



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Abuta v Nyandika (Civil Application E161 of 2021)  
[2022] KECA 823 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KECA 823 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E161 OF 2021  
PO KIAGE, M NGUGI & F TUIYOTT, JJA  
MAY 13, 2022**

**BETWEEN**

**KIRAITA ABUTA ..... APPLICANT**

**AND**

**RICHARD NYANDIKA ..... RESPONDENT**

*(Being an application for stay of execution of the judgment & decree of the Learned  
Principal Magistrate at Kisii delivered on 20th August, 2020 in CMCC NO. 814 OF 1999)*

**RULING**

1. The Notice of Motion dated 25<sup>th</sup> November, 2021 as drawn creates an immediate jurisdictional conundrum for the applicant. In it the applicant seeks the following main prayer -  
  
THAT, pending the hearing and determination of the intended appeal the Honourable Court be pleased to issue an order staying execution of the decree and judgment of the Principal Magistrate Court, Kisii in CMCC No. 814 of 199 delivered on 20<sup>th</sup> August, 2010.
2. In the affidavit in support of the motion, the applicant explains that on 20<sup>th</sup> August, 2019, the Principal Magistrate at Kisii delivered a judgment in CMCC No. 814 of 1999 against him. The effect of the decision was that the applicant was required to sign all the relevant transfer documents to transfer 1.1 hectares of land parcel known and described as East Kitutu/Mwamangera/616 to the respondent, failing which the Executive Officer of the court would do so. Dissatisfied with the judgment, the applicant moved to the Environment and Land Court (ELC) at Kisii in ELC Appeal No. 23 of 2019. There, the ELC dismissed his appeal.
3. The applicant tells us that the result of the failure at appeal is that he and his family faces an imminent and permanent eviction from his ancestral home and this will render him and his family homeless.



He also fears the intended transfer of the suit property to the respondent. He comes to this Court for protection while he pursues an appeal against the judgment of the ELC to this Court.

4. As one response to the application, the respondent questioned the jurisdiction of this Court to grant the orders sought. We formed a view that the question of jurisdiction must receive our immediate attention as it may well dispose of the entire application.
5. The application before us is brought under the provisions of Rule 5 (2)(b) of the Rules of this Court which reads:

“(2) Subject to sub-rule (1) the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may-

- b. in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, Order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

6. What we are asked to do is to stay execution of a subordinate court judgment yet the intended appeal to us is that against the decision of the superior court which dismissed the applicant’s appeal from the lower court. We can of course see why the applicant is anxious. The dismissal of his appeal at the ELC leaves him open to execution of the decree of the subordinate court. Yet the prayers he seeks are unhelpful because we cannot extend our jurisdiction to stay the decision of the subordinate court. That said, the applicant was not without recourse because under Rule 5 (2) (b) the power granted to this Court is not limited to granting a stay but an injunction where deserved. An order for injunction may have been efficacious in arresting the anxiety faced by the applicant but we cannot grant what was not sought. The prayer for stay not being available to the applicant, then the application before us must fail.
7. The Notice of Motion dated 25<sup>th</sup> November, 2021 is therefore incompetent and is hereby struck out with costs to the respondent.

**DATED AND DELIVERED AT KISUMU THIS 13<sup>TH</sup> DAY OF MAY, 2022.**

**P. O. KIAGE**

.....

**JUDGE OF APPEAL**

**MUMBI NGUGI**

.....

**JUDGE OF APPEAL**

**F. TUIYOTT**

.....

**JUDGE OF APPEAL**

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

*Signed.*

**DEPUTY REGISTRAR**

