



Leonard N. Shimaka t/a Marende Necheza & Company Advocates v Registered Trustees of Mudzini Kwetu Center Trust (Environment and Land Appeal E023 of 2023) [2023] KEELC 20201 (KLR) (25 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20201 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E023 OF 2023
LL NAIKUNI, J
SEPTEMBER 25, 2023**

BETWEEN

**LEONARD N. SHIMAKA T/A MARENDE NECHEZA & COMPANY
ADVOCATES APPELLANT**

AND

**THE REGISTERED TRUSTEES OF MUDZINI KWETU CENTER
TRUST RESPONDENT**

RULING

I. Introduction

1. The Appellant/Applicant herein – Leonard N. Shimaka t/a Marende Necheza & Company Advocates, moved this Honorable Court for its determination through filing of a Notice of Motion application dated 6th April, 2023 against the Respondent herein. It was brought under the dint of the provision of Sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act*, Cap.21 Laws of Kenya; Order 51 Rule 1 and the Order 40 Rules 1 & 2 of the Civil Procedure Rules 2010.
2. Pursuant to that, and upon being served accordingly, the Respondent also filed its response accordingly.

II. The Appellant/Applicant's case

3. The Appellant/Applicant sought for the following orders:-
 - a. Spent.
 - b. Spent.
 - c. That this Honorable Court be pleased to stay execution of the judgment issued on the 3rd March, 2023 by the Hon. D.W. Mburu [SPM] in CMCC No.2328



of 2018 and subsequent decree herein pending hearing and determination of this Appeal herein.

- d. That this Honourable Court be pleased to grant any other order it deem fit in the circumstances.
 - e. That the cost of this application be provided for.
4. 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 five (5) annexures thereto and marked as “SNL – 1 to 5” annexed thereto. The Appellant/ Applicant averred:
- a. The Respondent was likely to execute on the Judgment and Orders of the Magistrate's Court, issued by Hon. D. W. Mburu [SPM at Mombasa on the 3rd March, 2023 against the Applicant herein. [Annexed and marked a “SNL - 1” is a copy of Judgment].
 - b. The Respondent had since extracted the Decree and had listed the matter for Taxation on the Bill of Cost on the 11th April, 2023 at the magistrate’s Court. [Annexed and marked as “SNL - 2a, 2b, & 2c” is a copy of the Decree, Notice of Taxation, and the Bill of Cost].
 - c. Prior to the judgment he had made an application to be allowed to testify pursuant to Notice of Motion application dated 4th November, 2022 which application was declined. [Annexed and marked as “SNL - 3” was a copy of the application].
 - d. He did not agree with the said decision and had since appealed against the said Judgment by filing a Memorandum of Appeal. [Annexed and marked as “SNL - 4” was a copy of the Memorandum of Appeal].
 - e. The Honourable Court failed to appreciate that Respondent’s suit was malicious, frivolous and made in bad faith as the Deponent’s functions were purely that of an advocate as outlined under the provision of Section 34 of the Advocate Act Cap. 16 Laws of Kenya and by failing to allow him to Defend himself was a violation of his right to a fair trial and rule of natural justice.
 - f. The Honorable Court failed to consider that the monies received by the firm was done as Counsel for the vendor and was meant for specific functions as outlined in paragraphs 2.1 of that agreement inter alia:- The 10% deposit of a sum of Kenya Shillings Six Hundred and Fifty Thousand [Kshs. 650,000/=] of the purchase price shall be paid by the vendor’s advocate on the date of the signing(receipt whereof the Vendors Advocates hereby acknowledges) and a sum Kenya Shillings Three Hundred Fifty Thousand (Kshs. 350,000/=) shall be used to pay the land rates, consent, rent etc. and a sum of Kenya Shillings Three Hundred Thousand (Kshs. 300,000/=) shall be held by the Vendors Advocates on stakeholder basis].
 - g. The Honorable Court failed to consider that the firm refunded a sum of Kenya Shillings Three Hundred Thousand (Kshs. 300,000/=) which was held on a stakeholder basis as the sum of Kenya Shillings Three Hundred and Fifty Thousand (Kshs. 350,000/=) had already been paid to the County Government inform of rates and there was receipt thereof. [Annexed and marked as “SNL - 5a & 5b” is copy of the rate receipt].
 - h. The firm never benefited in any way from the said transaction hence it would be a mis courage of justice to be compelled to pay for the losses incurred by the Respondent due to a dispute between the vendor and the purchaser.



- i. Unless the said Judgment was stayed he would suffer great prejudice as the appeal shall be rendered nugatory.
- j. Unless stay of execution of the said Judgment was granted the Respondent would proceed to execute it against the Deponent and he likely to suffer great loss and prejudice. The Respondent would not be prejudiced if this application was allowed.

III. The Respondent's case

5. The Respondent responded through filing a Replying Affidavit dated 14th April, 2023 and filed on 17th April, 2023. It was the Respondent's argument that Memorandum of Appeal raised no triable issues and that it was also filed late out of time and without leave. Indeed, it was done after the expiry of the mandatory thirty (30) days.
6. It was further the Respondents position that the appeal was devoid of merit since the Appellant never filed witness statement or documents before the trial court despite having afforded enough facility and opportunity by the trial court. The motion for leave to defend was raised by the Appellant and dismissed by the court, no appeal was preferred within the time lines set by statute it could not thus be re - visited. Appellant cannot thus claim violation of principles of natural justice
7. The Respondent further argued that the Appellant could not make attempts to produce new evidence on appeal. In any event the suit property subject matter was procured successfully by the Respondent.

IV. Submissions

8. On 18th May, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 6th April, 2023 be disposed of by way of written submissions. Thereafter, all the parties fully complied. On 6th June, 2023 a ruling date was reserved on Notice by the Honourable Court accordingly.

A. The Written Submissions by the Appellant/Applicant

9. Through E – Filing, the Learned Counsel for the Appellant/Applicant herein through the Law firm of Messrs. Marende Nechea & Company Advocates filed their submissions dated 8th June, 2023. Mr. Ondieki Advocate commenced the submission by stating that the submissions in respect of the Notice of Motion application dated 6th April, 2023 in which prayers 1 and 2 of the application are spent and the main submissions are on prayer 3 and 4 of the said application.
 - a. Spent
 - b. Spent
 - c. That the Honourable court be pleased to say execution of the judgement issued on the 3rd March, 2023 by Hon. D.W Mburu (SPM) in CMCC No. 2328 of 2018 and the subsequent decree pending hearing and determination of the Appeal.
 - d. That the court be pleased to grant other order it deems fit in the circumstances.
 - e. That costs of this Application be provided for.
10. The Learned Counsel submitted that the application was supported by the affidavit of Leonard Necheza Shimaka sworn on 6th April, 2023 and filed in court on even date. The Respondent opposed



the Application through the Replying affidavit sworn by Nyange Sharia, an Advocate of the High Court of Kenya on 14th April, 2023.

11. The Learned Counsel on the issue of whether this Honourable Court should grant Stay of execution pending hearing and determination of the intended Appeal, argued that the essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful Appellant only gets a paper judgment, while at the same time balancing the rights of the parties.
12. The provision of Order 42 Rule 6(2) of the Civil Procedure Rules 2010, sets the conditions in which an Applicant must satisfy in an Application for stay of execution of a decree or order pending appeal. These conditions given are; that substantial loss may result to the Applicant unless the Order is made, that the Application has been made without unreasonable delay and that such security as the Court orders for the due performance of such decree or order as may ultimately be binding on the Applicant.
13. The first principle was that substantial loss may result to the Applicant unless the Order is made. In the case of “James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR”, the Court held as follows to what substantial loss is:

“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 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 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.”
14. The Learned Counsel submitted that, Judgment was delivered on 3rd March, 2023 in favour of the Respondent. The Applicant being aggrieved by the Judgment had lodged an appeal at the High Court as shown in annexure marked as “SNL – 4”. The Respondents had not stated whether they would be in a position to refund the Applicant in the event the Appeal succeeded on merits. The Applicant stood to suffer irreparable loss and prejudice should the Court not grant the stay of execution since the Respondents had not stated their ability to refund the decretal amount. The Respondents had not filed any affidavit of means to confirm their financial means or status. Thus, there was a risk of failure to compensate the Applicants should the Appeal succeed.
15. The Learned Counsel submitted that the Appeal was highly arguable and had a high chance of success and to ensure justice was administered efficiently it would be prudent for the Court to stay the execution pending the outcome of the appeal. The stay would prevent the appeal being rendered nugatory in the event the Appeal was successful.
16. On the second principle, that the Application had been made without unreasonable delay. The Applicant had lodged an appeal at the High Court as shown in evidence under annexure marked as “SNL – 4”. The Respondent extracted a decree and listed the matter for taxation on 11th April, 2023. The Respondent’s actions were in pursuit of executing the said Judgment while there was a pending appeal before the High Court. The Applicant had brought this application without undue delay as it was filed in Court on 6th April, 2023.



17. In the case of “Silas Kanyolu Mwatha v Josephine Kavive James [2021] eKLR” the Court cited the case of Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others-Civil Appeal No 291 of 1997, at Page 4 as follows:-

“ the mere fact that these are strong grounds of appeal would not, in itself, justify an order for stay...the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course be made without reasonable delay.”

18. The Learned Counsel submitted that the application had not been made with any inordinate delay and that he was willing to adhere to any directions that would be given by the Court. It was the Applicant’s humble submission that unless there was an order for stay of execution, the intended appeal if successful, would be rendered nugatory.

19. In conclusion, the Learned Counsel beseeched the Honourable Court that if given an opportunity to ventilate its issues to this Honourable Court, and that this Appellate Court finds that the prayers sought in the application for stay was necessary and ought to be granted. The Respondent was not going to be prejudiced in any manner whatsoever and if so they had not demonstrated or proved to what extent they will be prejudiced. It was the Learned Counsel’s submission that the balance tilts in favour of the Applicant and prayed that the Application before you be allowed as prayed with costs.

B. The Written Submission by the Respondent

20. On 2nd June, 2023, the Learned Counsel for the Respondent through the firm of Messrs. Sharia Nyange Njuguna & Company Advocates filed their written submissions dated 2nd June, 2023. Mr. Nyange Advocate submitted that the Appellant via a motion dated 6th April 2023 sought orders:

- a. Stay of the judgment and execution of CMCC No 2328 of 2018 pending hearing and determination of appeal filed.
- b. Further Orders and reliefs as the court deems fit.

21. The Learned Counsel submitted that it was the Appellant’s case that there already is a judgment and decree against himself delivered on the 3rd March 2023. According to the Appellant the Respondent had also fixed the suit for taxation in readiness of execution. It was the argument of the Appellant that they had since lodged an Appeal. The Appellant in making arguments in support of his motion has tried to show that the appeal filed was with merit and raises triable issues. It was the argument of the Appellant that they never benefitted from the money subject of the judgment entered by the trial court. It was the Appellants case that unless Orders sought were issued they would suffer prejudice and in the event the Orders sought are issued, the Respondent would not suffer any prejudice.

22. On the Learned Counsel submitted that the Respondent’s case was that the Respondent had opposed the motion by the Appellant via a Replying Affidavit sworn on the 14th of April 2023 and filed the 17th April 2023. It was the Respondents argument that Memorandum of Appeal raised no triable issues and that it was also filed late out of time and without leave. After the expiry of the mandatory thirty (30) days. It was further the Respondents position that the appeal was devoid of merit since the Appellant never filed witness statement or documents before the trial court despite having afforded enough facility and opportunity by the trial court. The motion for leave to defend was raised by the Appellant and dismissed by the court, no appeal was preferred within the time lines set by statute it could not thus be re - visited. Appellant could not thus claim violation of principles of natural justice. The Respondent further argued that the Appellant could not make attempts to produce new



evidence on appeal. In any event the suit property subject matter was procured successfully by the Respondent.

23. On whether the motion by the Appellant should be allowed, the Learned Counsel submitted that whereas the court had directed on the 18th May 2023 that the Appellant do file and served their submissions within seven (7) days, there had never been compliance with these directions of the court. The Respondent had never the less proceeded to file her submissions notwithstanding the lack of submissions by the Appellant who had moved the court under certificate of urgency.
24. It was the Respondents argument that the court had not been properly moved. The Appellant had not invoked the jurisdiction of the court for issuance of the Orders sought. The certificate and motion were filed during vacations without leave of court being sought under the vacation rules. The Appellants had also not invoked the jurisdiction of the court and thus the Orders sought cannot issue due to failure by the Appellant to move the court under the provision of Order 42 (6) of the Civil Procedure Rule, 2010 which empowered the court to grant the Orders of stay sought. The motion should thus be disallowed.
25. The Learned Counsel argued that the applicable legal principles in determine whether or not to grant stay was now settled. He cited the case of “Consolidated Marine – v Namprijad & Ano. Civil Appeal No.93 of 1989 Nairobi” where Court held that:-SUBPARA a.

“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.”
26. In this case what the Appellant sought to stay was an award of Kenya Shillings and Fifty Thousand (Kshs. 350,000/=) plus costs and interest. What the Appellant seemed to be contesting was a money decree. For the Appellant to succeed however him must demonstrated that:-
 - a. He will suffer substantial loss.
 - b. The Application has been brought without delays
 - c. He is willing to deposit security
27. On substantial loss, the Learned Counsel submitted that this did not arise. It was for the Appellant to show with the aid of evidence that he stood to suffer loss. In the case of “Samvir Trustee Limited – Versus - Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997”, Warsame J (as he then was), expressed himself as follows:

“for the applicant to obtain a stay of execution, it must satisfy the Court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the Court will not consider assertions of substantial loss on the face value but the Court in exercising its discretion would be guided by adequate and proper evidence of substantial loss.”
28. In the case of “Bungoma High Court Misc Application No 42 of 2011 - James Wangalwa & Another v Agnes Naliaka Cheseto” that:
 - a. “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 the successful party in the appeal. This is what substantial loss would entail.”

29. It was the Learned Counsel’s argument that no loss would be suffered by the Appellant. The sum awarded was a sum of Kenya Shillings Three Hundred and Fifty Thousand (Kshs. 350,000/=) plus costs and interest. They had demonstrated that the Respondent did purchase the suit property for a sum of Kenya Shillings Nine Million (Kshs. 9,000,000/=) and was the registered owner of the suit property after the initial transaction was botched.
30. The Respondent was capable of refunding the Appellant the sums awarded in the very unlikely event that the appeal herein succeeded. The ability of the Respondent to refund the Appellant was not in contest. The Respondent had both immovable and movable assets thus the Appellant could not claim that the appeal would be rendered nugatory. Where execution of a money decree is sought to be stayed, in considering whether the Applicant would suffer substantial loss, the financial position of the Applicant and that of the Respondent became a crucial issue. The court could not shut its eyes where it appears the possibility of the respondent refunding the decretal sum in the event that the Applicant was successful in his appeal was doubtful. The court had to balance the interest of the Applicant who was seeking to preserve the status quo pending the hearing of the appeal to ensure that his appeal was not rendered nugatory and the interest of the Respondent who was seeking to enjoy the fruits of his Judgement. In other words, the court should not only consider the interest of the Applicant but had also to consider, in all fairness, the interest of the Respondent who had been denied the fruits of her Judgement.
31. The Learned Counsel concluded by stating that the motion by the Appellant was devoid of any merit, and urged the court to disallow the motion herein. He enclosed the following authorities which included this Honourable Court’s decision in opposition to the motion herein filed for ease of reference:
 - a. “Michael Ntouthi Mitheu v Abraham Kivondo Musau”
 - b. “Khairrunissa Hussein Haji Ladha & Others v Suleiman Abdulrehman & Another”

I. Analysis and Determination

32. I have considered all the pleadings filed in this matter, being the Notice of Motion application dated 6th April, 2023 by the Appellant/Applicant herein, the responses by the Respondent, the written submissions, the plethora of cited authorities by all the parties herein, the appropriate and relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
33. 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 Appellant/Applicant through the Notice of Motion application dated 6th April, 2023 has made for stay of execution of judgement delivered on the 3rd March, 2023 and / or all such other orders and/or decrees of the court?
 - b. Whether the parties herein are entitled to the reliefs sought?
 - c. Who will bear the costs of the application?



IssueNo. a). Whether the Appellant/Applicant through the Notice of Motion application dated 6th April, 2023 has made for stay of execution of Judgement delivered on the 3rd March, 2023 and / or all such other orders and/or decrees of the court

34. 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.

35. 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.

36. 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?



37. The purpose of stay of execution is to preserve the substratum of the case. In the case of “Consolidated Marine v 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”.

38. What is the status quo on the suit land? The Appellant/Applicant contends the Judgment was delivered on 3rd March, 2023 in favour of the Respondent. The Applicant being aggrieved by the judgment has lodged an appeal at the High Court as shown in annexure SNL-4. The Respondents have not stated whether they would be in a position to refund the Applicant in the event the Appeal succeeds on merits.

39. The Respondent on the other hand contended that the Memorandum of Appeal raises no triable issues and that it was also filed late out of time and without leave. After the expiry of the mandatory thirty (30) days. It is further the Respondents position that the appeal is devoid of merit since the Appellant never filed witness statement or documents before the trial court despite having afforded enough facility and opportunity by the trial court. The motion for leave to defend was raised by the Appellant and dismissed by the court, no appeal was preferred within the time lines set by statute it cannot thus be revisited. Appellant cannot thus claim violation of principles of natural justice.

40. What amounts to substantial loss was expressed by the Court of Appeal in the case of “Mukuma v 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.”

41. Further to this, in the case of: - “Vishram Ravji Halai v 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.”

42. 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.



43. 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 v 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 v 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.”

44. 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.

45. In the current suit the Appellant/Applicant is seeking a stay of the Judgment from a subordinate court delivered on 3rd March, 2023. The Respondent has opposed the stay contending that the appeal is devoid of merit since the Appellant never filed witness statement or documents before the trial court despite having afforded enough facility and opportunity by the trial court. The motion for leave to defend was raised by the Appellant and dismissed by the court, no appeal was preferred within the time lines set by statute it cannot thus be re visited. Appellant cannot thus claim violation of principles of natural justice. The Respondent further argued that the Appellant cannot make attempts to produce new evidence on appeal. In any event the suit property subject matter was procured successfully by the Respondent.



46. As for the applicants having to suffer substantial loss, in the case of “Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga [1982-1988]KAR 1018” the Court of Appeal pronounced itself to the effect that:

“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 rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

(See also the case of “Machira T/A Machira & Co Advocates v East African Standard (No.2) [2002] eKLR 63”).

47. The Applicant has a burden to show the substantial loss they are likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Appellant to their Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. {See the case of “Absalom Dora v Turbo Transporters [2013] (eKLR).

48. As F. Gikonyo J stated in the case of:- “Geoffery Muriungi & another v John Rukunga M’imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (Deceased) [2016] eKLR” and which wisdom I am persuaded with:-

“.....the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal...”

49. The Applicant submitted that if the orders of the Lower Court as delivered are not stayed, he will stand to suffer substantial loss. The Applicant stands to suffer irreparable loss and prejudice should the Court not grant the stay of execution since the Respondents have not stated their ability to refund the decretal amount. The Respondent have not filed any affidavit of means to confirm their financial means or status. Thus, there is a risk of failure to compensate the Applicants should the Appeal succeed.

50. As already stated, the provision of Order 42 Rule 6 lays out the Law on stay of execution pending appeal, by giving court the discretion to order stay for sufficient cause. Sub-rule 2 outlines the mandatory conditions that have to be met for the court to grant stay pending appeal. The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Appellant.

51. Regarding the second pre-requisite in Order 42 Rule 6, that is substantial loss occurring to the Applicants, the court has already referred the consideration to be made in the case of “Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu (Supra)”.



52. The court, in the case of “RWW v 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.”

53. On the second condition, I find that it was not in dispute that the impugned Judgment was delivered on the 3rd March, 2023 respectively, wherein the Applicant filed this application on 6th April, 2023 which is 1 month and 3 days after the Judgment was delivered. In my own view, there was no inordinate delay by the Appellant/ Applicant to file this application.

54. 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 not 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 v 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.”

55. The grant of stay remains a discretionary order that must also consider 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?

56. 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.

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



I. Conclusion & Disposition

57. 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 6th April, 2023 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 3rd March, 2023 do issue and all its subsequent Order pending the hearing and final determination of this Appeal.
 - c. That the Appellant/Applicant shall deposit the entire decretal sum into an interest earning Escrow Joint account in a reputable commercial Bank, to be held by both advocates for the parties to this appeal Messers. Marende Necheza & Company Advocates and Sharia Nyange, Njuguna & Company Advocates, within the next 21 days from the date of the delivery of this ruling;
 - d. That the Appellant to file and serve a record of appeal within thirty (30) days of this ruling;
 - e. That the appeal shall be mentioned on 25th October, 2023 for directions on the mode of disposal of the appeal.
 - f. That the cost of this application be borne by Respondent.

It is so Ordered Accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 25TH DAY OF SEPTEMBER 2023.

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HON. JUSTICE L. L. NAIKUNI, (JUDGE)
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling delivered in the presence of:

- a. M/s. Yumna, the Court Assistant;
- b. No appearance for the Appellant/Applicant.
- c. Mr. Nyange Advocate for the Respondent

