Mwakima v Kenya Industrial Estates Ltd & 2 others (Environment and Land Appeal 39 of 2020) [2023] KEELC 18217 (KLR) (22 May 2023) (Ruling)

Neutral citation: [2023] KEELC 18217 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 39 OF 2020

LL NAIKUNI, J

MAY 22, 2023

BETWEEN

CATHERINE KADII MWAKIMA .... APPELLANT

AND

KENYA INDUSTRIAL ESTATES LTD .... 1ST RESPONDENT

CASH CROP AUCTIONEERS .... 2ND RESPONDENT

ARNOLD MWANGUKU MWAMBOKO .... 3RD RESPONDENT

RULING

I. Introduction

1. The Appellant/Applicant herein – Catherine Kadii Mwakima, moved this Honorable Court for its determination through filing a Notice of Motion application dated 9th September, 2021 against the 1st, 2nd and 3rd Respondents herein. It was brought under the dint of Order 42 Rule 6(1)(2) of Civil Procedure Rules, 2010, Sections 1A,1B and 3A of *Civil Procedure Act*, Cap 21 of the Laws of Kenya.
2. Pursuant to that, the Respondents also filed their responses accordingly.

II. The Appellant/Applicant's case

3. The Appellant/Applicant seeks the following orders:-
    a. Spent.
    b. That the pending hearing and determination of this application there be stay of execution of judgement delivered on the 30th November 2020 and / or all such other orders and/or decrees of the court.

c. That the pending of hearing and determination of the appeal there be stay of execution of the judgement of the court dated 30th November 2020 and all such other orders/decrees of the court.

d. That cost of this application be in the cause.

3. The Application is based on the grounds, testimonial facts and the averments made out under a 13 Paragraphed Supporting Affidavit sworn by Catherine Kadii Mwakima and dated 9th September, 2022 with two (2) annexures thereto and marked as "CKM – 1 and 2" annexed thereto. The Appellant/ Applicant averred:

a). She was the Appellant/Applicant herein. This application sought orders for stay of execution of the Judgement dated 30th November, 2020 and other Decree orders pending the hearing and determination of the appeal. Being aggrieved, the Appellant/Applicant had since preferred an appeal against the Judgement of the Principal Magistrate Court at Voi, immediately through the Memorandum of Appeal annexed hereto and marked as "CKM – 1".

b). The Appellant/Applicant filed an application before the trial court on the 7th December 2020 for stay of execution but was dismissed on 25th August 2021 on the grounds that there was no appeal pending to warrant granting of the orders of stay.

c). The suit property was ancestral land the only known home by the Appellant/Applicant and her family and the only source of their livelihood by farming and grazing a few animals.

d). Also, the Appellant/Applicant also had a very huge family comprising of minor grand children who lived and knew the suit property as their only home.

e). With the Judgement delivered in favour of the Respondent and now them holding a ruling, it meant there was eminent danger of the Respondents executing against the Applicant/ Appellant and which would render the appeal nugatory.

f). Such an execution was bound to inflict the Appellant and her huge family severe and substantial pain, loss and expose them into the danger especially when the entire world was struggling with Corona pandemic.

g). The execution was without doubt going to expose the Applicant/Appellant and her family into untold suffering, hardships, social and economic burden and rendering the family destitute in our country.

h). The Appellant/Applicant would be demonstrating that the trial court failed to take into account very pertinent issues as set out in the memorandum of appeal which issues if were taken into account the trial court could have arrived at a different decision.

i). The Respondent stood to suffer no prejudice if the instant application was allowed.

j). In light of the above, it was therefore imperative and in the interest of the fairness and justice that this Honourable Court be pleased to grant the orders sought in this instant application.

III. The 1st Respondent's case

5. The 1st Respondent through its Manager Legal Services, Charity Ndeke responded through filing a 23 Paragraphed Replying Affidavit dated 4th May, 2022 together with three (3) annextures marked as "CM – 1 to 3" thereto. She averred as follows that:

a. The Application was an abuse of the process of the court, frivolous, lacked merit and should be dismissed in the first instance.

b. All parties herein ventilated at full trial the pertinent issues raised in the Amended Plaint dated 9th November, 2018 and filed on 12th November, 2018 relating to parcel of land Number L.R. NO. Sagala/Kishamba "A"/1021.

c. On 30th November, 2020 the 1st Respondent obtained Judgment against the Appellant/ Applicant herein for completely failing to prove their case on a balance of probability and awarded the 1st Respondent costs of the suit. Annexed hereto and marked as "CM - 1" was a true copy of the aforesaid Judgment.

d. Subsequent to obtaining Judgment and decree she procured the services of Cash Crop Auctioneers, the 2nd Defendant herein to assist the Deponent in executing the said Judgment.

e. It was quite clear that the present application had no basis in law and fact and was a perfect example of use of conjecture at its best. Even if an appeal had been lodged, and all parties served, the decree holder could proceed and apply for execution.

f. The present Application was misconceived and premature as a Memorandum of Appeal did not automatically stay the execution of a decree.

g. On 25th August, 2021 again the Honorable Court dismissed the Appellant/Applicant's Application with costs to the 1st Respondent. Annexed hereto and marked as "CM - 3" as a true copy of the Ruling.

h. In the said ruling, the Learned Magistrate made a finding that the Applicant herein failed to satisfy the requirements of Order 42 Rule (6)(2) of the Civil Procedure Rules 2010.

i. Specifically the Learned Magistrate made a finding that living and cultivating crops on the suit land was not sufficient reason for granting stay pending appeal. That the Learned Magistrate went ahead and buttressed her finding with a case from the Court of Appeal.

j. As at the date of the Ruling (Annex CM-3), the Applicant had not filed her Memorandum of Appeal. This was confirmed by the Learned Magistrate at Paragraph 25 of the Ruling. It could be correctly inferred from the Appellant/Applicant's inexplicable inertia that the Applicant herein was indeed satisfied with the Judgment of the Honorable Court.

k. As at the time of filing this reply, the Appellant/Applicant had neither filed nor served her Record of Appeal.

l. The present Application was a mere afterthought and a gross abuse of the court process.

m. The same contained nothing but excuses to deny the 1st Respondent from enjoying its fruit of Judgment.

n. The present application was speculative at best and ought to be dismissed with costs.

o. From the above, it was clear that the Appellant/Applicant had no grounds to cause delay of execution of Judgment entered by the Learned Magistrate.

p. The Appellant/Applicant had not satisfied this Honourable court that she would suffer irreparable loss and damage if orders for stay was not granted.

q. It was the interest of justice and fairness that the Applicant's Application be dismissed with costs in favour of the 1st Respondent.

IV. The Further Affidavit by the Appellant

6. The Appellant/Applicant in making further averments to the filed Supporting Affidavit dated 11th November, 2021 deposed as follows:

    a. She sought orders of stay of execution pending hearing and determination of her appeal herein.

    b. While pending the hearing and determination of her application before this court, the Respondents had moved to execute the Judgement of the lower appealed against vide a 45 days redemption notice and notification of sale served upon herself dated the 19th October 2021. A copy was hereto annexed and marked as "Exhibit CKM – 1".

    c. The execution process commenced by the Respondents against her was meant to sale in the publication of her only known home and property after 45 days of the notice aforesaid.

    d. And without emphasis, should the ongoing execution now commenced by the Respondents materialize, the successful buyer would definitely evict her and her large family from the only matrimonial home and property.

    e. She stood to suffer and her family irreparable loss and damage.

    f. She therefore sought for the application to be certified as urgent and temporally orders of stay be granted forthwith.

I. Submissions

7. On 5th July, 2022 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 9th September, 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 the Honourable Court accordingly.

A. The Written Submissions by the Appellant/Applicant

8. On 8th July, 2022, the Learned Counsels for the Appellant/Applicant herein through the Law firm of Messrs. Mwinzi & Associates Advocates filed their submissions dated 27th June, 2022. Mr. Mwinzi Advocate commenced the submission by stating that the application for the determination before this Honorable Court was the Notice of Motion dated the 9th September,2021 and filed in the Court on the 21st September 2021. He informed Court that the application was supported by an affidavit of the Appellant/Applicant which was similarly dated the 9th September, 2021. He averred that the Appellant/Applicant sought for the stay of execution of the Judgement of the trial Court at Voi dated the 30th November, 2020 pending the hearing and determination of the pending appeal in Mombasa Appeal Number 39 of 2020.

9. The Learned Counsel submitted that the Appellant/Applicant had cited in her application, substantial or irreparable loss and hardship to occur should the Defendants be allowed to proceed with execution, which would mean, that, the Appellant/Applicant and her entire family members shall be evicted from her matrimonial home at Kajire Sagalla Location Voi Sub County. And specifically, the Plaintiff/ Applicant was saying they had no other known home and/or property and should there be execution of the judgement, the entire family of the Appellant/Applicant herein should be evicted from thereupon matrimonial home and thereupon rendered homeless and/or destitute in their own country.

10. The learned Counsel argued that the Appellant/Applicant stated that she was elderly with her husband and with a family of over 20 members comprising of minor grandchildren who had lived in the suit land all their life. It would be the worst thing to happen to them if they were to be evicted from their only known home if the land were to be auctioned instigated and/or caused by the Respondents. She had filed the appeal without delay as well as the application for stay of execution for the preservation of the property as she pursued for the appeal which in view of the applicant, it had high chances of success. It was therefore incumbent of this Honorable Court to grant the orders of the stay since once the execution happened, not only that the appeal shall be rendered nugatory but also, the Appellant/ Applicant and her entire family members shall suffer substantial loss and damage which could not be compensated in monetary terms.

11. The Learned Counsel urged the Honourable Court to grant stay of the execution without delay so as to have a chance to prosecute the appeal to the conclusion.The application before the Honorable Court had been primarily brought under the provision of Order 42 (1) (6) of the Civil Procedure Rules, 2010. The above provision sets out principles that the Honorable Court should consider while deciding whether to grant or refuse stay of execution pending appeal.

12. The provision of Order 42 states:-

> " No orders 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."

13. The Learned Counsel argued that the Honorable Court would therefore appreciate that, it was not the merit or likely success of the appeal before the superior court to be considered in granting or refusing the orders of stay but the hereunder set out grounds, which in our own view the applicant has duly satisfied:-

    a. Substantial loss likely to be suffered by the applicant if the orders are declined.

    b. Whether the application has been brought or made without unreasonable delaying.

    c. A security that the Hon Court may at its discretion order for due performance of such decree.

    d. Appeal will be rendered nugatory.

14. On whether there was likely substantial loss to suffer by the Applicant, the Learned Counsel submitted that whereas it was not the practice of the court to deprive a successful litigant of the fruits of his/her litigation, however, it was similarly, incumbent of the Court to take into account that the purpose of the stay of the execution pending appeal is to preserve the subject matter.This principle was applied in the case of: "Consolidated Marine – Versus - Nampijja & Another Civil App Number 93 of 1989 Nairobi, cited with approval in Paul Kamura. Kirunge – Versus - John Peter Nganga, where the Hon 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 Appellant who is exercising undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory."

15. The Learned Counsel argued that it followed that, therefore, not only was there substantial loss to be suffered by Appellant/Applicant was critical aspect to be considered, but also, the preservation of the subject matter in dispute, in this case, land as well as ensuring the appeal was not rendered nugatory by such execution. Would there be substantial loss to result to the Appellant/Applicant if the orders were refused and the execution of the Judgment happened? The answer was yes. First, it should be appreciated the fact that the subject matter in question was land. The land had not only been known as home for the Appellant/Applicant but also to her huge family members. That they had been on the land being their ancestral land for all these years. They knew no other home. The Appellant/ Applicant had stated not on one occasion before this Hon Court that, she had no other property to resort to should execution issue. Secondly, that the nature of execution expected was public auction of the subject parcel of land hosting the home of the Appellant/Applicant, meaning once execution was done, the subject suit property would pass to a third party hence changing the entire scenario.

16. Thirdly that, if the intended public auction were to take place, no doubt, what would follow was the immediate eviction of the Appellant/Applicant from their only known home by the successful bidder. They would then be rendered homeless and destitute with the minors and school going children's future negatively affected and not mentioning the prevailing Covid-19 pandemic setting in in the circumstances.

17. The Learned Counsel submitted that there could be known loss one could find him/herself in life, then destitution, risked to one's life, hopelessness and being exposed to vagaries. Under this ending, undoubtedly a substantial loss the law envisaged had been shown and proved to warrant granting of stay. Finally, under this heading, the Applicant/Appellant submitted that, it was obvious that, once the subject land herein passed to the successful buyer, then, it would be difficult if not impossible for the Appellant/Applicant to recover it if the appeal were to be successful. Once the land was in possession of a third party, the whole picture changed altogether and complicated everything for the Appellant/ Applicant. The appeal would be of no use.

18. In the case of:- "James Wangalwa & Another – Versus - Agnes Naliaka Cheseto (2012) eKLR cited in the case of "Civil Appeal no. 20 of 2020, HE – Versus - SM, the Honorable Court while explaining on what substantial loss was, it observed:-

> " ....the Applicant must 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 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."

19. The Learned Counsel contended that, the combination of the matters submitted herein pointed out to quite a substantial loss to be suffered. There could be no other way to look at it. The Appellant/ applicant had therefore fully met the criteria herein. They asked for orders stay to be granted forthwith.

20. On whether the Appellant/Applicant had been made without undue delay, the Learned Counsel submitted that the Judgement being appealed against was delivered on the 30th November, 2020. That the Appellant/Applicant without delay, on the 7th December, 2020 filed the appeal being Mombasa ELC APPEAL NO. 39 OF 2020. Similarly, the Appellant/Applicant moved Court through filing the application for stay of the execution in lower court on the same day the 7th December, 2020. All these facts were on Court record. Therefore, it followed that, it took the Appellant/Applicant only 7 days out of the possible allowed 28 days to draw both the appeal and the application herein and had both of them filed in this Honourable Court and the lower court respectively. The application had not only

been without emphasis made swiftly and without delay but also in fulfilment of the requirements of the law and criteria set out for granting the order of stay of execution. The Appellant/Applicant had also shown seriousness in pursuing and prosecuting the appeal by her such actions.

21. On the issue of whether the execution would render the Appeal nugatory, the Learned Counsel averred that should the orders of stay refused to be granted, then, by the time the appeal was heard and determined, the same would have been already overtaken by events and rendered nugatory or made a mere academic exercise. Why? The Honorable Court would appreciate the fact that, the execution being pursued by the Respondents was in the nature of disposing off the suit property by way of public auction. That meant that, should the exercise take place, the suit property shall pass ownership to a third party successful in the intended public auction. In that regard, it meant that should the appeal herein turns out successful, then, the Appellant/Applicant would by ten have lost the property to a third party.

22. Secondly, that, the successful buyer would without doubt move to evict the Appellant/Applicant and her family from the suit property. This would render the Appellant/Applicant homeless and destitute.Thirdly that, the Appellant/Applicant herein should she get favourable Judgment in the appeal, could be no longer be dealing with the Respondents who would have left the scene and handed over the suit property to a stranger who the Appellant/Applicant should then engage.Therefore, it followed what ought to be a swift transition after a successful appeal would turn out to be a complicated process with likely multiple court cases cropping up.In essence, they were submitting that, once the execution took place, automatically, the entire appeal was rendered nugatory. The Appellant/Applicant would be pursuing the appeal knowing very little to achieve in it if not nothing since her adversaries would be new people.

23. The Learned Counsel submitted that the Respondents herein were in possession of the Tittle Deed of the suit property. That in itself was sufficient security in the hands of the Respondents since the Appellant/Applicant could not even if she wanted to, dispose of the suit property to a third party or deal with the property in any way adverse to the interests of the Respondents in the circumstances. The Interests of the Respondents to the suit property was secure and that once the matter was concluded, the Respondents shall easily enforce their rights over the suit property should the appeal go their way.

24. Secondly that, the suit property was not only known home of the Appellant/Applicant herein but it was together with her huge family. She was only fighting for the property for residence and not for commercial. Thus, there was no way the Appellant/Applicant could tamper with the suit property to the detriment of the Respondents. Thus, in the given circumstances, they found it no reason that warranted for the Appellant/Applicant to be called to place a security pending the hearing and determination of the appeal.

25. In fact, the Appellant/Applicant had already filed the Memorandum of Appeal. It was only the filing of the Record of the Appeal, admission of the appeal and taking direction and fixing of the hearing of the appeal that were the only activities pending. And it was in the interest of the Appellant/Applicant that the appeal was expediently heard as to have this yoke placed on her shoulders of the Appellant/Applicant was removed as to have peace by retaining her matrimonial home.To buttress on these issues, the Learned Counsel cited the case of: "HGE - Versus – SM, Civil Appeal no. 20 of 2020 Kakamega High Court, where JUSTICE W.MUSYOKA J. on the 3rd day of July,2020,while granting the orders of stay, did not in his own discretion order the Appellant/Applicant to give security. They found the circumstances in this case need not to call the Appellant/Applicant to give security and as such humbly ask the Honourable Court to take the same route the Judge adopted hereto.

26. The Learned Counsel invited the Honourable Court to consider and find that this matter held special circumstances in that it was the Respondents holding the Tittle Deed and intending to dispose of the suit property to recover money advanced to the 3rd Respondent herein upon the property being mortgaged by the husband of the Appellant/Applicant unknowingly. The entire scenario as herein came out, called for a special approach by the Honourable Court. The elderly peasant Appellant/ Applicant was only at the mercy of the Court and the Respondents and, if she were to offer any security, the most she could do was offer her only valuable documents which was the Tittle Deed for the suit property. In any case it was already in possession of the Respondents themselves.It would not be fair and just to again ask the Appellant/Applicant for a further security.

27. The Learned Counsel concluded that the beauty was however, that the law does not make it mandatory for a security but gives the court unfettered discretion to decide. They implored the Honourable Court to find the Tittle Deed in possession of the Respondents was sufficient security and depart from asking for a further security.

B. The Written Submission of the 1st Respondent

28. On 26th August, 2022, the Learned Counsel for the 1st Respondent through the firm of Messrs. Chege Kibathi & Company Advocates filed their written submissions dated 22nd August, 2022 . Mr. Juma Advocate submitted that the Applicant herein had filed an Application by way of Notice of Motion dated September, 2021. The Notice of Motion application was supported by the affidavit sworn by Catherine Kadii Mwakima. The said Application sought Orders that:

    a. Spent

    b. That pending hearing and determination of this application there be stay of execution of the judgment delivered on 30th November,2020 and/or all such other orders and/or decrees of the Court.

    c. That pending hearing and determination of the Appeal there be stay of execution of the judgment of the court dated 30th November, 2020 and all such other orders/decrees of the Court.

    d. The cost of this application be in the cause.

29. In response to and in opposition to the aforesaid Application, the 1st Respondent filed a Replying Affidavit sworn by its Manager Legal Services, one Charity Ndeke. The Learned Counsel submitted that the Appellant/Applicant's Application was founded on the notion that substantial or irreparable loss and hardship would occur should the Respondents be allowed to proceed with execution of the Judgment of 30th November, 2021. She averred that she and her entire family members should be evicted from her matrimonialhome (which was the suit land) and that the Appellant/Applicant never had any other place to call home.The Appellant/Applicant further argued that she and her husband were elderly with a family of over 20 members comprising of minor grandchildren who had lived in the suit land all their life.

30. The Learned Counsel stated that the 1st Respondent contended that the instant application was frivolous and that it lacked merit. Therefore, according to the Counsel, it should be dismissed in the first instance.The 1st Respondent averred that the Appellant/Applicant had not satisfied the conditions pertaining to granting of orders for stay of execution. Even though they rightly quote case law that touch on the principles and test for granting of stay of execution, it was clear from the application by the Appellant/Applicant and submissions was not deserving of the prayers sought.

31. The Learned Counsel submitted that the 1st Respondent admitted that on the strength of documentation supplied to court that all parties in this suit ventilated at full trial, the pertinent issues raised in the Amended Plaint dated 9th November, 2018, relating to the suit land. On 30th November, 2020 Judgment was delivered in favour of the 1st Respondent (Annexure "CM – 1" of the 1st Respondent's Replying Affidavit). The trial Court was satisfied that the 1st Respondent fully complied with the statutory procedure provided for by the law in exercising their statutory power of sale. That all notices were served in accordance with the law and that the 1st Respondent's "statutory power of sale had crystallized and that its intention to exercise its statutory power of sale as per the provisions of the law cannot be halted."

32. The Learned Counsel submitted that subsequent to obtaining Judgment in its favour and decree thereafter, the 1st Respondent procured the services of the 2nd Respondent to realize the security. On 7th of December, 2020, the Applicant filed an application (Annextureas "CM – 2" of the 1st Respondent's Replying Affidavit) at the Principal Magistrate's Court at Voi seeking the following orders:-

    i. That the Application be certified urgent and service be dispensed with in the first instance.

    ii. That pending hearing and determination of the application, there be stay of execution of the Judgment delivered on 30th November, 2020 and/or all such other orders and/or decrees of the Court.

    iii. That pending hearing and determination of the appeal, there be a stay of execution of the Judgment of the Court dated 30th November, 2020 and all such other orders/decrees of the Court.

    iv. That costs of the application be in the cause.

33. On whether the present application had been canvassed before and whether Court made its pronouncement on the same, the Learned Counsel submitted that the Honourable Judge, as noted from the above, the present application, dated 9th September, 2021 was notoriously similar to the one filed on 7th December,2020.The 1st Respondent fervently opposed the application dated 7th December, 2020. The Court delivered its Ruling on the said application and made a finding that the Appellant/ Applicant did NOT satisfy the three (3) requirements for a grant of orders for stay of execution (Annexure as "CM – 3" of the 1st Respondent's Replying Affidavit).

34. The Applicant never appealed against the decision made by the Learned Magistrate at Voi in the ruling delivered on 25th August, 2021, but instead chose to file an application seeking similar prayers at the High Court at Mombasa, and the suit was between the same parties. The present application dated 9th September, 2021 was Res Judicata.To buttress on this issue, the Counsel cited the case of:-"Simon Kishanto Kudate – Versus - District Land Registrar; Tikoishi Ole Nampaso & another (Interested Parties) [2022] eKLR Justice Mbogo at paragraphs 7 and 8 held as follows:

> " .....7. The doctrine of Res Judicata is set out in Section 7 of the *Civil Procedure Act*. The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.

35. A close reading of Section 7 of the Act reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:

i. The suit or issue raised was directly and substantially in issue in the former suit.

ii. That the former suit was between the same party or parties under whom they or any of them claim.

iii. That those parties were litigating under the same title.

iv. That the issue in question was heard and finally determined in the former suit.

v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit."

36. It was further held in the case of "Heritage Insurance Company Limited – Versus - Patrick Kasina Kisilu (2015) eKLR, Justice Edward Muriithi, stated on repeat similar applications:-

> "I agree with the general tenor of the court decisions that take the view that to file similar application over the same subject matter seeking similar reliefs is an abuse of the court process. Indeed, where such applications have previously determined the matter the subsequent applications are barred by the principle of res judicata...."

37. The Learned Counsel submitted that the issue of abuse of Court process was a serious one, and once raised by a party, it posed a duty to Court to make a determination at the earliest opportune time. Additionally, the Counsel referred Court to the case of:- Uhuru Highway Development Limited – Versus - Central Bank of Kenya & 2 Others [1993] eKLR, the Honourable Court of Appeal Judges observed that:-

> "That is to say, there must be an end to applications of similar nature, that is to say further, wider principles of res judicata apply to applications within a suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation...."

38. The Learned Counsel beseeched the Honourable Court to find that the application by the Appellant/ Applicant was "Res Judicata" and an abuse of the process of court and dismiss it with costs to the 1st Respondent. He asserted that the guiding provision on whether Court should grant stay was found under the provision of Order 42, Rule 6(2) of the Civil Procedure Rules, 2010 which sets out the three (3) conditions in determining an application for stay. The Order states that:

> "(2) No order for stay of execution shall be made under sub rule (1)unless-
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> (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 decree or order as may ultimately be binding on him has been given by the applicant.
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> (3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application."

39. Thus, under the provision of Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 an Appellant/ Applicant should satisfy the court that:

a) Substantial loss may result to him unless the order was made;

b) That the application had been made without unreasonable delay; and

c) The Appellant/applicant had given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

40. On substantial loss, the Learned Counsel relied on the case of "Jamii Bora Bank Limited & another – Versus - Samuel Wambugu Ndirangu, where the court observed as follows at Paragraph 20:

> " Under this head, an applicant must clearly state what loss, if any, they stand to suffer. This principle was enunciated in the case of Shell Ltd – Versus - Kibiru and Another [1986] KLR 410 Platt JA set out two different circumstances when substantial loss could arise as follows:-
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> "The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages….It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts…."
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> The learned Judge further stated that:-
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> "It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. 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 cornerstone of both jurisdictions for granting 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.
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> Earlier on, Hancox JA in his ruling observed that:-
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> "It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would…render the appeal nugatory.
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> This is shown by the following passage of Cotton LJ in Wilson – Versus - Church (No.2) (1879) 12 ChD 454 at page 458 where he said:-
>
> undoubtedly right of appeal, this court ought to see the appeal, if successful, is not rendered nugatory." As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause."

41. According to the Learned Counsel was that the Appellant/Applicant in this case had failed to demonstrate how she would suffer substantial loss. The 1st Respondent was financially stable and should be able to pay any monies to the Appellant/Applicant should the Appeal succeed.The Trial Court in its ruling (Annexure as "CM – 3") on the issue of substantial loss, made a finding that by living on the suit land and cultivating food crops was not sufficient reason for granting stay pending appeal.

42. The Learned Counsel humbly submitted that by just stating that she would suffer substantial loss, the Appellant/Applicant never meet the threshold. On this point, the Counsel relied on the case of:

“Machira t/a Machira& Co. Advocates – Versus - East African Standard (No. 2) (2002) KLR 63 where Court held that:-

> “ it is incumbent upon the Applicant to prove specific that the Applicant cultivated in the suit land as alleged and no evidence that if the Applicant together with her alleged extended family would suffer if the 1st Respondent goes ahead to execute the judgment.

43. In the case of “Peter Rugu Gikanga & another – Versus - Weston Gitonga & 10 others [2014] eKLR, the Learned Judge Emanyara Emukule (as he then was) reiterated as follows:

> “ It is clear from the Replying Affidavit of the Peter Rugu Gikanga, that some of the Defendants/Applicants have moved out of the suit land in said to have structures thereon. Only the 3rd and 10th Defendants/Applicants persist on living on the land, allegedly because they have no alternative land. This, with respect, is no ground for granting a stay of execution. In CHARLES WAHOME GETH/ VERSUS. ANGELA WA/R/MU GETH/ (Court of Appeal Civil Application No. NAI 302 of 2007 UR 205/2007), the Court of Appeal held -
>
> ... it is not enough for the applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the applicants stand to suffer if the Respondent execute the decree in this suit against them.”

44. Thus, the Counsel humbly submitted that other than claiming to believing in the suit property, the Appellant/Applicant had failed to prove that she would suffer substantial loss. Lastly, the Counsel held that the Appellant/Applicant was NOT the registered owner of the suit land and therefore the claimed of loss were unfounded.

45. On unreasonable delay, the Learned Counsel submitted that the present application was filed on 11th November, 2021, this was about four (4) months since the date of Judgment. This was unreasonable delay that had not been explained by the Appellant/Applicant. This being an old matter, having been filed in the year 2016, the 1st Respondent ought to be allowed to enjoy the fruits of its Judgment and therefore the present application ought to be dismissed with costs to the 1st Respondent.

46. On provision of security, in the case of “Gianfranco Manenthi & Another – Versus - Africa merchant Assurance Co. Ltd [2019] eKLR the court observed as follows:-

> “ The applicant must show and meet the condition of payment of who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6 (1) of the denied the opportunity to execute the decree in order to enjoy the fruits of
>
> Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This plaintiff to initiate execution proceedings where the judgment involves a money decree. (Emphasis ours) The court would order for the release of the deposited decretal amount to the respondent in the appeal....
>
> Thus the objective of the legal provisions on security was never vexatious and frivolous appeals. Emphasis ours) In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel

for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree."

47. In the case of "Arun C. Sharma – Versus - Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others [2014] eKLR the court stated:-

> " 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 quite different because in civil process the judgment is like a debt hence respondent. That is why any security given under Order 42 Rule 6 of the decree or order as may ultimately be binding on the applicants."

48. The Learned Counsel submitted that should the Court be inclined to grant stay, then Appellant/ Applicant should be made to deposit full decretal amount to the 1st Respondent. The 1st Respondent was an institution that was able to pay back the security should the intended appeal be successful. As it stood, the 1st Respondent was in dire need of the Judgment sum which by now had accumulated more interest. The Counsel relied in the case of: Mwaura Karuga t/a Limit Enterprises – Versus - Kenya Bus Services Ltd & 4 Others [2015] eKLR, it was said:-

> " ...the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words "ultimately be entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under Order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and is seldom. The security to be given is measured on that yardstick (emphasis ours)."

49. The Learned Counsel submitted that should this Court be inclined to grant stay, then the Appellant/ Applicant should be directed to deposit the full judgment sum together with costs and interest. The court had also pronounced itself on the conditions that a party seeking stay of execution needs to meet. The landmark case in this prayer was in the cae of:- "Stanley Kangethe Kinyanjui – Versus - Tony Ketter & 5 others [2013] eKLR. The court set out the conditions as:

    a. Whether the applicant has presented an arguable appeal? and

    b. Whether the intended appeal would be nugatory if these interim orders were denied?

50. This Court went ahead to elaborate on these conditions as follows:

> " On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. Damji Pragji Mandavia – Versus - Sara Lee Household & Body Care(K) Ltd, Civil Application No. Nai 345 of 2004....
>
> An arguable appeal is not one which must necessarily succeed, but one Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.
>
> worthless, futile or invalid. It also means trifling. Reliance Bank Ltd – Versus - Norlake Investments Ltd [2002] 1 EA 227 at page 232
>
> Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impunity, the onus shifts to the latter to rebut by evidence the claim. International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403."

51. On whether the Applicant had an arguable appeal, the Learned Counsel submitted that this was the first limb that a court has to determine before issuing stay of execution orders. The Counsel referred Court to the case of:- "Samuel Mwaura Muthumbi – Versus - Josephine Wanjiru Ngugi & another [2018] eKLR the Court found that:-

> " Looking at the Draft Memorandum of Appeal filed, I am unable to say that the intended appeal is in-arguable. Of course, all the Applicants have to show at this stage is arguability - not high probability of success. At this point, the Applicant is not required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. "

52. It was the 1st Respondent's Submission that the Applicant's Memorandum of Appeal never raised triable issues. That the Learned Magistrate made a just finding in her Judgment delivered on 30th November, 2020. That the Learned Magistrate never erred in arriving at a conclusion that the Appellant/Applicant (the Plaintiff then) failed to prove her case on a balance of probability and that the 1st Defendant/Respondent's statutory power of sale had crystallized. The main ground in the appeal for the Appellant/Applicant was that the trial Magistrate never considered the Defence of non est factum. The Trial Court in making its finding, looked in depth into the threshold of raising the said defence and established that the Appellant/Applicant failed to meet the laid down threshold. This was found at Page 5 (Paragraph 22) to page 7 (Paragraph 31) of the Judgment (Annexure as "CM – 1" of the 1st Respondent's Replying Affidavit.) It was therefore their humble submission that the Appellant/Applicant never had an arguable appeal and that the present application should be dismissed with costs to the 1st Respondent.

53. On whether the appeal would be rendered nugatory, the Learned Counsel relied on the case of "Stanley Kangethe Kinyanjui – Versus - Tony Ketter & 5 others (2013J eKLR, the court held that: "The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd – Versus - Norlake Investments Ltd |2002] 1 EA 227 at page 232."

54. On the first limb, as to whether the Appellant/Applicant had an arguable appeal, the Counsel held that the answer was found to be it in the negative. Therefore, it was their submission that in the absence of an arguable appeal, then no appeal would be rendered nugatory should the order for stay be denied. They beseeched the Honorable Court to also make a finding that the Appellant/Applicant's present application had not satisfied the three (3) conditions for an order for stay of execution to be granted and therefore the same should be dismissed with costs to the 1st Respondent.

55. The Learned Counsel concluded by stating that under the provision of Section 27(1) of the *Civil Procedure Act* dictated that costs must follow the event unless the court for good reason orders otherwise. In the case of: Kenya Sugar Board – Versus - Ndungu Gathinji [2013] eKLR, the court, in recognizing that costs do follow the event, maintained an award of costs to a party stating that the discretion was applied judiciously. They prayed that the Court exercised its discretion and direct that the costs of the instant application be payable by the Appellant/Applicant.

I. Analysis and Determination

56. I have considered all the pleadings filed in this matter, being the Notice of Motion application dated 9th September, 2021 by the Appellant/Applicant herein, the responses, the written submissions, the plethora of cited authorities by all the parties, the appropriate and relevant provisions of *the Constitution* of Kenya, 2010 and the statures.

57. For the Honorable Court to reach an informed, reasonable, a just and fair decision on the subject matter, it has framed the following salient three (3) issues for its determination before this court:-

    a. Whether the allegation made by the Respondent to the effect that of the Appellant/Applicant had offended the doctrine of Res Judicata had any merit?

    b. Whether the Appellant/Applicant has made for stay of execution of judgement delivered on the 30th November 2020 and / or all such other orders and/or decrees of the court?

    c. Who will bear the costs?

ISSUE No. a). Whether the allegation made by the Respondent to the effect that of the Appellant/ Applicant had offended the doctrine of Res Judicata had any merit?

58. Under this sub – heading, the Honorable Court, to begin with, will deliberate on the substantive law on the doctrine "Res Judicata" as found under the provision of Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court"

59. The Black's law Dictionary 10th Edition defines "Res Judicata" as:-

> " An issue that has been definitely settled by judicial decision…the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties…"

60. A person may not commence more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions.

61. Therefore, in order to decide as to whether an issue in a subsequent Application is "Res Judicata", a Court of law should always look at the decision claimed to have settled the issues in question and the entire application and the instant Application to ascertain:-

    i. what issues were really determined in the previous Application;

    ii. whether they are the same in the subsequent Application and were covered by the Decision.

    iii. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.

61. To advance further on this issue, I have had to seek guidance from Kuloba J., in the case of "Njangu – Versus - Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported), held that:

> " If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata….."

62. Additionally, in the Court of Appeal case of "Siri Ram Kaura – Versus - M.J.E. Morgan, CA 71/1960 (1961) EA 462 the then EACA stated that:-

> " The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of Res Judicata…
>
> The law with regard to Res Judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ………
>
> The point is not whether the Respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.
>
> It is therefore not permissible for parties to evade the application of Res Judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit."

63. To this end, it is helpful to refer back to the reasons for the principle of finality including that decisions of the court, unless set aside or quashed, must be accepted as incontrovertibly correct. The principle is quite clear, and quite strict. The Court reaches this conclusion on an orthodox application of the principle. In the plea of res judicata only the actual record, that the issue has been decided upon, is relevant. Not what material was before the Court. Even if the reasoning given in the earlier decision was wrong, the matter cannot be re-opened by way of a similar Application. There are only 2 other Avenues which I will address later. The binding force of such Orders depends upon the general principles of law. If it were not binding, there would be "no end to litigation.". The principle of Res judicata applies to a matter decided in an earlier suit and upon its general principles it applies to proceedings in the same suit as well.

64. The provision of Article 159 (2) (b) of *the Constitution* mandates that justice ought not to be delayed. For these reasons and by the authorities stated above I find that the Respondent has not proved to this court that there was a similar application that was filed by the Appellant seeking the same prayers determined by a court of competent jurisdiction.

ISSUE No. b). Whether the Appellant has made for stay of execution of Judgement delivered on the 30th November 2020 and / or all such other orders and/or decrees of the court

65. Under this sub title, the Court wishes to state that the law governing stay of execution pending Appeal is found under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 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.

66. From the above legal provisions and myriad of Court decisions there are three conditions for granting of stay order pending Appeal under the provision of Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 which are:

    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.

67. In applying these principles to the instant case, I find the issues for determination as being namely:

    i. Whether the Appellant/Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.

    ii. What orders this Court should make?

68. 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 appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory".

69. What is the status quo on the suit land? The Appellant/Applicant contends the suit property is ancestral land the only known home by the Appellant/Applicant and her family and the only source of their livelihood by farming and grazing a few animals. The Appellant/Applicant has got also a very huge family comprising of minor grand children who live and knows the suit property as their only home. With the Judgement in favour of the Respondents (then Defendants) and now holding a ruling, meant there was eminent danger of the Respondents executing against the Appellant/Applicant making her homeless and destitute and which would render the appeal nugatory. Such an execution is bound to inflict the Appellant/Applicant and her huge family severe and substantial pain, loss and expose them into the danger especially when the entire world was struggling with the global Covid – 19/Corona pandemic.

70. The 1st Respondent on the other hand contended that the Application is frivolous, lacks merit and should be dismissed in the first instance. All parties herein ventilated at full trial the pertinent issues raised in the Amended Plaint dated 9th November, 2018 and filed on 12th November, 2018 relating to all that parcel of land known as Land Reference Number SAGALA/KISHAMBA "A"/1021. It is instructive to note that on 30th November, 2020 the 1st Respondent obtained Judgment against the Appellant/Applicant herein for completely failing to prove their case on a balance of probability and awarded the 1st Respondent costs of the suit. Subsequent to obtaining Judgment and decree, he procured the services of auctioneers trading in the name and style of "Cash Crop Auctioneers", the 2nd Defendant herein to assist her in executing the said Judgment. It is quite clear that the present application has no basis in law and fact and is a perfect example of use of conjecture at its best. Even if an appeal has been lodged, and all parties served, the decree holder could still proceed and apply for execution.

71. What amounts to substantial loss was 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."

72. Further to this, in the case of:- "Vishram 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 the provision of 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 under the provision of 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 the provision of 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."

73. 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.

74. It is therefore 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 the case of "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."

75. In the very initial stages of building jurisprudence on the legal aspect to be considered while granting stay of execution, was the decision of the case of "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.

76. In the current suit the Appellant/Applicant is seeking a stay of the Judgment from a subordinate court delivered on 30th November, 2020. The 1st Respondent has opposed the stay contending that the Appellant has not filed a Memorandum of Appeal to warrant the grant of the orders of stay of execution.

77. 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.
>
> 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."

78. On the second condition, I find that it was not in dispute that the impugned judgment was delivered on the 30th November, 2020 respectively, wherein the Applicant filed this application on 11th November, 2021 which is 12 months after the Judgment was delivered. Although, I fully concur with the Learned Counsel for the Respondents that this period sounds prolonged, but unfortunate the law is silent on the actual time limitation upon which to institute the application. In my own view, this period may not be termed as unreasonable, inordinate nor the Appellant/Applicant move Court with undue delay.

79. On the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules, 2010 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 Appellant/ Applicant has pledged his 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. 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."

80. The grant of stay 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 Judgment and also the right of a party to appeal. Nonetheless, in order not to prevent an appeal from being heard, the Honorable Court proceeds to allow the said application as prayed accordingly.

ISSUE No. c). Who will bear the costs of the application?

81. It is not 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.

82. In this case the Appellant/Applicant has succeeded in the Application. Therefore, it follows that they deserve the orders to be borne by the 1st Respondent.

I. Conclusion & Disposition

83. In the long run, after conducting an in-depth and elaborate analysis of the framed issues hereof, the Honourable Court is of the strong view that the Appellant/Applicant herein has been able to successfully establish their case on preponderance of probability. Thus in the view of the foregoing and for avoidance of doubt I do order as follows:

    a. THAT the Notice of Motion application dated 9th September, 2021 by the Appellant/Applicant herein be and is hereby found to have merit and is hereby allowed in its entirety.

    b. THAT this Honourable Court orders that a stay of execution of the Judgment delivered on 30th November, 2021 do issue and all its subsequent Order pending the hearing and final determination of this Appeal.

    c. THAT for expediency sake, the matter to be mentioned on 27th June, 2023 for purposes of:-

        i. Confirming the filing of the Records of Appeal;

        ii. Admitting the Appeal; and

        iii. Taking direction of the Appeal including the hearing date under the provision of Section 79B & G of the *Civil Procedure Act*, Cap. 21 and Order 42 Rules 11, 13 and 16 of the Civil Procedure Rules, 2010.

    d. THAT the cost of this application be borne by 1st Respondent.

84. It Is So Ordered Accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 22NDDAY OF MAY2023.

....

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

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

a. M/s. Yumna, Court Assistant;

b. Non Appearance by the Appellant/Applicant.

c. Non Appearance by for the 1st Respondent