



**Chemao v Maina (Environment and Land Appeal E036 of 2024)
[2025] KEELC 921 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 921 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E036 OF 2024
EC CHERONO, J
FEBRUARY 20, 2025**

BETWEEN

BERNARD MICHEAL CHEMAO APPLICANT

AND

WILSON NGESHE MAINA RESPONDENT

RULING

1. Before this court for determination is the Notice of Motion filed by the Applicant dated 04/10/2024. It is filed by the applicant under Sections 1, 1A, 3A, 3B and 63 (e) of the [Civil Procedure Act](#) and Orders 42 Rule 6 (6) and 51 Rule 1 of the [Civil Procedure Act](#) seeking the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That this honourable court be pleased to stay the execution of the order and ruling made on the 08/08/2024 and or the decree in Sirisia Principal Magistrate Court ELC Case No. 18 of 2021 pending the hearing and determination of the appeal herein.
 - d. The Costs be in the cause.
2. The application is premised on grounds shown on the face of the said application supported by his affidavit and on a supplementary sworn on 04/10/2024 and 28/10/2024.
3. In his supporting affidavit and supplementary affidavits referred herein above, the Applicant deposed that Sirisia PM ELC No. 18 of 2021 proceeded ex-parte and a judgment was delivered against him on 19/06/2024. That he further filed an application dated 03/07/2024 which was to set aside/vary and or review the said ex parte judgment and to allow the him to file a defence. He deposed that the said application was dismissed vide a ruling delivered on 08/07/2024. The said ruling is the subject of this appeal. He argued that he is exposed to execution despite having an arguable appeal. He stated that no



prejudice will be occasioned to the Respondent and undertakes to abide by any terms and conditions that the court may give.

4. In response, the Respondent filed an undated replying affidavit where he deposed that the Applicant cannot purport to have a dismissal order stayed. He argued that no basis has been given for the grant of the orders sought and that he shall be prejudiced if the orders sought are granted since he wishes to have a public access road opened unreasonably blocked by the Applicant since 2001. That the Applicant has not demonstrated how he will be prejudiced by the execution of the lower court's decree.
5. When the matter came for directions, the parties agreed that the said application be canvassed by way of written submissions.
6. The appellant filed submissions dated 24/11/2024 where he argued that he has satisfied the requirements for the grant of the orders sought. He submitted that he shall suffer substantial loss since his house shall be demolished and the subject matter shall be lost rendering the appeal nugatory. It was submitted that the application has been filed without undue delay and that he is willing to abide by any terms and condition on security. He relied on the case of High Court of Kenya at Nairobi Civil Division Civil Appeal No. E080 OF 2021 NTSA VS. Samper Tours Travel and Henry 7 4 Others vs. County Government of Vihiga Cause 76 of 2021(2022) KEELRC 133 71 KLR.
7. The Respondent on his part filed submissions dated 20/11/2024 where he submitted that the application was filed 57 days after the impugned ruling/order was made translating to an unreasonable delay which has not been explained. He also argued that the order appealed against being a dismissal is a negative order incapable of being executed to warrant the orders sought. Reliance was placed on various cases inter alia James Wangalwa & Another vs. Agnes Nalika Chesto (2012) eKLR, Kanwal Sarjit Sighn Dhimanzi vs. Kashavji Juvrat Shan (2008) eKLR, Oliver Collins Wanyama vs. Engineers Board of Kenya (2019)eKLR.
8. I have considered the application, the supporting affidavit, the replying affidavit and the written submissions filed by both parties as well as the authorities cited. The singular issue for determination in this application is whether the Applicant has established the principles for the grant of stay of execution pending the hearing and determination of the intended appeal.
9. Order 42, Rule 6 of the Civi Procedure Rules, 2010 provides as follows:
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and



- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

10. The purpose of an order for stay of execution pending appeal is to preserve the subject matter of the appeal so as not to render the appeal nugatory or an academic exercise. I agree with the decision of the court in *RWW vs EKW (2019) eKLR* where it was held:

“.....the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

11. A cursory perusal of the record herein shows that the impugned ruling was a dismissal of an application dated 03/07/2024. The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the trial Court is in the nature of a negative order incapable of execution and as such there is nothing to stay. See *Western College of Arts and Applied Sciences v EP Oranga & 3 others [1976] eKLR* where the Learned Judges stated thus:

“ 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 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.”

12. Similarly, in *Raymond M. Omboga v Austine Pyan Maranga Kisii HCCA No 15 of 2010, Makhandia, J* (as he then was) stated thus:

“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 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 do not arise...”

13. The upshot of the above is that the application dated 04/11/2024 is devoid of merit and the same is hereby dismissed with costs to the Respondent.

14. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF FEBRUARY, 2025.

HON.E.C CHERONO

ELC JUDGE

In the presence of;

Appellant-present.



Respondent/Advocate-absent.

Bett C/A.

