



**Kenindia Assurance Company Limited v Kipnyekei t/a Nyekwei &
Company Advocates (Environment and Land Appeal E033 of 2022)
[2024] KEELC 6980 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6980 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E033 OF 2022
EO OBAGA, J
OCTOBER 23, 2024**

BETWEEN

KENINDIA ASSURANCE COMPANY LIMITED APPLICANT

AND

**JEVAN KIPNGETICH KIPNYEKEI T/A NYEKWEI & COMPANY
ADVOCATES RESPONDENT**

RULING

1. In the Notice of Motion dated 27th July, 2023 the Appellant seeks for orders that:-
 - i. Spent
 - ii. Spent
 - iii. Spent
 - iv. This Honourable Court be pleased to grant an order of stay of execution of the judgment delivered on 7.09.2022 in Eldoret CM E&L No. 116 of 2019 and/or the decree therein and all consequential orders arising therefrom pending the hearing and determination of this Appeal.
 - v. This Honourable Court be pleased to issue to grant (sic) an order that the money deposited in court by the Respondent on 14.11.2019 of KShs. 340,000/- in Eldoret CM E&L No. 116 of 2019 be retained in court pending the hearing and determination of this Appeal.
 - vi. This Honourable Court do make any such further orders or any other relief it may deem just to grant in the interest of justice.
 - vii. The costs of this Application be provided for.



2. The grounds in support of this Application are to be found on the face of the Motion and the Supporting Affidavit of the Appellant's Branch Manager, Salmon Oluoch Budi, dated 21st July, 2023. In summary, the Appellant's case is that judgment in Eldoret CM E&L No. 116 of 2019 was delivered on 7th September, 2022 in favour of the Respondent herein. Being aggrieved by the entire judgment, the Appellant filed the Appeal herein, and now, has lodged this Application for stay of execution. The Court is also being asked to retain the amount of KShs. 340,000/- deposited in court by the Respondent, being the disputed sum and auctioneers fees, pending hearing and determination of this Appeal. The Court was informed that the Appellant made a similar Application in the lower court but the Trial court dismissed it on 5th July, 2023.
3. The Appellant expressed apprehension that if the stay is not granted, the Respondent will have the funds released and he has in fact already commenced the process of having the said funds released to him. It is alleged that the Appellant will not be in a position to recover the amount if the Application herein is not allowed. It was urged that the Respondent would suffer no prejudice as the money would be preserved, whereas the Appellant would suffer substantial loss and the Appeal will be rendered nugatory if the orders sought are not granted. The Appellant expressed willingness to abide by the terms of the court in allowing this Application. The Application is said to have been made in utmost good faith and without undue delay and should thus be allowed in the interest of justice.
4. The Application was opposed through the Respondent's Replying Affidavit sworn on 14th August, 2023 terming it a misconception of the law. The Respondent deponed that the judgment of the Trial Court declared that the Appellant had no right to levy distress of service charge and awarded him costs. The court also dismissed the counter claim with costs, which dismissal is a negative order incapable of execution. That there was therefore no executable relief granted. Further, that the order to deposit money was made pending hearing and determination of the suit, upon such determination, the said order lapsed. In addition, that under Section 27 of the *Civil Procedure Act*, costs follow the event, therefore the order on costs cannot be subject to an order of stay notwithstanding the magnitude of the costs.
5. The Respondent also deponed that the Appellant had not established any substantial loss it would suffer. He asserted that the money paid into court was his own money and the Appellant had not shown that he would be unable to refund it. He added that he is a senior legal practitioner of repute and it cannot be said that he is indigent. That no sufficient cause has been established to warrant grant of an order of stay. It is the Respondent's case that the Appellant has not offered security for the due performance of the decree and neither was the application which was lodged on 21st July, 2023 made timeously. He asked that the same be dismissed with costs.

Submissions:

Applicant's Submissions;

6. The application was canvassed by way of written submissions. In the Appellant's submissions dated 22nd January, 2024 Counsel explained that the Application was brought under Order 42 Rule 6(1) & (2), and the Appellant had met the conditions set out thereunder. Counsel set out the history of the suit from the delivery of judgment, submitting that the Application was made without unreasonable delay. Counsel submitted that the Appeal will be rendered nugatory if the application is not allowed and he relied on *Kenya Airports Authority vs Mitu-Bell Welfare Society & Ano.* (2014) eKLR which cited *Githunguri vs Jumba Credit Corp Ltd & Ano.* (1988) KLR 838 and *Magnate Venture Ltd vs E.N.G. Kenya Limited* (29) KLR 538.



7. Counsel for the Applicant submitted that if the application is not allowed, the Appellant will suffer substantial loss since the Respondent has commenced the process of releasing the KShs. 340,000/- to the Appellant's detriment since the amount forms the basis of the Appeal. It was argued that the Appellant has an arguable Appeal with a high probability of success as demonstrated in the Memorandum of Appeal. He relied on *Antoine Ndiaye vs African Virtual University (2015) eKLR* and *Kenya Power & Lighting Company Ltd vs Esther Wanjiru Nokabi (2014) eKLR*. As regards security, it was submitted that security is discretionary and the type of security to be given depends on the circumstances of the case (*Sankale ole Kantai T/a Kantai & Co. Advocates vs Housing Finance Co. (K) Ltd (2014) eKLR*). The Appellant's willingness to abide by the Court's terms in allowing the Application was reiterated.
8. On the impending release of the KShs. 340,000/-, Counsel submitted that the said amount is the disputed sum and auctioneers fee and forms the basis of the Appeal. That allowing the Respondent to access it would be allowing him to avoid payment of the rent. Counsel relied on *Kericho Civil Appeal No. 40 of 2009; Finlay (K) Ltd vs Jared Otworu Mogere*. On costs, Counsel cited Section 27 of the [Civil Procedure Act](#) which provides that costs are discretionary and they follow the events. Counsel argued that the Application was merited and should be allowed with costs to the Appellant.

Respondent's Submissions;

9. On his part, the Respondent filed his submissions dated 23rd January, 2024. In those submissions Counsel claimed that the order dismissing the Appellant's counterclaim is a negative order and argued that this court has no jurisdiction to grant stay thereof. For this argument, he relied on *Western College of Arts and Applied Sciences vs Oranga (1976) KLR 63*. Counsel submitted that the judgment entered in his favour was also in the form of a declaratory order, which cannot be executed, hence the order for stay of execution would be in vain (*Norman Washington Manley Bowen vs Shahine Robinson & Another (2015) JMCA Civ 57*). Counsel added that the monies were deposited pursuant to an order issued pending hearing and determination of the suit, which is now spent. Further, that since no Appeal has been lodged against the order regarding deposit and withdrawal thereof, this court has no jurisdiction under Order 42 Rule 6 to issue a stay against the said order.
10. Counsel also submitted that the costs were awarded under Section 27 of the Civil Procedure Rules and cannot therefore be subject of an order for stay of execution. That aside, the Appellant had not established any substantial loss it would suffer as it did not demonstrate that the Respondent will be unable to refund the money if the Appeal succeeds. Counsel relied on *Governors Balloon Safaris Limited vs Skyship Company Limited & Another (2015) eKLR*, *Kenya Power & Lighting Company Limited vs Esther Wanjiru Wokabi (Supra)* and *Governor Kericho County & Another vs Ngeno (2022) eKLR*. Counsel asserted that the Appellant had not established sufficient grounds for the grant of a stay of execution. In addition, that the existence of a strong Appeal does not necessarily lead to the grant of an order of stay of execution if substantial loss is not proved (*Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others, Civil Appeal No. 291 of 1997*). Counsel submitted that no offer for security had been made, neither had the Application been made on time and there was no explanation for the delay. He urged that the Application be dismissed with costs.

Analysis and Determination;

11. Upon considering the Motion, the response thereto and the submissions filed by Counsel on behalf of their respective Clients as well as the authorities cited, I am of the view that the following issues arise for determination:
 - a. Whether the orders granted by the Trial court are capable of being stayed;



- b. If so, whether the Appellant has satisfied all the conditions for grant of an order of stay of execution;
- c. Whether the court should stay the release of the KShs. 340,000/- deposited in court by the Respondent; and
- d. Who shall bear the costs of this Application?

Whether the orders granted by the Trial court are capable of being stayed;

12. The first step is to determine whether the orders arising out of the judgment of the trial court are capable of being stayed. I have read judgment of the Trial Court, a copy of which was annexed to the Application herein. In the said judgment, the Trial Magistrate acknowledged the existence of an Arbitration clause and held that the parties were bound by it. He proceeded to dismiss any prayer in both the original suit (vide the Plaintiff) and the Counterclaim which sought to enforce or terminate the lease with costs. The Trial Magistrate then indicated that his judgment was limited to the issue of distress for service charge which had been raised in the Plaintiff. Earlier in the judgment, he had explained that the Plaintiff sought a declaration that there is no known procedure in law for levying distress over service charge. To this end, he entered judgment for the Plaintiff, who is the Respondent herein with costs, in effect agreeing issuing the declaration sought. It is thus true that the judgment gave a dismissal order, a declaratory order and an award for costs.
13. An order dismissing a suit is in the nature of a negative order because it does not order any of the parties to do anything or restrain from doing anything. It is for this reason that negative orders have been held to be incapable of execution, and for that reason, such an order is incapable of being stayed. In the case of *Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others* (2016) eKLR, the Court of Appeal expounded on the issue of stay of execution of negative orders, stating that:-
- “In *Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah* (2008) eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:
- “The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences vs. Oranga & Others* (1976) KLR 63 at page 66 paragraph C).”
14. See also a recent decision of the Court of Appeal in [*Gitundu vs Wathuku \(Civil Application E024 of 2021\)*](#) [2022] KECA 959 (KLR), where it was held that:-
- “Additionally, even if we had the requisite jurisdiction, this Court has said time without number that stay orders cannot issue in respect of negative orders, where the court has not ordered any of the parties to perform any task. See *Western College of Arts and Applied Sciences vs EP Oranga & 3 Others* (1976) eKLR. In this case, the learned Judge merely struck out the applicant’s application. The Court cannot stay that striking out.”
15. The same goes for declaratory orders, which orders are meant to clarify issues so as to remove legal uncertainties and doubts. A declaratory order merely proclaims the existence of a right, clarifies legal



relationships or certain set of facts. The Court of Appeal in *Attorney General vs Bala (Civil Appeal 223 of 2017)* [2023] KECA 117 (KLR), stated that:-

“HWR Wade in “Administrative Law” 5th Edition at page 523 stated as follows in reference to a declaratory judgment:

‘A declaratory judgment by itself merely states some existing legal situation. It requires no one to do anything and to disregard it will not be contempt of court. By enabling a party to discover what his legal position is, it opens the way to the use of other remedies to give effect to it, if that should be necessary.’”

16. Like the negative order, a declaratory order also contains no provision for enforcement against the person it is issued. It is said to have no coercive effect and threatens no one, thus it is incapable of being stayed. In the case of *Johana Nyokwonyo Buti vs Walter Rasugu Omariba & 2 Others* (2011) eKLR, the Court of Appeal explained that:-

“...a declaration/declaratory judgment is an order of the court which merely declares what the legal rights of the parties to the proceedings are and which has no coercive force, that is, it does not require anyone to do anything.”

17. The difference between declaratory orders and executory orders was set out in the case of *Katiba Institute vs President of Republic of Kenya & 2 Others; Judicial Service Commission & 3 others (Interested Parties)* (2020) eKLR, where the court had this to say:

“The issues raised in this petition, therefore, fall squarely within the doctrine of a fresh cause of action arising out of a declaration as was stated in the Chief RA Okoya case, quoted with approval in the Okiya Omtata case, where the court said:

‘First: (i) Executory judgment declares the respective rights of the parties and then proceeds to order the defendant to act in a particular way, e.g. to pay damages or refrain from interfering with the plaintiffs’ rights, such order being enforceable by execution if disobeyed.

Declaratory judgments, on the other hand, merely proclaim the existence of a legal relationship and do not contain any order which may be enforced against the defendant.

Second: A declaratory judgment may be the ground of subsequent proceedings in which the right, having been violated, receives enforcement but in the meantime there is no enforcement nor any claim to it’.”

18. In *Okoiti vs The Cabinet Secretary, Industry, Trade And Co-Operatives & 13 others; Kenya Bureau Of Standards & another (Interested Parties) (Petition 19 of 2020)* [2022] KEELRC 1675 (KLR), Onyango J. sitting in the ELRC at Nairobi had this to say on declaratory orders:-

“(74) I however agree with the Petitioner that a declaratory order which does not require execution like in the instant case cannot be the subject to of stay of execution proceedings...

(84) The Applicants are effectively out of office until such orders are reversed by the Court of Appeal after hearing the appeal as the orders are declaratory and do not require execution since they are negative orders.”

19. The Trial Court did not order the Respondent to do anything to effect the judgment through the dismissal order or the declaration that there is no known procedure in law for levying distress over



service charge. These were both negative orders and going by the above analysis, there is nothing to be stayed in that regard.

20. The other determination issued by the trial court is the award of costs to the Plaintiff. The Trial Court only awarded costs of the suit to the Plaintiff. These costs are yet to be ascertained, and the ascertainment of costs happens through taxation. At this point in time, the Respondent is not able to execute on costs until he has filed a Bill of Costs, the same is taxed and a Certificate of costs issued. It is at this point that the Respondent will be able to execute and recover costs. It is my understanding therefore that before the costs are taxed, the award of costs remains just that, an award, which cannot be executed before the costs are taxed. There has been no allegation that the Respondent has taxed his costs and started the process of execution.
21. For this reason, there is nothing to stay, since once more, the order for costs is only the expression of the award, only clarifying who among the two parties is entitled to costs of the suit. This award will be effected once the Respondent taxes his costs, before that happens, the prayer for stay with regards to the costs awarded is premature, and issuing an order of stay at this point would amount to issuing orders in vain. In any event, the Appellant has not indicated how the payment of the costs in the Trial Court will prejudice it. It was more concerned with the money deposited by the Respondent in the lower court.
22. All in all, the question as to whether the orders granted by the Trial court are capable of being stayed, is answered in the negative. None of the orders arising out of the judgment of the Trial court is capable of being stayed, thus prayer for stay execution fails.

If so, whether the Appellant has satisfied all the conditions for grant of an order of stay of execution;

23. Flowing from the above discussion, this court has already found that the orders arising out of the judgement of the Trial court are incapable of being stayed. That being the case, there is no reason to ponder on whether the Appellant has satisfied the conditions for grant of an order of stay of execution. Such a discussion would be not only be superfluous, but also an academic exercise to boot.

Whether the court should stay the release of the Kshs. 340,000/- deposited in court by the Respondent;

24. The Appellant also seeks an order that the KShs. 340,000/- deposited by the Respondent in Eldoret CM E&L No. 116 of 2019 be retained in court pending hearing and determination of this Appeal. The Appellant explained in his Supporting Affidavit that the amount constituted KShs. 258,324.85/- and the auctioneer's fee of KShs. 81,065/-. The Appellant further explained in its submissions that the money was deposited upon hearing of an interlocutory application as a condition to restrain it from levying distress. In his Replying Affidavit, the Respondent expounded that the money was indeed deposited as a condition in an Application for injunction pending hearing and determination of the suit, which contention the Appellant has not denied.
25. The Respondent contended, and this court agrees, that any and all interlocutory orders lapse after hearing of the suit and delivery of the judgment. This was the position held by the Court of Appeal in *Olive Mwhaki Mugenda & another vs Okiya Omtata Okoiti & 4 others* (2016) eKLR, where the court observed that;

“77. We agree that this Court should not make orders in vain. We reiterate that this appeal arises from an interlocutory ruling and it is trite law that any and all interlocutory orders lapse upon delivery of judgment after the full and final determination of a suit. In this matter, all counsel disclosed to this Court that judgment on the amended Petition is due for delivery on 6th April 2016.



It is our considered view that upon delivery of judgment in the substantive Petition as amended, the interlocutory orders made on 18th December 2015 shall automatically lapse. The effective orders in this matter and Petition shall be as per the decree and orders made in the final judgment delivered by the trial court.”

26. It must be noted also that there was no order in the Judgment of the trial court with regards to release of the amount deposited by the Respondent. This order was only made in the ruling delivered on 5th July, 2023 where the Trial Court held that the condition under which the money was deposited in court had lapsed. The Court further explained that if the depositor fails to reclaim the said money, the same be forwarded to the Unclaimed Financial Assets Authority per the Judiciary Finance Management Regulations in force. The Appellant however did not seek to stay the orders of 5th July, 2023 and thus the said orders cannot be subject of this application herein. In any event, the only reason the court would have for ordering that the amount deposited in court not be released to the Respondent is for it to act as security. However, in an application for stay of execution, it is the Appellant, the party seeking the stay, that is expected to offer security for the due performance of the decree. Yet the money sought to be retained herein was actually deposited by the Respondent, not the Appellant. An order retaining the said amount would be akin to ordering the Respondent, who is the decree holder to pay security for the due performance of the decree that he is being denied from executing.
27. It is therefore bizarre for the Appellant to seek an order of stay of execution and still expect the Respondent, in whose favour the judgement was made, to be forced to maintain security and still expect him to be denied the fruits of his judgment. The Appellant justifies his actions by averring that the amount deposited is the decretal sum, and if the Respondent is allowed to access it, it will be unable to obtain the decretal sum should the Appeal succeed. I am guided by the authority of *Kenya Shell Limited vs Benjamin Karuga Kibiru & Another (1986)* eKLR where the Court stated that;
- “It is not normal in money decrees for the Appeal to be rendered nugatory, if payment is made...If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”
28. Moreover, as correctly submitted by the Respondent, no proof has been tabled that if the Appeal is successful, he will be unable to raise the rent claimed by the Appellant. He has deponed that he a senior legal practitioner of repute and not an indigent. In the case of *Mutua Kilonzo vs Kioko David Machakos (2008)* eKLR the Court dismissed an application for stay pending appeal for a monetary decree, stating that:-

“To my mind, the Applicant has failed to establish what loss he would suffer if the decree is executed. I say this with respect because Lilian Munyiri aforesaid is an officer at Gateway Insurance Company Ltd and has not stated that she personally knows the means of the Respondent. She merely states that from evidence at the trial he is a man of straw. How that conclusion is reached and based on what evidence, I cannot tell. It is now a catchphrase that every Respondent in an application for stay of execution is called a man of no means? That is all fine if there is evidence to back up that position. If the job done or other means of living



are clearly deponed to, then it is easy to fathom what means the Respondent has. Ringera J in Lalji Bhimji put it succinctly when he stated thus;

‘...he (the applicant) must persuade the Court that the decree holder is a man of straw from whom it will be nigh to impossible or at least very difficult to obtain back the decretal amount in the event the intended appeal succeeding. Such persuasion must spring from affidavits or evidence on record’.”

29. Indeed, save for the allegation that the Appellant would not be able to recover the sum if the Respondent is allowed to withdraw the money from court and the Appeal is in turn successful, no evidence has been tabled that he is a man of straw. That being the case, this court finds no justification for restraining the Respondent from processing release of the amount of KShs. 340,000/- deposited in the lower court.

Who shall bear the costs of this Application?

30. The Appellant rightly submitted that under Section 27 of the *Civil Procedure Act*, costs are awarded at the discretion of the court. Counsel for the Appellant also correctly submitted that costs follow the event, which term refers to the outcome of the litigation. It is trite therefore that costs are awarded to the successful party. The proviso to Section 27 provides an exception to this rule, being that the court or judge shall for good reason direct otherwise.
31. The Appellant having failed in this Application, the Respondent has automatically emerged a victor in this endeavour. This court has not been shown any good reason why it should deny victor the costs. The Respondent is entitled to the costs of the Application, and he shall have them.

Orders:

32. The upshot is that there is nothing arising out of the Trial Court Judgment for this Court, to stay. In addition, there has been no justification for denying the Respondent from accessing his money deposited in the lower court. Consequently, therefore, the court hereby finds that:-
- i. The Notice of Motion dated 27th July, 2023 is without merit and the same is dismissed.
 - ii. The Respondent will have the costs of this Application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 23RD DAY OF OCTOBER, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Mogambi for Respondent

Court Assistant –Laban

