



REPUBLIC OF KENYA



KENYA LAW
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**Mjomba v Mwanjala & 4 others (Environment and Land Appeal
25 of 2022) [2023] KEELC 16806 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16806 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 25 OF 2022**

**LL NAIKUNI, J
MARCH 28, 2023**

BETWEEN

SELINA MSAE MJOMBA APPELLANT

AND

STEPHEN MWANJALA 1ST RESPONDENT

HARON KACHILI 2ND RESPONDENT

MWAMBANGA MKALI 3RD RESPONDENT

JOYCE KADOMA 4TH RESPONDENT

NEW LIFE INTL GATHERING CHURCH 5TH RESPONDENT

RULING

I. Introduction

1. The Appellant/Applicant herein – Selina Msae Mjomba” – moved this Honorable Court by filing a Notice of Motion application dated 10th August, 2022 for its determination. The application was brought under the provision of Sections 1A,1B and 3A of the *Civil Procedure Act*, Cap. 21, order 42 rules 6, 7, 14 order 22 rule 22 and order 51 of the *Civil Procedure Rules*, 2010 of the Laws of Kenya.

II. The Appellant/Applicant’s case

2. The Appellant/Applicant sought for the following orders:-
 - a. Spent.
 - b. That in the interim, there be a Stay of Execution of the Ruling of Voi ELC NO E047 of 2021:selina Msae Mjomba – Versus - Stephen Mwanjala &4 Others that was delivered on 7th



July 2022 and its subsequent Order pending the hearing and determination of this Application inter parties;

- c. That in the interim, there be stay of proceedings in Voi ELC NO E047 of 2021: Selina Msae Mjomba -versus- Stephen Mwanjala & 4 Others pending the hearing and determination of this Application inter parties.
 - d. That there be a Stay of Execution of the Ruling of Voi ELC NO E047 of 2021: Selina Msae Mjomba -versus- Stephen Mwanjala & 4 Others that was delivered on 7th July 2022 and its subsequent Order pending the hearing and final determination of this Appeal;
 - e. That there be stay of proceedings in Voi ELC NO E047 of 2021: Selina Msae Mjomba -versus- Stephen Mwanjala & 4 Others pending the hearing and determination of this Appeal; and
 - f. That the costs of the Application be to the cause.
3. The Application is based on the following grounds that:
- a. On 7th July, 2022, Honourable T.N. Sinkiyian (SRM) delivered a Ruling in Voi ELC NO E047 of 2021: “Selina Msae Mjomba – Versus - Stephen Mwanjala & 4 others dismissing the Appellant’s /Applicant’s Application in its entirety while at the same time allowing the 4th Respondent’s Application in its entirety.
 - b. The Applicant herein being aggrieved with the said Ruling and Order has filed a Memorandum of Appeal in this High Court and has commenced the Appellate process;
 - c. If the said Stay of both Execution and proceedings in the civil case Voi ELC NO E047 of 2021: Selina Msae Mjomba – Versus - Stephen Mwanjala & 4 Others pending Hearing and determination of the Appeal is not granted it will render the entire Appeal nugatory and of a purely academic nature;
 - d. The 4th Respondent had threatened to execute against the Appellant/Applicant on the strength of the Ruling as delivered.
 - e. This Application had been made without any unreasonable delay;
 - f. It was only fair and just that the Stay be allowed as it shall cause no prejudice on the part of the Respondent.
4. The Application premised on the testimonial facts and the averments made out under the 14 Paragraphed Supporting Affidavit sworn by Selina Msae Mjomba dated 10th August, 2022 together with three (3) annexures marked as “MMM – 1 to 3” annexed thereto. The Applicant averred that:
- a. She was the Appellant/Applicant herein hence competent to swear the affidavit.
 - b. On 7th July, 2022, Honourable T.N. Sinkiyian (SRM) delivered a Ruling in Voi ELC NO E047 of 2021: “Selina Msae Mjomba -Versus -Stephen Mwanjala & 4 others” dismissing the Appellant’s /Applicant’s Application in its entirety while at the same time allowing the 4th Respondent’s Application in its entirety.
 - c. Subsequently on 8th July, 2022 they wrote a letter to the Voi Executive Officer requesting to be supplied with a certified copy of the Ruling and proceedings to enable him peruse them and obtain advise accordingly. Annexed herein and marked as her Annexure “SMM - 2” was a copy of the letter to attest to the foregoing facts.



- d. The Applicant herein being aggrieved with the said Ruling and Order filed a Memorandum of Appeal in this High Court and had commenced the Appellate process;
- e. Her Advocates upon receiving the ruling made an application to the Sub - ordinate Court seeking the leave of the Court to be allowed to lodge the Appeal but upon the Court having considered the Application directed that the Ruling that was being appealed against lay as of right. Annexed herein and marked as Annexure “SMM – 3” was a copy of the Order to attest to the foregoing facts.
- f. Subsequently, on the strength of this, they successfully lodged a Memorandum of Appeal before this Honorable Court.
- g. The filed Memorandum of appeal had an arguable appeal with high chances of success.
- h. However, despite of this, there was imminent danger of execution by the 4th Defendant based on the strength of the aforementioned Ruling. The Advocates for the 4th Defendant had written a letter to the Advocates on record for the Appellant/Applicant and had shown a desire to execute which was likely to render the Appeal nugatory. Annexed herein and marked as Annexure “SMM -4” was a copy of the said letter to attest to the foregoing facts.
- i. The lower Court had already set the matter for pre – trials. Thus, unless the proceedings of the lower Court were stayed, the Main Suit would proceed in the absence of the 4th Defendant which would not only prejudice her as she would be forced to file a new Suit against the 4th Defendant if the Appeal succeeded but also it would render the entire Appeal nugatory.
- j. The slight delay in filing this Application was inordinate and excusable as it was occasioned by the fact that they were waiting for certified copy of the proceedings to enable her Advocates on record to advise him accordingly.
- k. If this application was allowed the Defendants/Respondents would not suffer any prejudice which may not be compensated by way of costs.
- l. The affidavit was in support of her application for not only the stay of proceedings in the subordinate Court but also stay of execution of the Ruling and Order of the Subordinate Court dated 7th July,2022 pending the hearing and determination of this Appeal.

III. The 4th Respondent’s case

5. On 14th September, 2022, the Respondent herein filed a 15 Paragraphed Replying Affidavit dated 7th September, 2022 and sworn by Joyce Kadoma together with one annexure marked as “JK – 1” annexed thereto. She averred as follows that:
 - a. She was the 4th Respondent herein and competent to swear this affidavit.
 - b. She was surprised by the Appellant/Applicant moving to high Court over this issue which according to her, the Applicant was wasting court’s time.
 - c. The application before this Honorable was baseless and an abuse of the Court process.
 - d. The Affidavit was in opposition to the Applicant’s Application dated 10th August 2022 seeking stay of execution orders.



- e. After the delivery of the ruling by the Sub – Ordinate Court, the Applicant was served with a letter requesting for a reasonable proposal on costs. Attached to the application and marked “JK -1” was a copy of the said letter.
- f. Despite of this, her Advocate on record got no response to the letter for costs but instead she was served with Memorandum of Appeal.
- g. The right procedure for costs was to have filed a Party and Party Bill of Cost to be taxed by court before being paid by the party who was supposed to be paid.
- h. Her advocate sent a letter to the Applicant’s advocates so that they could compromise the costs without involving the Court again.
- i. It looked like the Applicant had intention to appeal because she never responded to the request letter on costs.
- j. A party could not be compelled to pay costs which had not been taxed by Court but parties could agree on costs out of Court.
- k. There was no threat of execution of the ruling as the intention on the letter on issue of costs to the Applicant was to invite her to a discussion and compromise the costs without going back to court.
- l. The Honorable Court was clothed with the requisite powers to hear and determine this issue.
- m. The Applicant would suffer no harm if this application was dismissed.

IV. The Further Affidavit by the Appellant/Applicant

5. With the leave of Court, the Appellant/Applicant responded to the Replying Affidavit dated 7th September, 2022 by the 4th Respondent and its annexures. He averred as follows:
 - a. She reiterated in entirety the contents of her application, the affidavit thereto and that the Further Affidavit was only supplemental to what was already contained in her Application as supported by the Supporting Affidavit and its attendant Annexures.
 - b. Her apprehension about the possibility of the 4th Respondent initiating an execution process against her was real and not imagined. This was as from the writing of the letter by her Advocate which she marked her Annexure “SMM - 4” unequivocally expressed her intention to set in motion the execution process against her in satisfaction of the Ruling of the Subordinate Court.
 - c. Now that the 4th Respondent had unequivocally stated that she had no intention of setting in motion the execution process of the Ruling she was appealing against. Her apprehension was not justified in the circumstances, she prayed that her Application be allowed as filed.
 - d. She had an arguable appeal with high chances of success against the Ruling that she appealing against. Annexed I the application and marked as her Annexure as “SMM-1(a) (b)” was a copy of the proceedings preceding the Ruling and the Ruling she appealing against to attest to the foregoing facts.
 - e. She had already filed and served the Respondents with a Memorandum of Appeal against the said Ruling which raised arguable issues with a probability of success. Annexed in the application and marked as her annexure “SMM – 2”.



6. She reiterated having already filed and served the Respondent with a Memorandum of Appeal and a Record of Appeal against the said Ruling which according to her raised arguable issues with a probability of success. Annexed in the application and marked as her Annexure “SMM - 2” was a copy of the served Memorandum of Appeal to attest to the foregoing facts.
7. If this Application was allowed, the Respondents would not suffer any prejudice. She swore the affidavit for not only seeking for orders of the stay of proceedings in the Sub - Ordinate Court but also stay of execution of the Ruling and Order of the Sub - Ordinate Court dated 7th July,2022 pending the hearing and determination of this Appeal.
8. She prayed for the orders sought to be granted in the interest of justice.

I. Submissions

9. On 19th September, 2022 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 10th August, 2022 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and a ruling date was reserved on Notice by Court accordingly.

A. The Written Submissions by the Appellant/Applicant

10. On 7th October, 2022, the Appellant/Applicant through the Law firm of Messrs. Mwawasi & Owiti Company Advocates filed their written submissions dated even date. Mr. Mwawasi Advocate provided the brief facts of the case to the effect that the Appellant/Applicant herein who was the Plaintiff before the civil case at the Sub - ordinate Court in Voi, instituted the said instant Suit on 8th October,2021 against the Respondents in this matter being ELC (Voi) no: E047 of 2021: Selina Msae Mjomba – Versus - Stephen Mwanjalla together with a Notice of Motion Application which sought the following Orders:
 - a. That this Application be certified as Urgent and service of the same be dispensed with in the first instance.
 - b. That in the Interim, this Honorable Court be pleased to issue an Interlocutory Order of Injunction directed to the Defendants/Respondents, whether by themselves, their Agents, Servants, Officers or any other person acting under their alienating or proceeding with and/or carrying out any improvements or dealing in any way whatsoever with a portion of the unsurveyed piece of land measuring approximately 3.5 acres forming part of the larger portion of land collectively known as Sagalla/Kishamba“B”/1 belonging to the Plaintiff pending the hearing and determination of this Application ‘Inter – Parties’ .
 - c. That upon hearing of this Application “Inter Partes”, this Honorable Court be pleased to issue an Interlocutory Order of Injunction directed to the Defendants/Respondents, whether by themselves, their Agents, Servants, Officers or any other person acting under their instructions, directions and/or supervision, restraining them from trespassing, alienating or proceeding with and/or carrying out any improvements or dealing in any way whatsoever with a portion of the unsurveyed piece of land measuring approximately 3.5 acres forming part of the larger portion of land collectively known as Sagalla/Kishamba“B”/1 belonging to the Plaintiff pending the hearing and determination of the Main Suit.
 - d. That in the alternative, in the interim, this Honourable Court be pleased to issue out a temporary Order maintaining the Status Quo pending the hearing and determination of this Application inter Parties.



- e. That in the alternative, this Honourable Court be pleased to issue out an Order maintaining the Status Quo pending the hearing and determination of the Main Suit.
 - f. That this Honourable Court be pleased to grant any Order or relief that it deems fit and necessary to grant to meet the ends of Justice; and
 - g. That Costs of the Application be provided for.
11. The Learned Counsel submitted that when the Application was placed before the Court in Chambers “Ex Parte, the Court declined to grant Prayers (a), (b) and (c) and directed that the Application be served upon the Defendants for “inter parties’ hearing. Upon service with the Pleadings together with the Application, the Defendants filed their respective responses to the Application. Most specifically, the 1st Defendant on 9th November, 2021 filed a Memorandum of Appearance, a Replying Affidavit and a Notice to Plead and Act as in favour of the 2nd and 3rd Defendant. Whist the 4th Defendant filed her Memorandum of Appearance, Grounds of Opposition and a Replying Affidavit to the Application on 24th November, 2021. Subsequently, on 26th November, 2021 the 4th Defendant filed an Application seeking for her name to be struck off from the Suit which was followed by a Further Affidavit filed on 20th December, 2021. As regards the 5th Defendant, he filed his Memorandum of Appearance on 24th November, 2021, his Replying Affidavit together with his grounds of opposition on 19th January, 2022.
12. The Learned Counsel informed Court that when the matter came up for directions, the parties agreed to dispose of the two Applications that is that of the Appellant’s Application dated 8th October, 2022 and the 4th Respondent’s Application dated 26th November, 2021 simultaneously by way of written submissions. In compliance with the Court’s direction, on 7th February, 2022 the Appellant filed her submissions supporting her Application. This was while at the same time opposing the 4th Respondent’s Application, the 1st - 3rd Respondent filed their submissions opposing the Appellant’s Application. On 7th March, 2022, the 4th Respondent filed her submissions opposing the Appellant’s Application and also supporting her Application on 7th March, 2022. The 5th Respondent filed his submissions opposing the Appellant’s Application on 3rd March, 2022.
13. The Learned counsel further informed Court that when the matter came up for ruling on 7th July, 2022, the sub - ordinate Court dismissed the Appellant’s Application in its entirety with costs while allowing the 4th Respondent’s Application with costs. Dissatisfied with the ruling by the Sub - Ordinate Court, the Appellant/Applicant filed a Memorandum of Appeal on 25th July, 2022, a Record of Appeal on 4th October, 2022 and the Application which are the basis of these submissions. On 10th August, 2022 during Court’s Vacation which sought the following Orders:-
- a. That this Application be certified as urgent and the same be dispensed off at first instance;
 - b. That in the interim, there be a Stay of Execution of the Ruling of Voi ELC NO E047 of 2021: Selina Msae Mjomba – Versus - Stephen Mwanjala & 4 OTHERS that was delivered on 7th July 2022 and its subsequent Order pending the hearing and determination of this Application inter parties;
 - c. That in the interim, there be stay of proceedings in Voi ELC NO E047 of 2021: Selina Msae Mjomba =versus= Stephen Mwanjala & 4 Others pending the hearing and determination of this Application inter parties.
 - d. That there be a Stay of Execution of the Ruling of Voi ELC NO E047 of 2021: Selina Msae Mjomba - Versus - Stephen Mwanjala & 4 Others that was



delivered on 7th July 2022 and its subsequent Order pending the hearing and final determination of this Appeal.

- e. That there be stay of proceedings in Voi ELC NO E047 of 2021: Selina Msae Mjomba – Versus - Stephen Mwanjala & 4 Others pending the hearing and determination of this Appeal; and
 - f. That the costs of the Application be to the cause.
14. Despite all the Respondents having been served with the Application as directed by the Court, only the 4th Respondent filed a Response to the Application on 14th September, 2022. When the matter came up for directions on 19th September, 2022 the Court directed that parties dispose of the Application through written submissions which are the basis of these submissions.
15. From the filed the Application and the response by the 4th Respondent, the Learned Counsel raised two pertinent issues for the determination by this Honorable Court. These were:-
- a. Whether the instant Application was merited; and
 - b. Who bore the costs.
16. On the issue of whether the instant application was merited. According to the Learned Counsel, he submitted that Prayers (a), (b) and (c) of the Application were now spent and the only remaining Prayers for determination were Prayers (d), (e) and (f) respectively to wit:
- (d) That there be a Stay of Execution of the Ruling of Voi ELC NO. E047 of 2021: Selina Msae Mjomba – Versus - Stephen Mwanjala & 4 others that was delivered on 7th July 2022 and its subsequent Order pending the hearing and final determination of this Appeal;
 - (e) That there be stay of proceedings in Voi ELC NoE047 of 2021: Selina Msae Mjomba – Versus - Stephen Mwanjala & 4 others pending the hearing and determination of this Appeal; and
 - (f) That the costs of the Application be to the cause.
17. The Learned Counsel submitted that the Appellant under Prayer (d) had sought a Prayer to the effect that this Court be pleased to issue out an Order staying the Execution of the Ruling pending the hearing and determination of the Appeal. The basis of this Prayer was as a result of the Letter written to her Advocates on Record dated 15th July, 2022 by the 4th Respondent's Advocates on Record who had invited the Appellant's Advocates on Record to float a reasonable proposal of attendant costs in favour of the 4th Respondent as the entire Suit as against the 4th Respondent had been struck out by the Court in its Ruling dated 7th July, 2022. This letter was marked as the Appellant's Annexure "SMM - 4" as found at Page 9 of the Application.
18. The Learned Counsel argued submitted that in response to the Appellant's Application, although the 4th Respondent had unequivocally averred that the apprehension by the Appellant was not justified, it is our submission that the Appellant was right to be apprehensive in the circumstances putting into consideration that she was contemplating filing an Appeal at the time. But without prejudice to the foregoing, from the Replying Affidavit as filed by the 4th Respondent, the 4th Respondent had intimated that she was not intent on initiating the execution process as against the Appellant. This had been averred in the entirety of the 4th Respondent's Replying Affidavit and as such they prayed that this Prayer be granted on the strength of these averments which in fact support the Application.



19. As regards the fate of the 1st, 3rd and 5th Respondents who despite being served with the Application had not filed any response, it was their submission that the decision by the said Respondents not to file their responses means that they had squandered the opportunity to file any submissions as regards the Appellant's Application as the Replying Affidavit was the foundation document within which their submissions and/or List of Authorities ought to have been anchored.
20. The Learned counsel urged the court to be guided by the binding authority of case of: "[Gideon Sitelu Konchellah – Versus - Lekakeny Ole Sunkuli & 2 Others](#) (2018) eKLR where the Supreme Court of Kenya when faced with a similar circumstance held inter alia at Paragraph 9 that:
- “.....A Replying Affidavit is the principal document wherein a Respondent's Reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence this foundational Pleading, the Replying Affidavit, it follows that even the written submissions purportedly filed by the 1st Respondent on 17th August, 2017 are of no effect...”
21. As regards to prayer (e) of the Application, it was the Learned Counsel's contention that the said Prayer remained uncontroverted by the Respondents and ought to be deemed as admitted too. Without prejudice to the foregoing, the Appellant had annexed in her Further Affidavit as her Annexures marked as “SMM - 1(a),(b),2 and 3” a copy of the Proceedings in the Subordinate Court that led to the Ruling being appealed against, the Ruling itself, the filed Memorandum of Appeal and the filed Record of Appeal respectively. The Appeal as filed had high chances of success and it was only just and fair that this Honorable Court be pleased to stay the proceedings of the Subordinate Court pending the hearing and determination of the Appeal otherwise the Appellant would be greatly prejudiced as if the Suit proceeded and the Appeal was successful, she would be forced to file a new Suit as against the 4th Respondent which would come at a great expense of both resources to her and the Court.
22. The Learned Counsel asked the court to be guided by the authority of "[West Credit – Versus - Geoffrey Mokaya Aboki & Karen Chepkurui](#) (2022) eKLR” where the Court while faced with a similar circumstance and while allowing the Application held inter alia' that:
- “...in deciding whether to Order a stay, the Court should essentially weigh the pros and cons of granting and not granting the Order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended Appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the Application has been brought expeditiously...”
23. In conclusion, the Learned Counsel prayed that this Honorable Court be pleased to allow the Application as filed with costs taking that the Applicant had proffered plausible reasons showing that it was merited.

B. The Written Submissions by the 4th Respondents

24. On the 12th October, 2022, the 4th Respondent through the law firm of Messrs. Mwzighe & Co. Advocates filed their submissions dated 11th October, 2022. Mr. Mwzighe Advocate commenced the submissions by enumerating on the application by the Appellant/Applicant via Notice of Motion application dated 10th August 2022 and the orders sought thereof.
25. The Learned Counsel submitted that from the foregoing reliefs, the issues for determination would be as follows:



- i. Whether stay of execution of the ruling by the Sub – ordinate Court - Voi ELC No. E047 of 2021 could be granted.
 - ii. Whether proceedings before the trial Court in Voi ELC No. E047 of 2021 could be stayed.
 - iii. Who would bear the cost of this Application.
26. To begin with, the learned Counsel made reference to the case of “*Galaxy Paints Company Limited – Versus - Falcon Guards Limited* Court of Appeal Case Number 219 of 1998, where the Court of Appeal stated that:-
- “ issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial court by dint of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court’s determination.”
27. On the issue of whether stay of execution of the ruling of VoiELC No.E047 OF 2021 could be granted, the Learned Counsel submitted that up to now there was no threat of execution of the Ruling delivered in the aforementioned case. To him, from the Ruling, the 4th Respondent was removed from the proceedings. This was done with costs to follow events as the Plaintiff’s application was dismissed. The 4th Respondent never wanted the Appellant/Applicant to shoulder much costs if she had filed a Party and Party Bill of cost. Then it would have been subjected to taxation and at the end certificate of costs to be issued for the Appellant to pay the 4th Respondent costs. In this case, after delivery of the ruling, on 15th July 2022 the 4th Respondent wrote a letter to the Appellant/Applicant advocate’s requesting for a reasonable proposal on costs. The same letter was evidenced as annexure marked as “JK – 1” in the 4th Respondent’s Affidavit sworn on the 7th September 2022 and filed in court on 14th September 2022. The Learned averred that the letter read ‘inter alia’:-
- “ That following the Ruling delivered by Hon. T.N Sinkiyian - SRM in this matter on 6th July 2022 and the orders made therein kindly let us have your reasonable proposal on our costs”.
28. The Learned Counsel argued that the letter did not exhibit any peremptory instructions and no one could execute costs by not following the right procedure unless there was consent filed by parties in Court on costs. The principles guiding the grant of a stay of execution pending appeal were well settled. He stated that these principles were provided for under the provision of order 42 rule 6(2) of the Civil Procedure Rules, 2010.
29. Therefore, the Learned Counsel averred that an Applicant for stay of execution of a decree or order pending appeal was obliged to satisfy the conditions set out in order 42 rule 6(2) of the *Civil Procedure Rules*, 2010, aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
30. As for what substantial loss was, the Learned counsel submitted that it was observed in ”*James Wangalwa & Another – Versus - Agnes Naliaka Cheseto* [2012] eKLR, that:
- “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR.



This is so because execution is a lawful process. The applicant has to establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

31. On the same issue, the Learned Counsel also made reference to the case of “[RWWX – Versus - EKW](#) [2019] eKLR, where the Court considered the purpose of a stay of execution order pending appeal, in the following words:

“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.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

32. On whether proceedings in Voi ELC No.E047 of2021 could be stayed, the Learned Counsel held that the Applicant sought to stay proceedings in VOI ELC NO.47 of 2022 yet she had not demonstrated to this court proper grounds to be granted the said orders. In the case of “[Kenya Wildlife Service – Versus - James Mutembei](#) (2019) eKLR, Gikonyo J held that:

“Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”.

33. Further, in the persuasive authority in “*Global Tours & Travels Limited*; Nairobi HC Winding up Cause No. 43 of 2000 Ringera J, (as he then was) stated that:-

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice ...the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.

34. Similarly, he referred Court to the case of “Kenya Wildlife Case (Supra), Gikonyo J quoted [Halsbury’s Law of England](#), 4th Edition. Vol.37 page 330 and 332 that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of



his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue. This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases. It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case”.

35. Therefore, the Learned Counsel argued that the proceedings in Voi ELC No. E047 of 2021 could not be stayed as the Appellant/Applicant was abusing the court process. The court in Voi should be let to proceed with the proceedings since the application before this court together with the Appeal were frivolous and stood to be dismissed. According to him, the Applicant had not demonstrated that she deserved the orders sought in this Application. Instead, she should proceed with the Voi matter and conclude the same. The Applicant was running away from court ruling and orders and is now trying to hide her face before this court. This court should lift the veil and expose the Applicant to the position of the law.
36. To him, the Application before this court should be dismissed with costs. The applicant had dragged the Respondent to this Appeal with no apparent reason. The same should be dismissed with costs. Parties who tend to appeal on every order or ruling made by a trial court because they feel that the court was wrong but the appeal itself is not anchored on grounds that will make the trial court to be at fault should never go unpunished. These are parties who just file unnecessary appeals which are waste of the Judicial Precious time.
37. On the issue of who should bear the costs of the application the Learned Counsel submitted that the Black's Law Dictionary 9th Edition defined costs to mean the expenses of litigation, prosecution or other legal transaction especially those allowed in favor of one party against the other.
38. He cited the provision of Section 27(1) of the *Civil Procedure Act*, cap. 21 which provides that:

Subject to such conditions as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full powers to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise to those powers;

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.

40. In conclusion, the Learned Counsel referred Court to the case of: “*Party of Independent Candidate of Kenya – Versus - Mutula Kilonzo & 2 Others* (2013) eKLR cited with approval of the High court of Kenya at Nyeri in the case of:- *Julius Irungu Wairia - Versus - Lilian Kagwiria* [2018] eKLR where the court held that:

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial judge is given discretion.....but this is a judicial and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule costs



should be awarded to the successful party, a rule which should not be departed from the exercise of good reasons for doing so.”

VI. Analysis and Determination

41. I have keenly considered all the pleadings filed being the Notice of Motion application dated 10th August, 2022, the filed responses, written submissions and the myriad authorities cited herein, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes. For the Honorable Court to arrive at an informed, reasonable and just decision, it has condensed the subject matter into the following three (3) issues for its determination. These are:-
- a. Whether the Appellant/Applicant has made out a case for being granted stay of execution of the Ruling of Voi ELC No E047 of 2021: Selina Msae Mjomba – Versus - Stephen Mwanjala & 4 others that was delivered on 7th July 2022 pending the hearing and determination of the appeal?
 - b. Whether the Appellant has made a case for stay of proceedings in Voi ELC No E047 of 2021:Selina Msae Mjomba – Versus Stephen Mwanjala & 4 others pending the hearing and determination of the appeal?
 - c. Who will bear the costs?

Issue No. (a) Whether the Appellant has made out a case for being granted stay of execution of the Ruling of Voi ELC NO E047 of 2021: Selina Msae Mjomba – Versus - Stephen Mwanjala & 4 others that was delivered on 7th July 2022 pending the hearing and determination of the appeal?

42. The main issues under this sub title are on the stay of execution. The law concerning stay of execution pending Appeal is found in order 42 rule 6 of the *Civil Procedure Rules* which stipulates as follows:

“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 1st 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 1st Applicant.



43. Legally speaking, there are three (3) conditions for granting of stay order pending Appeal under order 42 rule 6 (2) of the Civil Procedure Rules, 2010 to which:
- i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
 - ii. The application is brought without undue delay and
 - iii. 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.
44. I find issues for determination arising therein namely:
- i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
 - ii. What orders this Court should make
45. The purpose of stay of execution is to preserve the substratum of the case. In the case of *Consolidated Marine – Versus -Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi), the Court held that:-
- “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellants who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
46. What is the status quo on the suit land? The Applicant contends that they would suffer substantial loss if the stay is not granted because their prayer for stay is a result of the Letter written to her Advocates on Record dated 15th July, 2022 by the 4th Respondent’s Advocates on Record who had invited the Appellant’s Advocates on Record to float a reasonable proposal of attendant costs in favour of the 4th Respondent as the entire suit as against the 4th Respondent had been struck out by the Court in its Ruling dated 7th July, 2022. The 4th Respondent on the other hand guided the court to the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 averring that to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent
47. What amounts to substantial loss was well expressed by the Court of Appeal in the case of “*Mukuma – Versus - Abuoga* (1988) KLR 645 where their Lordships stated that:-
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
48. Additionally, in the case of:- ”*Visbram Ravji Halai – Versus - Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules, 2010 is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, Cap. 21 the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to



the overriding objective in the exercise of its powers under the Civil Procedure Act, Cap. 21 or in the interpretation of any of its provisions. According to section 1A(2) of the Civil Procedure Act:

“the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective.”

49. Given the above position, the court must make sure that the fettered discretion is exercised judicially. The appellant needs to satisfy the Court, first, that the appeal, or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the results or the success could be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he fails to demonstrate the other limb.
50. Therefore, it is important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See the case of “*Suleiman – Versus - Amboseli Resort Limited* [2004] 2 KLR 589. This was the position of Warsame, J (as he then was) in *Samvir Trustee Limited – Versus - Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 where he expressed himself as hereunder:

“..... A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion..... The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

51. One of the very initial cases on this aspect was “*Butt – Versus - Rent Restriction Tribunal* [1979], the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings. Finally, the court in exercising its discretion whether to



grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

52. In the current suit, the Appellant/Applicant is seeking for stay of the execution of the ruling from a subordinate court delivered on 7th July, 2022 and the subsequent decree thereof. The 4th Respondent has opposed the stay contending that there no plan to execute that ruling by her. This argument is not convincing at all. From the given circumstances, the Court is of great view that the Appellant is susceptible to suffering substantial loss should the orders not be granted. Thus, the better option is to grant it accordingly.
53. The court, in the case of “[*RWW – Versus - EKW*](#) [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“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.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

54. On the second condition, I find that it was not in dispute that the impugned ruling was delivered on the 7th July, 2022 respectively, wherein the Applicant filed this application on 10th August, 2022. I find that this application was brought without undue delay.
55. On the last condition as to provision of security, I find that order 42 rule 6 (2) (b) of the [*Civil Procedure Rules*](#) stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. The Applicant has pledged her readiness and willingness to deposit the title deed for the suit land with the Court as security for due performance of any decree that may be binding on him. I am guided by the legal ratio in the case of: “[*Aron C. Sharma – Versus - Ashana Raikundalia T/A Rairundalia & Co. Advocates*](#) the court held that:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

56. The grant of stay of execution remains a discretionary order that must also take into account the fact that the Court ought not to make a practice of denying a successful litigant the fruits of their ruling. So as not to prevent an appeal, I shall allow the said application.



Issue b). Whether the Appellant has made out a case for stay of proceedings in Voi Elc No E047 of 2021:selina Msaе Mjomba Vs Stephen Mwanjala & 4 others Pending the hearing and determination of the appeal

57. A decision on whether or not to grant stay of proceedings is discretionary and this Court has powers to stay proceedings pending an Appeal. This jurisdiction is derived from of order 42 rule 6 (1) of the *Civil Procedure Rules*.

58. On this issue, I have been compelled to rely on the case of Re Global Tours & Travel Limited (Supra) as cited by the Learned Counsel for the 4th Respondent where Ringera, J (as he then was) held that:

“...As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...”

59. For the Court to grant stay of proceedings, the Appellant/ Applicant ought to have shown that it has an arguable Appeal with high chances of success such that if stay of proceedings is not granted the Appeal will be rendered nugatory.

The prayer for stay of proceedings is an equitable relief. An applicant must have come to court with clean hands. It is therefore important for the court to consider whether or not the application for stay of proceedings has been filed expeditiously and in good faith not merely to frustrate the wheels of justice from rolling smoothly and freely. The Court is aware that the stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue. This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.

60. The Appellant has demonstrated that the application is not frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity.

61. Further, the Court has noted that the ruling the Appellant intended to appeal was delivered on 7th July, 2022. The Memorandum of Appeal was filed on 25th July, 2022 while the present application was filed on 11th August, 2022. One (1) month and three (3) days could not be said to have been inordinate. This court was thus satisfied that the present application was filed without any delay.

62. A perusal of the aforesaid Memorandum of Appeal led this court to the conclusion that the intended appeal was indeed arguable and not frivolous as the question before the appellate court erred in law and fact by looking at the merits and demerits of the main suit at such an interlocutory stage and by dismissing the entire suit against the 4th Defendant despite the existence of triable issues between the parties as evidenced on both the Plaintiff and the 4th Defendant's own written statement of defence on



record by applications dated 30th September, 2021 by the Plaintiff and another dated 26th November, 2021 by the 4th Defendant.

63. Although the Respondent had submitted that the application herein was an abuse of the court process, frivolous and vexatious, this court found and held that in the event it did not grant an order for stay of proceedings and the Appeal herein was heard and was successful, the proceedings in the lower court would have been rendered unnecessary, even though an appropriate order for costs could have been made to remedy that.
64. Notably, a perusal of the typed proceedings, on 18th July, 2022 showed that the court heard the matter. Accordingly, having considered the application, affidavit in support and against the application this court came to the firm conclusion that this was a suitable case for it to grant an order of stay of proceedings so as not to render the Appeal herein nugatory. Judicial time is precious and scarce and must not be wasted in proceedings that would end up being academic exercises.
65. As was held in the case of “*Muchanga Investments Ltd – Versus - Safaris Unlimited (Africa) Ltd & 2 others* [2009] eKLR, the Court of Appeal rendered itself as follows:-

“Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”

ISSUE (c). Who will bear the costs of the application dated 10th August, 2022

66. It is now well established that the issue of costs is at the discretion of the Court. Costs mean the award that a party is given after the conclusion of any legal action, process or proceedings of any litigation. The provision of Section 27(1) of the *Civil Procedure Act* holds that costs follow the events. By event it means the results or outcome of the said legal action, process or proceedings thereof. (See the Court of Appeal cases of “*Cecilia Kabururu Ngayo – Versus Barclays Bank of Kenya Limited* (2016) eKLR and *Republic – Versus - Rosemary Wairimu, Ex-Parte Applicant – Versus - Ibururu Dairy Farmers Co-operative Society Ltd* (2014) eKLR the Court held that:

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event.....it is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

67. In this case the Appellant has succeeded in the Application. Therefore, it follows that they deserve the orders to be borne by the 4th Respondent.

I. Conclusion & Disposition

68. Ultimately, after conducting an in-depth and elaborate analysis of the framed issues hereof, the Honorable Court is of the strong view that the Appellant has been able to successfully establish her case on preponderance of probability. Thus in the view of the foregoing and for avoidance of doubt, I do proceed to specifically order as follows:
- a. That the Notice of Motion application dated 10th August, 2022 by the Appellant/Applicant herein be and is hereby found to have merit and is hereby allowed in its entirety.
 - b. That this Honorable Court orders that there be a stay of execution of the Ruling of Voi ELC No E047 of 2021: Selina Msae Mjomba Vs Stephen Mwanjala & 4 others that was delivered on



7th July 2022 do issue and all its subsequent Order pending the hearing and final determination of this Appeal.

- c. That this Honorable Court orders that there be a stay of proceedings of the Civil Case before the ELC (Voi) No. E047 of 2021: Selina Msae Mjomba – Versus - Stephen Mwanjala & 4 others pending the hearing and final determination of this Appeal.
- d. That for expediency sake, this appeal to be fixed for hearing within the next one hundred and eighty (180) days from the date of the delivery of this ruling commencing from 5th October, 2023. There shall be a Pre – Trial Conference session on 22nd May, 2023 when the appeal shall be admitted and directions taken pursuant to the provisions of Section 79B and G of the Civil Procedure Act, cap. 21 and order 42 rules 11, 13 and 16 of the Civil Procedure Rules, 2010.
- e. That the cost of this application be borne by 4th Respondent.

69 It Is So Ordered Accordingly.

RULING VIDE THE MICROSOFT TEAMS VIRTUAL MEANS, DELIVERED SIGNED AND DATED AT MOMBASA THIS 28TH DAY OF MARCH 2023.

HON. JUSTICE L. L. NAIKUNI, (JUDGE)

ENVIRONMENT AND LAND COURT AT MOMBASA

In the presence of:

- a. M/s. Yumna, the Court Assistant.
- b. No Appearance for the Appellant/Applicant.
- c. No appearance for the 1st, 2nd & 3rd Respondents.
- d. Mr. Mwanzighe Advocates for the 4th Respondent

