



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: OKWENGU, J. MOHAMMED & KANTAI, J.J.A.)**

**CIVIL APPLICATION NO. 41 OF 2019**

**BETWEEN**

**EKTELA EKAILODIO & 11 OTHERS.....APPLICANTS**

**AND**

**CHRISTOPHER KURUTYON LONYALA & 26 OTHERS.....1ST RESPONDENTS**

**CABINET SECRETARY, MINISTRY OF LANDS**

**AND SETTLEMENT & 10 OTHERS.....2ND RESPONDENTS**

***(An application for stay of execution from the Ruling and Order of the Environment***

***and Land Court of Kenya at Kitale (Obaga, J.) delivered on 26th April, 2016***

**in**

**ELC Petition No. 2 of 2014)**

\*\*\*\*\*

**RULING OF THE COURT**

The record of the Motion said to be brought under **rule 5(2) (b)** and **rule 15** of the **rules of this Court** does not contain the ruling or judgment which is being appealed. The Notice of Appeal lodged at the Environment and Land Court of Kenya, Kitale, on 10th April, 2019 which is at page 25 of the said record states:

***“TAKE NOTICE THAT the Interested Parties in PETITION NO. 2 OF 2014 being dissatisfied with the decision of Hon. Justice MWANGI NJOROGI, Successor Judge of the ELC Kitale High Court delivered on 28/3/2019 on the application of the Interested Parties dated 19/3/2019 seeking for stay of execution against the Court Order of 26/4/2016 issued by Justice E. OBAGA, Predecessor Judge, intends to appeal to the Court of Appeal against the whole decision/Ruling of Hon. Justice MWANGI NJOROGI, JUDGE, declining to give stay of execution filed by Interested Parties on the grounds that Interested Parties were late to arrive in Court thereby unfairly striking (sic)out the application necessitating this appeal.***

***The Address for the Applicants is Care of P.O. Box 110-30200, KITALE.***

***IT IS INTENDED To serve copies of this notice on KARANI GREY & CO. ADVOCATES – KITALE, (Counsel Representing the 10th and 11th Respondents) NAIKUNI, NGAAH., MIENCHA & CO. ADVOCATES-NAIROBI (Counsel representing Petitioners) and STATE COUNSEL, Stale Law Offices- Eldoret (Counsel representing the Government).”***

In the Motion the 12 applicants pray that, pending the hearing and determination of the appeal we grant a stay of execution of a Court Order delivered on 26th April, 2016 by Obaga, J. pronounced by Mwangi Njoroge, J. on 13th April, 2018:

***“...on application by interested parties seeking for enforcement of court order declined by the Court on 28/3/2019 dated***

19/3/2019 brought under certificate of urgency for an ex-parte orders by the Interested Parties in Petition No. 2 of 2014.

**THAT Status Quo Orders issued by Hon. E. OBAGA, Judge in ELC Petition No. 2of 2014 on 2/3/2016 in the High Court of Kenya at Kitale in the presence of all parties be maintained until the appeal herein is heard and determined....”**

The gist of the grounds in support of the Motion and the affidavit of **Wilfred Ogutu**, the 11thApplicant, a further supporting affidavit where various documents are attached is that the applicants applied to the Environment and Land Court at Kitale for stay of execution of certain orders which application was refused by that court. It is feared that the applicants and their families will be evicted from certain lands if we do not give a stay order pending appeal.

The judgment or ruling intended to be appealed is not, as we have stated, included in the record and is not before us and we do not have the benefit of knowing what decision was reached. What is however clear from the material before us is that the applicants filed an application for stay of execution which the ELC considered and declined to give orders in favour of the applicants. In other words the ELC issued a negative order.

This Court has had occasion to consider situations where the High Court and courts of equal status have issued negative orders and the Court is asked, as here, to make orders under **rule 5(2) (b)** of the **rules of the Court**.

In **Devani & 4 Others v Joseph Ngindari & 3 Others C.A. NAI 136 of 2004** where the High Court had declined to issue judicial review orders this is what we said:

*“By dismissing the judicial review application the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted it will have the indirect effect of reviving the dismissed application.”*

In **Exclusive Estates Limited v Kenya Posts and Telecommunications Corporation & Anor [2005] 1 EA 53** this Court expressed itself thus on the issue:

*“The stay of execution envisaged by rule 5(2) (b) of the rules of this Court is the execution of a decree or order capable of execution in any of the methods stipulated by section 38 of the Civil Procedure Act. A “decree holder” as defined in section 2 of the Civil Procedure Act:*

*“means any person in whose favour a decree has been passed or an order capable of execution has been made and includes the assignee of such decree or order.”*

*The order which dismissed the suit was a negative order which is not capable of being executed.”*

In the Motion before us there is no decree or order capable of being executed. The ELC declined to stay a Judgment or ruling and we cannot, in those circumstances, give a favourable order under **rule 5(2) (b)** of the **rules of this Court**. The Motion has no merit and is dismissed.

**Dated and delivered at Nairobi this 20th day of November, 2020.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**