



REPUBLIC OF KENYA



**Jeizan & another v Bayusuf & 3 others (Environment & Land Case
170 of 2017) [2023] KEELC 21057 (KLR) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21057 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 170 OF 2017
LL NAIKUNI, J
OCTOBER 18, 2023**

BETWEEN

NURU ALI JEIZAN 1ST PLAINTIFF

ANWAR MOHAMMED BAYUSUF LTD 2ND PLAINTIFF

AND

NASSAR MOHAMED BAYUSUF 1ST DEFENDANT

MA BAYUSUF 2ND DEFENDANT

FADHILI M BAYUSUF 3RD DEFENDANT

AHMED M BAYUSUF 4TH DEFENDANT

RULING

I. Introduction

1. This ruling regards a Notice of Motion application dated 30th November 2021 filed by Nuru Ali Jeizan and Anwar Mohammed Bayusuf Limited the Plaintiffs/Applicants herein on 20th January, 2022. It was brought under the provision of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21 and Order 18 and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010.
2. Despite of the application having been served, there was no responses filed. In essence the application was not opposed. Nonetheless, on 30th March, 2023 the 1st Respondent filed their written submissions dated 27th March, 2023. Hence, due to the nature and intricacies of the orders sought herein, the Honorable Court feels its imperative to proceed and deal with on merit it deserves whatsoever.

II. The Plaintiffs/Applicants case

3. The Plaintiffs/Applicant sought for the following prayers reproduced herein verbatim:-



- a. Spend.
 - b. That there be stay of execution of the decree and Judgment delivered on 18th November 2021 and an order of interim injunction do issue against the Defendant/Respondent, their agents, servants, nominees and or employees from evicting, removing, repossessing and or in any manner interfering with the Plaintiff's property being plot No MN/V/1966 (Original No MV/V/16921 1-2) pending the hearing and determination of this application "inter parties'.
 - c. That there be stay of execution of the decree and judgment delivered on 18th November 2021 and an order of interim injunction do issue against the Defendant/Respondent, their agents, servants, nominees and or employees from evicting, removing, repossessing and or in any manner interfering with the Plaintiff's property being plot No MN/V/1966 (Original No MV/V/16921 1-2) pending the hearing and determination the appeal filed herein
 - d. Any other order that the Court may deem fit to grant in the interest of justice.
 - e. Costs be in the cause.
4. The application was based on the grounds, testimonial facts and the averments found under the contexts of the twenty - four (24) Paragraphed Supporting Affidavit of James Mwasya Munyokisworn and dated 30th September, 2021 and seven (7) annexures marked as 'JMM – 1 to 7' annexed thereto. He deponed that:-
- a. He was the Manager of the 2nd Plaintiff's/Applicant's company and was authorized to swear an affidavit on its behalf. (Attached as 'JMM - 1' was the company resolution)
 - b. The Plaintiffs/Applicants filed this suit herein on 18th May 2017 and the Defendants filed their responses accordingly.
 - c. But thereafter, the 1st Plaintiff/Applicant's father fell ill and was taken to Bahrain for medication.
 - d. The 1st Plaintiff/Applicant had to shuffle between Kenya and Bahrain to take care of the ailing father.
 - e. Sometimes in the month of August, 2019 the 1st Plaintiff travelled to Baharain but could not travel back to Kenya due to restrictions which had been effected in the month of March, 2020 due to Covid 19 pandemic.
- In the month of May, 2021 the 1st Plaintiff/Applicant was indisposed having contracted the Covid -19 and due to this she could not be allowed to travel to Kenya which information she informed her Advocate.
- f. On 1st June 2021 when the matter came up for hearing, she was unable to testify in court when the hearing came up. Her former Advocate un – procedurally relied on the witness statement without the Constitutional need for the Plaintiffs to present their case vide a viva voce testimony.
 - g. The Plaintiffs were denied their constitutional right of a fair hearing and consequently Judgement was delivered on 18th November, 2021 whereby their suit against the Defendant was dismissed.



- h. Being a land matter which was very pertinent to the Plaintiffs and which raised very strong issues, the same ought to be canvassed on a full hearing through examination of evidence before Judgement was entered.
- i. The Applicants would be demonstrating in the appeal that the trial Court failed to hear the Plaintiffs who were to raise very pertinent issues which if heard the Court would have arrived at a different decision.
- j. The Plaintiffs/Applicants ought to be accorded an opportunity to be heard before the Court makes its final decision. The Applicant seeks for the stay of execution of the Decree of the Judgement delivered on 18th November, 2021 pending the hearing and final determination of the appeal restraining the Defendant from evicting, removing, repossessing the Plaintiffs/Applicants from the suit property.
- k. The Applicant had a meritorious appeal which may be renders a nugatory if the Court failed to grant the orders sought herein and they would suffer substantial and irreparable loss.
- l. Applicants averred that their constitutional right be heard was not granted and they have filed a notice of appeal. The Applicant held that they had a meritorious appeal which would ill be rendered nugatory if the Honorable court does not grant orders sought.

III. Submissions

- 5. On 20th February 2023 while all parties were in Court, they were directed that the application dated 30th November, 2021 be disposed off by way of written submissions. Pursuant to that all the parties fully complied accordingly. Thereafter, the Court indicated it would render its Ruling on notice.

A. The Written Submissions by the Plaintiffs/Applicants

- 6. On 15th March, 2023 the Learned Counsels for the Plaintiffs/Applicants herein the Law firm of Messrs. Bosire & Partners Advocates filed their written Submissions dated 9th March, 2023. Mr. Bosire Advocates commenced his submission by stating that what was before Court for determination was the Plaintiffs/Applicants' Notice of Motion Application dated 30th November, 2021 and filed on 20th January, 2022. Vide this Application the Plaintiffs/Applicants sought for the following orders;
 - a) Spent
 - b) Spent.
 - c) That there be a stay of execution of the decree and judgment delivered on 18th November, 2021 and an order of interim injunction do issue against the Defendants/Respondents, their agents, servants, nominees and or employees from evicting, removing, repossessing and or in any manner interfering with the Plaintiffs' property being plot No MN/V/1966 (Original No MV/V/169211-2) pending the hearing and determination of the appeal filed herein.
 - d) Any other order that the Court may deem fit to grant in the interest of justice.
 - e) Costs be in the cause.
- 7. The application was premised on the grounds appearing on the face of it together with the supporting affidavit of James Mwasya Munyoki sworn on 30th November, 2021 and the annexures attached thereto. The Learned Counsel informed Court that the Respondent opposed the Application through Grounds of opposition dated 14th March, 2022 and filed on 18th March, 2022. In it, the Respondents



averred that the Advocate on record never sought for leave before acting in the matter where Judgment had already been entered and that the application was misconceived and a waste of the Court's time.

8. In support of his submissions, the Counsel raised the following four (4) issues. These were:-

Firstly, whether the Advocate for the Plaintiffs/Applicants was properly on record. He stated that the Defendants/Respondents in their grounds of opposition dated 14th March, 2022 contended that the Advocate on record for the Plaintiffs/Applicants never sought for leave before acting in the matter herein where Judgment had already been entered. In response, the Learned Counsel averred that the Law firm of Messrs. Bosire and Partners on record for the Applicants filed a consent on 2nd December, 2021 together with the Notice of Appeal and Notice of Change of advocates as provided in Order 9, Rule 9(b) of the *Civil Procedure Rules*.

Order 9, Rule 9 of the *Civil Procedure Rules*, 2010 provides that:-

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-

- (a) upon an application with notice to all parties;or
- (b) upon consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be

9. The Learned Counsel held that the provision of Order 9 rule 9 of the *Civil Procedure Rules* was intended to protect the interests of an Advocate who had represented a party until after Judgment, from letting go the brief without a possible guarantee of his or her legal fees being paid.

In view of the above provision he submitted that, where an Advocate coming on record after Judgment had filed a consent with the outgoing Advocate they never required the leave of the Court to come on record and in this case the Law firm of Messrs. Bosire and Partners having filed a consent with the outgoing Advocate, they were properly on record.

10. Secondly, on whether the Applicant's Appeal was arguable. The Learned Counsel stated that the law governing grant of stay of execution pending appeal was set out in Order 42 Rule 6 of *Civil Procedure Rules*, 2010.

11. According to the Learned Counsel, he submitted that the above rule was clear that a court could only grant stay of execution of a Judgment or order if an appeal had already been filed and was pending hearing. The existence of an appeal was a condition precedent to the exercise of the courts discretion under Order 42 Rule 6 (1) of the *Civil Procedure Rules*, 2010. The Plaintiffs/Applicants herein were in compliance with the said order in that a notice of appeal was filed on 2nd December, 2021 and the same was annexed and marked as “JMM -6”. He averred that the Plaintiffs/Applicants had a constitutional right which ought to be considered and that they were also given an opportunity to ventilate their appeal without the fear that an execution was going to be levied against them while pending the hearing of the said appeal. To buttress on this point, the Learned Counsel relied on the case “*James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR that where the court held this:-

“The right of appeal is a constitutional right that actualizes the right to access to justice, protection and benefit of the law, whose essential substance, encapsulates that the appeal



should not be rendered nugatory, for anything that renders the appeal nugatory impinges on the very right of appeal.”

12. The Learned Counsel stated that the purpose of an application for stay of execution pending an appeal was to preserve the subject matter dispute so that the rights of the Appellants who were exercising their undoubted right of appeal was to safeguarded and the appeal if successful. He cited the case of: Civil Appeal 48 of 2015 [*Selestica Limited v GoldGold Development Ltd*](#) |2015, where was held that:-

“This court is enjoined to find that the right of appeal is a constitutional right and the cornerstone of the rule of law. It is guaranteed under Article 50(1) of the *Constitution*, Section 75 of the *Civil Procedure Act* and Order 43 (1) of the *Civil Procedure Rules*. The said right was exercised under section 79G of the Act and stay sought under Order 42 rule 6 of the Rules. It is not the intention of this court to oust a party approaching it from the judgment seat. The orders sought are discretionary in nature and can be granted on terms to be stated by the court. It has not been demonstrated that the appellant came to this court laced with unclean hands. It is the defendant in the lower court and being dissatisfied with the mandatory orders given by the lower court, it has an unfettered right of appeal. In my view, the dispute herein can be determined by application of the law hence, the right to a hearing and fair trial can only be guaranteed if stay pending appeal is granted to the appellant.”

13. The Learned Counsel submitted that an application for a stay of a decree pending hearing and determination of the appeal, the Court of appeal set out the guiding principles in the case of: [*Butt v Rent Restriction Tribunal*](#) [1979]KLR (Madam Miller and Porter JJA) cited in the case of “[*Henry Ambeva v Phanice Khanjala*](#) 2018] eKLR who upon considering an Application of that Motion

14. He further argued that, the Appeal had very high chances of success as it raised triable issues i.e. the issue of the Plaintiffs/Applicants being denied the chance to present their case vide a ‘viva voce’ testimony. The appeal raised cogent points of law and that the orders of stay sought was the only way to balance the competing interests pending the hearing of the said appeal. The Learned Counsel averred that as seen in the supporting affidavit sworn by James Mwasya Munyoki, the 1st Plaintiff/Applicant stating as follows:-

- a. She was denied her right to be heard in the face of the evidence adduced and the submissions made;
- b. When the matter came up for hearing she had travelled to Barhain to attend to her ailing father and was held up there due to the travel restrictions which were imposed by the Government due to Covid - 19 pandemic.
- c. She informed her then advocate of her travel and predicament and that she had also contracted Covid 19.
- d. During the hearing the said advocated un-procedurally relied on the witness statement filed without the Plaintiffs presenting their case via a viva voce testimony;
- e. No hearing was done as envisaged under Order 18 of the Civil Procedure Rules; and
- f. The proceedings held on 14th June, 2021 contravened the provision of Article 50 of the *Constitution*.

15. In view of the above, the Learned Counsel argued that, fair trial is guaranteed under Article 50 (1) of the [*Constitution*](#). But a fair trial never existed in a vacuum. It was governed by rules which by themselves



ensured that each party was given the opportunity to present or defend his/her case fairly. That was the purpose of a trial Court. It must make sure that the parties were given ample opportunity to ventilate the issues arising from their case and the Applicant herein was denied that chance hence the appeal and application herein. He cited the provision of Article 50 (1) of the Constitution.

16. The Learned Counsel averred that when a case was decided in accordance with substantial justice as depicted under Article 50 (1), justice would not only be seen but would be seen to have been done. The appeal raised triable issue and thus if the relief sought were not granted the Applicants would be ousted from the seat of justice, contrary to the Constitution imperatives on the right to access justice as contemplated in Article 48 of the Constitution and as a result deny them the right to a fair hearing under Article 50(1) of the Constitution and which right could not be limited by dint of Article 25 (c) of the Constitution, particularly when it was clearly established that the dispute herein could be determined by application of the law. The right to be heard was a fundamental right that must not be denied to enable the Plaintiffs/applicants to ventilate their position.
17. To support the issues raised here, the Learned Counsel cited the case of:- "Dari Limited & 5 others v East African Development Bank & 2 others [2020] eKLR where the Court held that:-

“The right to be heard “audi alteram partem” is the twin pillars of natural justice. It recognises that no person should be judged without a fair hearing that is each party should be given an opportunity to respond to evidence brought against them. This indeed was reiterated by the Judges of the court of appeal in the case *Kal Mbaki & 2 Others v Gichuhi Macharia* [2005] eKLR thus:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard. This Court has indeed reiterated that principle on many occasions and we need only cite one for emphasis: - “*Matiba v Attorney General* [1995 - 1998] 1 EA 192 where in an application for leave to seek an order of certiorari, the superior court refused to grant the prayer for stay without hearing counsel for the applicant who was present in court.”

We also rely in the case of *Kennedy Korir Sargo v KCB Bank Limited & another* [2021] eKLR, where the Court held that;

18“This principle of natural justice cements the fact that a man or woman cannot incur the loss of property or liberty for an offence by a judicial proceeding, until he or she has had a fair opportunity of answering the case against him or her. This principle is reflected in many statutes and provisions of the law, which are geared towards ensuring that a notice is given to a person against whom an order is likely to be passed before :decision is made. That is, it is the basic requirement of the principle of natural justice that the opportunity of being heard must be given. Right to hearing provides as individual an opportunity to present his or her case before the court and put forward evidences in support of their case and which would then form the basis of a judicia officer arriving at a fair decision.”

The *Halsbury's Laws of England*, 5th Edition. Vol. 61 page 545 at para 640 states:

“The audi alteram partem rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of



the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing...The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases."

18. Furthermore, in the case of: "*Msagha v Chief Justice & 7 Others* Nairobi HCMCA no 1062 of 2004 (HCK)[2006] 2 KLR 553 it was held that:-

"The Court observes firstly that the rules of natural justice "audi alteram partem" hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialization of the globe during the hey-days of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision...It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.

19. Further, the Learned Counsel cited the Supreme Court of Canada in "*Baker v Canada (Minister of Citizenship & Immigration)* 2 SCR 817 6 held that:

"The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions." Emphasis added.

Lastly, under this issue, the Learned Counsel cited the case of:- "Syokimau Residents Association & 5 others v Regina Mueni Kaloki & another eKLR, where the court held that:-

"This was a restatement of Lord Wright's decision in *General Medical Council v Spackman* [1943] 2 All ER 337 cited with approval in *R v Vice Chancellor JKUAT Misc Appl No 30 of 2007* that:

"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."

18. In *Ridge v Baldwin* [1963] 2 All ER 66 at 81, Lord Reid expressed himself as follows:



“Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void.”

19. The rationale for that position was reiterated in *Egal Mohamed Osman v Inspector General of Police & 3 Others* [2015] eKLR at page 7 where the Court referred to *The Management of Committee of Makondo Primary School and another v Uganda National Examination Board*, HC Civil Misc Application No 18 of 2010, in which the Ugandan Supreme Court stated as follows regarding the rules of natural justice:

“It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'.

20. Thirdly, whether the appeal and the instant application were filed expeditiously. The Learned Counsel stated that pursuant to Rule 75 Sub Rule 2, a notice of appeal was to be filed within fourteen(14) days from the of the decree or order appealed against. In the case at hand the Judgment was delivered on 18th November, 2021 and the Notice of Appeal was filed on 2nd December, 2021 thus was filed within time. In respect to the instant application he held that the delay was not inordinate. Rule 75 sub 1 and 2 of the *Court of Appeal Rules*. He also cited the provision of Order 42 Rule 6 sub rule 4 of the *Civil Procedure Rules*, 2010.

21. Finally, on Whether the Applicants would suffer substantial loss, The Learned Counsel contended that the Plaintiffs/Applicants had shown sufficient cause both in the grounds of application and Supporting affidavit as follows:-

“Its the Applicants' submission that, they will suffer substantial loss if these orders are not granted. ne Appellants' case is that they have an arguable appeal in that; when the matter came up for hearing the 1st Applicant had travelled to Barhain to attend to her ailing father and was held up there due to the travel restrictions which were imposed by the Government due to Covid 19 pandemic and that subsequently she fell ill which information she passed on to the previous advocate. However, the said Advocate proceeded to rely on her witness statement filed without the Plaintiffs presenting their case a viva voce testimony.

22. The Applicants contended that, if the orders herein were not granted and the execution do issue, the Plaintiffs/Applicants would stand to suffer substantial losses, damages and prejudices for the following reasons;

- a. They stood to lose their bargaining power in and over the suit land
- b. They stood to lose a pivotal asset and land resource
- c. They stood to lose a critical investment
- d. They shall be prejudiced in the event the Respondents sell and/or disposes of the suit land



With regards to security of costs, the Learned Counsel relied on the case of: *Absalom Dova v Tarbo Transporters* [2013]eKLR cited in the case of *HGE v SM* [2020] eKLR held that;

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his 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”.

23. In conclusion, the Learned Counsel submitted that if the Application was not granted as prayed. The Respondent would proceed with the execution of the decree and the appeal would be rendered nugatory as the pertinent issue to litigate over would have been dealt with and the Applicants. He stated that the Applicant had satisfied the requirements for grant of the orders sought. Thus, he humbly prayed that the application be allowed.

B. The Written Submission by the 1st Defendant/Respondent

24. On 30th March, 2023, the Learned Counsel for the 1st Defendant/Respondent the Law firm of Messrs. M.K Mulei & Company Advocates filed their written submissions dated 27th March, 2023. Mr. Mulei Advocate humbly commenced his submissions by stating that the application herein lacked merit and ought to be dismissed at the earliest possible opportunity.
25. The Learned Counsel asserted that the application sought for both stay of execution and also for an order of an injunction. The said orders were premised on the allegation that an arguable appeal had been filed the gist of which appeal is that the Plaintiff/Applicant herein was not given a right to a fair hearing during the conduct of this case.
26. The provision Order 18 of the *Civil Procedure Rules* 2010 under which the application was brought among other laws cited by the Applicant deals with the procedure during hearing of suits. He humbly submitted that this application never dealt with the issue on stay of execution of the Judgement or Decree derived from it and injunctions but other reliefs on being denied to be heard. Further the provisions of the said order were fully observed during the hearing this suit since each party was given a chance to be heard and the Plaintiff/Applicant who was represented by an able counsel opted to rely on the statement she had filed. No right to a fair hearing was infringed in the circumstances.
27. The 1st Defendant/Respondent humbly submitted that the Plaintiff/Applicant did not have any arguable appeal. No ground or Memorandum of Appeal had been annexed to the application stating clearly what the appeal was all about. The only issue which could be discerned from the affidavit were allegations that the 1st Plaintiff/Applicant never testified *viva voce* due to the fact of having been abroad which cannot be said be a ground of appeal. Infact what the Applicant was trying to do was not to appeal on merit but to complain to the court that she was not called to give *viva voce* evidence after realizing that the decision did not go her way.
28. The Learned Counsel humbly submitted that there was no law requiring a party in a proceeding to give *viva voce* evidence. The Plaintiffs/Applicants had only filed a notice of appeal without any Memorandum of Appeal showing the grounds on which it was based. In the case of *OGM (Suing as the father of:- "KGW v FG & Another* [2020] eKLR.



29. The Plaintiff/Applicant had not annexed Memorandum from which this court could determine the existence of any arguable point hence the application ought to fail.
30. The 1st Defendant/Respondent submitted that the Notice of Appeal filed was fatally defective as it referred to a Judgment and decision which never existed since the Judgment was by a different judge and not the one mentioned in the notice.
31. The 1st Defendant/Respondent further and humbly submitted that in order for a right the provision under Articles 47 and 50 of the Constitution to be said to have been violated in any proceedings, the tribunal ought to have either acted unfairly or impartially on the person raising a complaint on such basis. In the present case the court gave each party an opportunity and was never prejudiced or impartial against any party hence the rights under the provision of Articles 47 and 50 of the Constitution were guarded. On the above submissions, the Learned Counsel relied e rely on the authority of: "Shivaji Simon v Advocates Disciplinary Tribunal; Nelly Mutua Wafula & 2 Others (Interested Parties) [2022]eKLR".
32. Lastly the 1st Defendant/Respondent humbly argued that that the' affidavit in support of the application contravened the provisions of Order 19 (1) of the Civil Procedure Rules, 2010 which required that affidavits be confined to such facts as the deponents is able of his knowledge to prove.
33. The deponent of the said affidavit was alleging that he had authority to swear an affidavit on behalf of the 1st Plaintiff/Applicant. No such authority has been annexed to the affidavit. Further the deponent having never participated in the proceedings earlier can only have heard of the things he deponed about thereby contravening the law.
34. On the above submissions, the Learned Counsel urged this honourable court to dismiss the application for stay with costs and allow the 1st Defendant/Respondent enjoy the fruits of his Judgment.

IV. Analysis and Determination

35. I have keenly assessed the pleadings, being the Notice of Motion application dated 30th November, 2021 by the 1st and 2nd Plaintiffs/Applicants herein, the written submissions and the several authorities cited by the parties herein, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.
36. To reach an informed, reasonable and equitable decision the Honorable Court has framed three (3) salient issues for its determination. These are:-
 - a. Whether the Notice of Motion application dated 30th November, 2021 by the Plaintiffs/Applicants herein has demonstrated that the orders of stay of execution pending appeal are merited.
 - b. Whether the parties herein are entitled to the reliefs sought.
 - c. Who bears costs of the application.

IssueNo a). Whether the Notice of Motion application dated 30th November, 2021 by the Plaintiffs/Applicants herein has demonstrated that the orders of stay of execution pending appeal are merited;

37. Under this Sub title, the main substratum of this application is on whether to grant the orders of stay of execution pending the hearing and determination of an appeal following the delivery of a Judgment.



The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 Rule 6 (2) of the [Civil Procedure Rules](#) which provides:-

Rule 6 (1) states as follows:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.”

38. From the above provisions a number of ingredients to be considered while granting the orders for stay of execution. To begin with, there ought to be an appeal preferred at the appellate court emanating from a party being aggrieved from a Judgement delivered by the Superior Court. My understanding of an appeal is as envisaged under Rule 82 of the [Appellate Jurisdiction Court Act](#). Clearly and as stated in the case cited by the Learned Counsel for the Respondent of [OGM \(Suing as the father of:- “KGW v FG \(Supra\)](#) where the Court held that:-

“The mere filing of Notice of Appeal is not enough to establish sufficient cause envisaged under Order 42 Rule 6 *Civil Procedure Rules*, a Memorandum of Appeal would in my view provide cogent evidence of existence of sufficient cause.”

That is to say, an appeal is not a mere filing of a Notice of Appeal.

39. Additionally, the other ingredients to be considered are if there is in existence:-
- a. Substantial loss may result to him unless the order is made;
 - b. That the application has been made without unreasonable delay; and
 - c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
40. These principles were enunciated in “[Butt v Rent Restriction Tribunal](#) [1979] the Court of Appeal provided what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said thus; -

‘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.

- b. 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.
- c. 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.



- d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

41. This was buttressed in “[RWW v EKW](#) [2019] eKLR, where the Court stated thus:-

“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.”

IssueNo b). Whether the parties herein are entitled to the reliefs sought.

42. Under this Sub heading, the Court wishes to apply all the legal principles and the ingredients set out under the provision of Order 42 Rules (6) (1) of the *Civil procedure Rules*, 2010 to the instant case. Firstly, from the record apart from a notice of appeal before the Court of Appeal dated 1st December, 2012 and marked as “JMM – 6” was not an appeal. There is no Memorandum of Appeal filed as required by Law. Thus, it would be difficult for the Court to appreciate the magnitude, the issues being raised and whether they are arguable or not for the Court to consider while granting the orders being sought. Secondly, on whether the applicant is likely to have substantial loss has not been demonstrated with empirical documentary evidence at all. Instead, the Plaintiffs/Applicant has spend a large part of the application justifying why she was not able to testify as she was abroad. To me the application seem to be addressing issues on fair hearing and/or a right to be heard without before being condemned as enshrined under Article 25 (C) and 50 (1) of the *Constitution* of Kenya, 2010. The Plaintiffs/Applicants seem to be urging Court to sit as an appeal on its own decision to re – consider all the pertinent issues to be adduced by the 1st Plaintiffs/Applicant through a Viva voce evidence and which the Court would be able to arrive at a different decision.

43. On the requirement of proving substantial loss, the Applicants herein avers that they stand to suffer substantial loss and irreparable damage if the orders sought are not granted. The Court of Appeal in the case of “[Mukuma v Abuoga](#) [1988] KLR 645 described substantial loss as;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

44. In an application of this nature, the Applicant is mandated to demonstrate the loss they stand to suffer if the order for stay is not granted. In the affidavit it is deponed that loss would be incurred by no supporting evidence is provided to substantiate this claim. It trite law that this must be substantiated. This was echoed in the case of:- “[Kenya Shell Limited v Kibiru](#) [1986] KLR 410” where the Court provided thus:-

“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 corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.

45. Apart from stating that if the orders sought are not granted, the Defendant/Respondent will proceed to execute the Decree emanating from the Judgement of this Court delivered on 18th November, 2021 by evicting and interfering with the suit property, there has been nothing placed before this Court to show that would happen. This Court insists on tangible evidence being placed before it to demonstrate this assertions. The Court is a life to the fact that the Defendant/Respondents ought to be in a position to enjoy the fruits of the Judgement unless otherwise stated by law.
46. Thirdly, on the requirement of time limits of filing the application. I make the observation that the Applicants filed the application on 30th November 2021. This was twelve (12) days after delivery of the Judgment dated 18th November 2021. In all fairness, this was done without any unreasonable nor inordinate delay at all as required under Order 42 Rule 6 of the *Civil procedure Rules*, 2010.
47. Finally, on the requirement of providing security. The purpose of providing security is well elaborated 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.”

48. The Plaintiffs/Applicants, failed to provide any security. Provision of security is coached in mandatory terms under Order 42 Rule 6. In the case of “*Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others* [2015] eKLR, where it was held that:-

‘On the issue of providing of security, the Applicant has not provided any security say the title deed of the suit properties. Provision of security is coached in mandatory terms under Order 42 rule 2 . “... 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 binding’ are deliberately used and are useful here, for they refer to the 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 interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

48. Taking account of all the above factors, I find that the Plaintiffs/Applicants have failed to prove grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the *Civil Procedure Rules*. For these reasons, the application must fail.



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

49. It is trite law that costs follow the vent and is usually a matter of Court’s discretion as provided In the case of:- *Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ibururu Dairy Farmers Co-operative Society Ltd* Judicial Review application no 6 of 2014 court held as follows: -

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

50. The matter herein was unopposed and as such I order the Plaintiffs/Applicants to bear their own cost.

V. Conclusion & findings.

51. Upshot of the matter having caused an elaborate analysis to the framed issues herein, the Honorable Court proceed based on the principles of preponderance of probabilities and the balance of convenience to make the following specific orders:-

- a. That the Notice of Motion application dated 30th November, 2021 by the Plaintiffs/Applicants herein found to be unmeritorious and hence be and is hereby dismissed.
- b. That the parties to bear their own costs.

It Is So Ordered Accordingly

**RULING DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS, SIGNED,
DATED AT MOMBASA THIS 18TH DAY OF OCTOBER 2023**

.....

HON. JUSTICE L.L. NAIKUNI (MR)

ENVIRONMENT & LAND COURT

MOMBASA

Ruling delivered in the presence of:-

- a. M/s. Yumah, the Court Assistant.
- b. Mr. Bosire Advocate for the Plaintiffs/Applicants
- c. No appearance for the Defendants/Respondents*

JUSTICE L.L. NAIKUNI

