



**Omumatera v Nyangala (Environment and Land Appeal
E049 of 2021) [2024] KEELC 4127 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4127 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E049 OF 2021**

DO OHUNGO, J

MAY 9, 2024

BETWEEN

GILBERT OMUMATERA APPELLANT

AND

CHARLES ATANDA NYANGALA RESPONDENT

*(Being an appeal from the judgment and decree of the Principal
Magistrate Court at Butere (Hon. F. Makoyo, Principal Magistrate)
delivered on 26th October 2021 in Butere MCELC No. 8 of 2019)*

RULING

1. Judgement was delivered in this appeal on 28th March 2023. The appeal was allowed, and the judgement of the Subordinate Court was set aside and replaced with an order dismissing the respondent's case. The appellant was awarded costs of this appeal and costs of the case before the Subordinate Court.
2. Being dissatisfied with the judgement, the respondent filed a Notice of Appeal on 10th April 2023. Shortly thereafter, he filed Chamber Summons dated 14th August 2023 through which he seeks stay of execution of the judgement of this court pending hearing and determination of his appeal to the Court of Appeal.
3. The application is supported by an affidavit sworn by the respondent. He deposed that the appellant had written to him a letter dated 20th April 2023 through which the appellant indicated a desire to execute the judgement. He added that if the judgement is executed, he will suffer irreparable loss and that his appeal will be rendered an academic exercise.
4. The appellant opposed the application through a replying affidavit in which he deposed that there was nothing to stay since the judgment was merely a dismissal of the respondent's case.



5. The application was canvassed through written submissions which both sides duly filed. The respondent cited Order 42 rule 6 (2) of the Civil Procedure Rules as well as the case of Butt v Rent Restriction Tribunal [1982] KLR 417 and argued that his appeal raises pertinent issues and that it would be rendered nugatory if stay is not granted.
6. On his part, the appellant argued that the respondent had not satisfied the conditions for granting stay pending appeal and that the respondent was guilty of inordinate delay since the present application was filed some five months after the judgement had been delivered. Additionally, the appellant argued that after receiving the letter dated 20th April 2023, the respondent waited for another four months before filing the present application. He also argued that the respondent had not demonstrated that he would suffer substantial loss and had not provided any security for due performance of the decree. Consequently, the appellant urged this court to dismiss the application with costs.
7. I have considered the application, the affidavits, and the submissions. The issue that emerges for determination is whether stay of execution pending appeal should be granted.
8. The principles that guide this court's exercise of jurisdiction to grant stay of execution pending hearing and determination of an appeal are outlined at Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010 which provide as follows:
 6.
 - (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 sub rule (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.
 9. It follows that an applicant seeking stay pending appeal must demonstrate that substantial loss will result to him if stay is not granted, and that the application has been made without unreasonable delay. Such an applicant is further required to give such security as the court may order for the due performance of the decree. See Kenya Power & Lighting Co. Ltd v Kigaita Ngare Unduthu & 36 others [2020] eKLR and Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR. As Platt Ag JA (as he then was) stated in Kenya Shell Limited v Benjamin Karuga Kibiru & another (supra), substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. It is virtually impossible for such an application to succeed if an applicant fails to demonstrate that he will suffer substantial loss if stay is not granted.



10. The judgment appealed against was a dismissal of the respondent's suit. A dismissal is a negative order. Such an order is incapable of execution, with the consequence that there is nothing to stay. See *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR and *Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others* [2021] eKLR. The fear of eviction that has gripped the respondent cannot be traced to any execution of the judgment since no eviction was ordered by the court.
11. Additionally, I note that the judgement being appealed against was delivered on 28th March 2023 while the present application was filed on 15th August 2023, almost five months later. I agree with the appellant that the respondent is guilty of inordinate delay.
12. I find no merit in Chamber Summons dated 14th August 2023. I dismiss the application with costs to the appellant.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 9TH DAY OF MAY 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

The Appellant present in person

No appearance for the Respondent

Court Assistant: M. Nguyayi

