the order sought, once the 1st respondent is paid the decretal amount, it will be impossible to recover it if the intended appeal is successful, which position was adopted by Mr. Ngechu.
9. On his part, Prof. Wangai maintained that the High Court having dismissed the appeal, there is no positive order capable of being stayed, and this Court has no jurisdiction to stay the orders made by the trial court.
10. This Court has firmly held, time without number, that stay orders cannot issue in respect of negative orders, that is, where the High Court or any other superior court has not ordered the performance of any duty or task. See, for example, *Western College of Arts and Applied Sciences v E P Oranga & 3 Others* [1976] eKLR and *Oliver Collings Wanyama v Engineers Board of Kenya* [2019] eKLR.
11. Mr. Ondieki conceded that the High Court did not issue any positive order requiring execution, but pointed out that the applicant is also seeking stay of the trial court's judgment.
12. Our simple finding on this issue is that the intended appeal to this Court is against the judgment of the first appellate court, not the trial court. In the circumstances, this Court cannot address itself to orders that were not issued by the first appellate court.
13. The application before us is bad in law and is for dismissal, which we hereby do. The applicant shall bear the 1st respondent's costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER 2023.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA



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**JUDGE OF APPEAL
MUMBI NGUGI**

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

