



**Matus & another v Intex Construction & another; National Environment Management Authority & 2 others (Interested Parties) (Environment & Land Petition E003 of 2021) [2023] KEELC 21623 (KLR) (15 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21623 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E003 OF 2021  
JO MBOYA, J  
NOVEMBER 15, 2023**

**BETWEEN**

**JASON EDWARD MATUS ..... 1<sup>ST</sup> PETITIONER**

**CATHERINE ROSEMARY BOND ..... 2<sup>ND</sup> PETITIONER**

**AND**

**INTEX CONSTRUCTION ..... 1<sup>ST</sup> RESPONDENT**

**SAMIT GEHLOT ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... INTERESTED PARTY**

**CITY COUNTY GOVERNMENT OF NAIROBI ..... INTERESTED PARTY**

**SPRING VALLEY RESIDENTS' ASSOCIATION ..... INTERESTED PARTY**

**RULING**

**Introduction and Background**

1. The Petitioners/Applicants herein approached the Honorable court vide an amended Petition dated the 22<sup>nd</sup> June 2021; and in respect of which same sought for various reliefs pertaining to and concerning (sic) offensive developments which were (sic) being undertaken on L.R No. 7158/148, situate within Upper Spring Valley Estate, in the City of Nairobi.
2. Subsequently, (the Petition details in terms of the preceding paragraph) was heard and disposed of vide Judgment rendered on the 20<sup>th</sup> December 2021; whereupon the Honourable court proceeded to and



struck out the Further amended Petition and by extension the entire suit anchored on the Further amended Petition.

3. Other than the order whereby the court struck out the Further amended Petition, the Honourable Court proceeded to and awarded costs of the suit to the Respondents and the 2<sup>nd</sup> Interested Party, respectively.
4. Following the award of costs to and in favor of the Respondents, the Respondents proceeded to and filed a Bill of costs dated the 21<sup>st</sup> August 2023; and in respect of which same now seek to tax the costs awarded at the foot of the Judgment and thereafter recover same from the Petitioners/Applicants herein.
5. Arising from the foregoing, the Petitioners/Applicants have now filed the Notice of Motion Application dated the 4<sup>th</sup> October 2023; and in respect of which same have sought for the following reliefs;
  - i. ....Spent.
  - ii. ....Spent.
  - iii. ....Spent.
  - iv. That pending the hearing and determination of the appeal in Nairobi Court of Appeal Civil Appeal No. E439 of 2022 against the judgment and decree of this court delivered on the 21<sup>st</sup> December 2021 and consequential orders or proceedings arising therefrom including but not limited to taxation/assessment of costs awarded by the said judgment and decree and execution arising therefrom.
  - v. The costs of this Application to be in the cause.
6. Instructively, the instant Application is predicated and anchored on the various grounds enumerated in the body of the Application. Furthermore, the Application is supported by the affidavit of the 2<sup>nd</sup> Petitioner/Applicant sworn on the 3<sup>rd</sup> October 2023; and to which the Deponent has annexed one composite document alluded to as Exhibit GRB-1, thereto.
7. Upon being served with the Application under reference, the Respondents herein filed Grounds of opposition and in respect of which same has contended that the Application before hand has not only been mounted with unreasonable and inordinate delay, but same is also devoid of merits.
8. On the other hand, the 2<sup>nd</sup> Interested Party also filed Grounds of opposition dated the 18<sup>th</sup> October 2023; and in respect of which same has similarly contended, inter-alia, that the current Application is not only premature, but same is also misconceived. Similarly, the 2<sup>nd</sup> Interested Party has also contended that the Application before hand seeks for an order of stay of execution, albeit in respect a non-existent Judgment and Decree.
9. Suffice it to point out that the Application beforehand came up for hearing on the 18<sup>th</sup> October 2023; whereupon the advocates for the respective Parties covenanted to canvass the Application by way of written submissions. Consequently and in this regard, the court proceeded to and circumscribed the trimline for the filing and exchange of the written submissions.
10. Pursuant to and in line with the directions of the Honourable court, the Petitioners/Applicants proceeded to and filed written submissions dated the 27<sup>th</sup> October 2023; whereas the Respondents filed written submissions dated 31<sup>st</sup> October 2023. On the other hand, the 2<sup>nd</sup> Interested Party filed written submissions dated the 1<sup>st</sup> November 2023.



11. For coherence, the three sets of submissions are on record.

**Parties' Submissions:**

**a. Applicant's Submissions:**

12. Vide written submissions dated the 27<sup>th</sup> October 2023; the Applicants adopted the grounds at the foot of the Application, as well as reiterated the contents of the Supporting affidavit thereof. Furthermore, the Applicants herein thereafter raised and highlighted two[2] issues for consideration by the Honourable court.
13. Firstly, Learned counsel for the Applicants has submitted that the Applicants herein felt aggrieved and dissatisfied with the Judgment and consequential decree of the court (sic) issued on the 21<sup>st</sup> December 2021; and thereafter proceeded to and filed a Notice of Appeal, evidencing their desire to challenge the entire Judgment and decree.
14. Additionally, Learned counsel for the Applicants has ventured forward and submitted that subsequently the Applicants herein compiled and filed the Substantive appeal to the Court of Appeal vide Civil Appeal No. E439 of 2022, which appeal is still pending hearing and determination before the Court of Appeal.
15. On the other hand, Learned counsel for the Applicants has further contended that the appeal before the Court of Appeal raises several and pertinent grounds of appeal and in particular, Learned counsel has invited the court to take cognizance of Ground 16 of the Memorandum of Appeal, which highlights the question of award of costs upon the dismissal of the Petition.
16. To the extent that the appeal pending before the Court of Appeal is said to be arguable, Learned counsel for the Applicants has impressed upon the Honourable court that there does exist sufficient cause to warrant the grant of an order of stay of execution pending the hearing and determination of the appeal before the Court of Appeal.
17. Invariably, Learned counsel for the Applicants has thereafter contended that the Applicants herein have satisfied the requisite ingredients attendant to the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules 2010.
18. Secondly, Learned counsel for the Applicants has submitted that the Applicants herein shall be disposed to suffer Substantial loss in the event that the impugned taxation of the bill of costs proceeds, culminating into the issuance of a Certificate of taxation.
19. Besides, Learned counsel for the Applicants has submitted that in the event of issuance of Certificate of taxation, the Respondents herein and the 2<sup>nd</sup> Interested Party; shall be at liberty to proceed with execution and thereby recover the costs attendant to the certificate of taxation, which execution shall occasion substantial loss to the Applicants.
20. Furthermore, Learned counsel for the Applicants has submitted that taxation of bill of costs is a process towards the execution and consequently, such a process is amenable to an order of stay of execution by the Honourable court.
21. In support of the foregoing submissions, Learned counsel for the Applicants has cited inter-alia the holding in the case of KSC International Ltd (under receivership) & 3 Others vs Gichuki King'ara & Co Advocates (2019)eKLR, Nairobi City Council vs Tom Ojienda & Associates (Civil Appeal Application ) E080 of 2022 (2022) KECA 1326 (KLR), Karuturi Networks Ltd & Another vs Dally



& Figgis Advocates (2009)eKLR and African Safari Club Ltd vs Safe Rentals Ltd (2021)eKLR, respectively.

22. Lastly, Learned counsel for the Applicants has submitted that the Petition under reference was in respect of a Public Interest litigation and hence the court ought not to have condemned the Applicants to foot and/or bare the costs of the proceedings.
23. Nevertheless, Learned counsel for the Applicants has submitted that insofar as costs were decreed, the Applicants herein shall be amenable to offer security for the due performance of the decree in the sum of Kes.100, 000/= only, which Learned counsel for the Applicants contends to represent the scale fees provided under the Advocates Remuneration Order, 2014, on account of Instruction fees.
24. Based on the foregoing submissions, Learned counsel for the Applicants has therefore impressed the court to find and hold that the Application herein is meritorious and thus worthy of being granted.

**b. Respondents' submissions:**

25. The Respondents herein filed written submissions dated the 31<sup>st</sup> October 2023; and in respect of which same has raised, highlighted and canvassed two[2] pertinent issues for consideration by the Honourable court.
26. First and foremost, Learned counsel for the Respondents has submitted that the bill of costs filed by and on behalf of the Respondents has not been taxed yet. For coherence, Learned counsel has contended that the said bill is still the subject of taxation before the Taxing master/Deputy Registrar.
27. To the extent that the bill of costs has not been taxed yet, Learned counsel for the Respondents has submitted that the process of taxation, which by itself a lawful process, cannot be contended to pose substantial loss to the Applicants herein either in the manner contended or at all.
28. To buttress the submissions that the process of taxation cannot ipso facto occasion substantial loss to the Applicants, Learned counsel for the Respondents has cited and relied on, inter-alia, the case of Doris Awion Abira vs M. I Wafula & Co Advocates (2021)eKLR, Deposit Protection Fund vs Rosaline Njeri Macharia (2006)eKLR and Pius Musimba Mwasia & 15 Others vs Onesmus Ndolo Ng'eta & 3 Others (2022)eKLR, respectively.
29. Secondly, Learned counsel for the Respondents has submitted that prior to and before granting an order of stay of execution pending the hearing and determination of an appeal, the court is obliged to ascertain and establish that substantial loss is likely to arise and/or accrue.
30. Nevertheless, in respect of the instant matter, Learned counsel for the Respondents has submitted that the Applicants herein have neither established nor demonstrated the nature or kind of substantial loss, if any, that the Applicants shall be disposed to suffer.
31. Furthermore, Learned counsel for the Respondents has submitted that in the absence of substantial loss; which is the cornerstone to the grant of an order of stay of execution, the Applicants herein are therefore not entitled to the reliefs sought at the foot of the Application dated the 4<sup>th</sup> October 2023.
32. In support of the foregoing submissions, Learned counsel for the Respondents has cited and relied on, inter-alia, the case James Wangalwa & Another vs Agnes Naliaka Chesetu (2012)eKLR and Kenya Shell Ltd vs Benjamin Karuga Kibiru Another (1986)eKLR, respectively.
33. In a nutshell, Learned counsel for the Respondents has contended that the Application beforehand is not only misconceived, but is devoid of merits; and hence same ought to be dismissed with costs to the Respondents.



**c . 2<sup>nd</sup> Interested Party's Submissions:**

34. The 2<sup>nd</sup> Interested Party filed written submissions dated the 1<sup>st</sup> November 2023; and in respect of which same has reiterated the grounds of opposition dated the 18<sup>th</sup> October 2023; and thereafter highlighted two salient issue for due consideration by the Honourable court.
35. It is the submissions of the 2<sup>nd</sup> Interested Party that the Applicants herein have neither established nor demonstrated that the Applicants are disposed to suffer substantial loss or at all, unless the orders of stay of execution are granted.
36. Additionally, Learned counsel for the 2<sup>nd</sup> Interested Party has submitted that what is before the court is the question of taxation of Party and Party costs, which upon taxation shall culminate into the issuance of a Certificate of taxation defining the quantum of costs payable.
37. On the other hand, Learned counsel for the 2<sup>nd</sup> Interested Party has submitted that the costs are taxed and ascertained in monetary terms; and that once same are so taxed, the recovery of such costs shall not occasion any substantial loss or at all.
38. Further and in any event, Learned counsel for the 2<sup>nd</sup> Interested Party has contended that where an Applicant impleads and allude to substantial loss, it behooves same to avail evidence of such loss. Instructively, Learned counsel has pointed out that it is not enough to allege that substantial loss shall arise.
39. In support of the foregoing submissions Learned counsel has cited and relied in the holding of the case of Deposit Protection Fund vs Rosaline Njeri Macharia (2006)eKLR and RWW vs EKW (2019)eKLR.
40. Secondly, Learned counsel for the 2<sup>nd</sup> Interested Party has also submitted that the current Application by and on behalf of the Applicant has been mounted with unreasonable and inordinate delay, which delay negates the entire Application before the Honourable court.
41. Other than the forgoing, Learned counsel has submitted that despite coming to court after more than the two years after the delivery of the Judgment and the consequential decree, the Applicants herein have neither accounted for nor explained the reasons for the delay.
42. Owing to the foregoing, Learned counsel for the 2<sup>nd</sup> Interested Party has therefore invited the court to find and hold that the instant Application is defeated by the Doctrine of Latches and hence the court ought not to aid the indolent, including the Applicants herein.
43. In support of the submissions that the current Application has been mounted with unreasonable and inordinate delay, Learned counsel for the 2<sup>nd</sup> Interested Party has cited and relied in the holding of the case Joshua Ng'atu vs Jane Impinda & 3 Others (2019)eKLR.
44. Invariably, Learned counsel for the 2<sup>nd</sup> Interested Party has contended that the Applicants herein has neither met nor satisfied the threshold underpinned by the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, 2010.
45. Arising from the foregoing, the 2<sup>nd</sup> Interested Party has therefore invited the court to find and hold that the current Application is devoid of merits and ought to be Dismissed with costs.



### **Issues for Determination:**

46. Having reviewed the Application beforehand and the Responses thereto; and upon consideration of the submissions filed on behalf of the respective Parties, the following issues do emerge for due consideration and determination;
  - i. Whether the instant Application is Legally tenable taking into account that the decree of the court constitutes a Negative order and not otherwise.
  - ii. Whether the Applicants herein have established or demonstrated that Substantial loss shall arise and/or ensue; in the event the orders sought are not granted.
  - iii. Whether the instant Application was mounted timeously and with due promptitude and if not; whether the application is defeated by the doctrine of Latches.

### **Analysis and Determination**

#### **Issue Number 1 Whether the instant Application is Legally tenable taking into account that the decree of the court constitutes a Negative order and not otherwise.**

47. Before venturing to analyze the issue mentioned herein before, it is appropriate to observe that the Petition beforehand was filed and commenced by the Petitioners/Applicants. For coherence, the proceedings herein were premised and/or anchored on the Further amended Petition dated the 22<sup>nd</sup> June 2021.
48. Subsequently, it suffices to point out that the Petition under reference was duly canvassed by the Parties and thereafter same was disposed of vide Judgment rendered on the 20<sup>th</sup> December 2021 and not on the 21<sup>st</sup> of December 2021, as alleged by the Applicants herein.
49. Furthermore, after due consideration of the issues that were raised and highlighted at the foot of the Further amended Petition dated the 22<sup>nd</sup> June 2021, the Honorable court found and held that the Petition beforehand was not merited.
50. Consequently and in this regard, the court proceeded to and struck out the Further amended Petition with costs too the Respondents and the 2<sup>nd</sup> Interested Party, respectively.
51. Arising from the foregoing, there is therefore no gainsaying that the final orders of the court/outcome of the matter, was an order in the negative and not otherwise. Simply put, the court struck out the Petition and hence did not direct the Petitioners/Applicants to do or abstain from doing any act, whatsoever.
52. Premised on the foregoing, the question that does arise is whether such a decree, like the one beforehand, wherein the Petition/suit was struck out is capable of attracting an order of stay of execution pending the hearing and determination of the appeal to the Court of Appeal.
53. To my mind, where the resultant order and/or decree of the court culminates into a negative order, such an order/decree, is incapable of being stayed either in the manner sought or otherwise.
54. To this end, it suffices to point out that there are a legion of decisions handed down by the Court of Appeal and whose import and tenor is explicit and crystal clear. Instructively, the golden thread discernable from the plethora of decisions, some of which, shall be referenced presently, is to the effect that a negative order cannot be the basis of an order of stay of execution.



55. Firstly, it is impetative to recall and reiterate the ration decidendi in the case of *Western College of Arts & Applied Technology vs Oranga* (1976)eKLR, where the Court of Appeal stated and held thus;

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.

56. Furthermore, the position enunciated in the decision (*supra*) was re-visited and amplified by the Court of Appeal in the case of *Charles Barongo Nyakeri vs The County Government of Kisii* (2020)eKLR where the court stated and held as hereunder;

11. This Court has also consistently held that a negative order cannot be executed, and that where the trial court in its judgment has dismissed a suit, that is a negative order that is not amenable to grant of any stay. See *Western College of Arts & Applied Sciences V Oranga & Others* [1976] KLR 63.

12. The applicant’s claim was dismissed by the ELRC. What followed was a negative decree that cannot be executed. The order of stay of execution of the trial court’s judgment pending hearing and determination of the intended appeal sought by the applicant cannot therefore be granted.

57. Similarly, the now established, trite and hackneyed position that an order of stay of execution cannot issue in respect of a negative order/decreed was re-emphasized by the Court of Appeal in the case of *Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme versus Millimo, Muthomi & Co. Advocates & 2 others (Civil Appeal (Application) E383 of 2021) [2022] KECA 491 (KLR)* (18 February 2022) (Ruling), where the court held thus;

“17. We start by acknowledging the fact that the ruling appealed against was a compounded one dealing with 2 applications, which yielded two different results. The first application, which was made by the applicant, was dismissed. As submitted by learned counsel for the 1st respondent, the position taken by this Court in respect of applications for stay of execution in respect of negative orders is clear. Negative orders cannot be stayed. We reiterate the sentiments of the predecessor of this Court in its decision in *Western College of Arts and Applied Sciences vs Oranga & Others* (1976-80) 1 KLR, where the Court stated in respect of stay of execution as follows:“But what is there to be executed under the judgment, the subject of the intended appeal” The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In *Wilson v Church*, the High Court had ordered the trustees of a church to make a payment out of that fund

In the instant case, the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in and application for stay, it is so ordered.”Further, in the more recent case of *Kenya Commercial Bank*



Limited vs Tamarind Meadows Limited & 7 Others [2016] eKLR, the Court of Appeal expounded on stay of execution stating:

16. In *Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah* [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows: “The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences vs. Oranga & Others* [1976] KLR 63 at page 66 paragraph C).”
18. The orders dismissing the applicant’s application to review, set aside or otherwise vary its earlier conditions extending time within which to file a reference against the Bill of costs cannot be stayed. The second aspect of the ruling was in respect of the application by the 1st respondent seeking garnishee orders against the 1st respondent, which orders were granted. The applicant challenges the said orders on appeal and asks us to stay their execution.
58. From the foregoing exposition of the law, there is no gainsaying that the order of stay of execution pending the hearing and determination of the appeal before the court of appeal, which is being sought by the Applicants herein, have certainly been mounted in vacuum.
59. Consequently and in any event, the orders sought are legally untenable.
60. Before departing from the issue as to whether the orders of stay sought are legally tenable, it is also imperative to underscore that the orders of stay in question were sought in respect of (sic) a Judgment and decree alleged to have been delivered on the 21<sup>st</sup> December 2021.
61. Nevertheless, having reviewed the entire record of the court, I have not come across any Judgment that was delivered by this court on the 21<sup>st</sup> December 2021; as alleged or at all. To the contrary, the only Judgment that was rendered by the court was made on the 20<sup>th</sup> December 2021 and not otherwise.
62. To the extent that there is no Judgment and decree rendered on the 21<sup>st</sup> December 2021, capable of being stayed, it is my finding and holding that the current Application, has also been mounted against a non-existent Judgment and decree.
63. Suffice it to point out that Parties are bound by their pleadings and in respect of the instant matter, the Applicants are bound by the terms of the Application dated the 4<sup>th</sup> October 2023. See the decision in the case of *Dakianga Distributors Ltd vs Kenya Seed Company Ltd* (2015)eKLR.
64. In a nutshell, my answer to issue number one [1]; is to the effect that the orders sought at the foot of the current Application are legally untenable and thus un- available to the Applicants.



## Issue Number 2

### **Whether the Applicant herein have established or demonstrated that substantial loss shall arise and/or ensue in the event the orders sought are not granted.**

65. The Applicants herein have contended that the taxation of the Party and Party bill, which has since been mounted by the Respondents is likely to occasion substantial loss to the Applicants herein and hence the basis of the Application for stay of execution pending appeal.
66. Having contended that the taxation proceedings are likely to occasion substantial loss to the Applicants, it was incumbent upon the Applicants herein to venture forward and to place before the Honourable court cogent and plausible evidence to underpin the allegations that the taxation of the bill of costs shall indeed occasion substantial loss.
67. Nevertheless, it is import to underscore that where one adverts to and/or impleads substantial loss, it is not enough for such allegations to be thrown onto the face of the court and thereafter anticipate that the court would return a favorable finding or at all, irrespective of proof.
68. In my humble view, it behooves an Applicant to not only implead substantial loss, but to venture forward and prove that indeed substantial loss, in its various perspectives/ nuances, shall indeed accrue if the orders of stay are not granted.
69. Without belaboring the point, it suffices to reiterate the decision in the case of Kenya Shell Ltd versus Benjamin Karuga Kibiru & Another (1986)eKLR, where the court of appeal stated 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.”
70. Arising from the foregoing, it is therefore incumbent upon this court to interrogate whether the Applicants herein have established and demonstrated that same are disposed to suffer substantial loss. Suffices to point out that the evidence of substantial loss ought to be adverted to and deponed in the affidavit.
71. Despite the foregoing, it is worthy to underscore that in the entire body of the Supporting affidavit sworn on the 3<sup>rd</sup> October 2023, the Deponent thereto has neither supplied nor availed evidence, to anchor the allegations that same shall be disposed to suffer substantial loss.
72. Furthermore, the only averment alluded to at paragraph 5 of the Supporting affidavit is to the effect that the Applicants herein shall incur costs in defending the taxation beforehand; and that the costs incurred in defending the taxation shall cause and/or occasion substantial loss.
73. Nevertheless, I beg to point out that it was the duty and obligation of the Applicants to proffer explicit and credible evidence pertaining to substantial loss and to show how the intended taxation shall occasion such loss. Further and in addition, it is worth noting that evidence of substantial loss ought not to be the basis of inference, implication and/or anticipation by a court.



74. Barring repetition, it is important to reiterate that Evidence of Substantial loss, must be explicit, apparent and discernable from the Supporting Affidavit and not otherwise. For good measure, such evidence must not be the basis of hypothesis.
75. On the other hand, it is also important to underscore that the evidence of substantial loss cannot be adverted to, supplied and/or be availed vide submissions, in the manner that Learned counsel for the Applicants has attempted in respect of the instant matter.
76. Simply put, the submissions alluded to and anchored vide Paragraph 27.0 of the written submissions by the Applicants have therefore been mounted on quick- sand and are devoid of probative value.
77. Lastly, it is also significant to underscore that execution proceedings are lawful and legitimate and hence execution per se, cannot be contended to occasion substantial loss. For coherence, an Applicant must proceed further and enumerate how the imminent execution would impact on him/herself and thus occasion substantial loss. For clarity, this can only done and achieved by adverting to such other factors and reasons, which would underpin such loss which ipso facto, may not be compensable in monetary terms.
78. To buttress the foregoing, I beg to adopt and endorse the holding of the Court in the case of James James Wangalwa & another versus Agnes Naliaka Cheseto Misc Application No 42 of 2011 [2012] eKLR., where the court stated and held as hereunder;

“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. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein Vs .Chesoni [2002] 1KLR 867, and also in the case of Mukuma Vs. Abuoga quoted above.

79. Instructively, I beg to state that even if the determination of the instant Application was based on proof of Substantial loss, (which has not been satisfied), I would still have come to the conclusion that the Applicants herein have not met the requisite threshold, upon which the orders of stay of execution could issue and or be granted.

### **Issue Number 3:**

#### **Whether the instant Application was mounted timeously and with due promptitude and if not; whether the application is defeated by the doctrine of Latches.**

80. Other than the issues which have been adverted to and calibrated upon in terms of the preceding paragraphs, it is important to recall that the Judgment and consequential decree that anchors the current Application was rendered on the 20<sup>th</sup> December 2021.
81. On the other hand, it is not lost on this Honourable court that the current Application was not mounted up to and including the 4<sup>th</sup> October 2023. Quiet clearly, the Application has been mounted after a duration of more than 22 months from the date of the impugned decree was rendered.



82. Consequently and in this regard, the question that does arise is; whether the Application was mounted timeously and with due promptitude or otherwise.
83. To my mind, one does not require to be a reputable Mathematician to hold/ discern that the duration taken before the filing of the current Application was grossly unreasonable and thereby ought to have been accounted for.
84. Nevertheless, it suffices to state that despite having filed the current Application after a whooping 22 Months from the date of delivery of the Judgment; the Applicants herein did not find it expedient and/or mete to avail to the court the reasons, if any, underpinning the delay.
85. Surely, the Applicants were called upon to mount the Application without unreasonable delay and hence where there is some scintilla of delay, it was obligatory for the Applicants to account for the unreasonable delay by placing before the Honourable court, cogent, plausible and credible explanation.
86. Sadly however, the Applicants herein did not deem it appropriate and left it for the court to imagine what may have caused the delay. In the absence of any such explanation, the obvious inference to be drawn by a court of law and equity; is to the effect that the delay was deliberate, negligent and representative of inaction, on the part of the Applicants.
87. Without belaboring the point, it is my humble finding and holding that the current Application has been mounted with unreasonable and inordinate delay, which delay has neither been accounted for nor explained.
88. Consequently and without any iota of hesitation, I come to the conclusion that the Application beforehand is also negated by the Doctrine of laches, which frowns upon inordinate delay before approaching a court of Justice for Equitable intervention.
89. As pertains to the import, tenor and legal consequence of the Doctrine of laches, it suffices to cite and reiterate the holding in the case of Chief Land Registrar & Another versus Nathan Tirop & Others (2018)eKLR, where the Court of Appeal held thus;

“ 55. Laches means the failure or neglect, for an unreasonable length of time, to do that which by exercising due diligence could or should have been done earlier; it is negligence or omission to assert a right within a reasonable time, warranting a presumption that the party entitled to assert it either has abandoned it or declined to assert it. This equitable defense is based upon grounds of public policy, which requires the discouragement of stale claims for the peace of society. (See Republic of Phillipines vs. Court of Appeals, G.R. No. 116111, January 21, 1999, 301 SCRA 366, 378-379).”

90. Remarkably, Equity does not aid the indolent. In respect of the instant matter, the Applicants herein, even assuming that same had established sufficient cause (which is not the case), truly went to slumber; and cannot at this juncture wake up to partake of Equitable discretion. Period.

**Final Disposition:**

91. Having evaluated and analyzed the thematic issues itemized in the body of the Ruling, it is evident that the current Application seeking orders of stay of execution pending the hearing and determination of the Appeal before the Court of Appeal, is not only pre-mature and misconceived, but legally untenable.



92. Consequently and in the premises, the Application dated the 4<sup>th</sup> October 2023; be and is hereby Dismissed with costs to the Respondents and the 2<sup>nd</sup> Interested Party, which costs shall be taxed by the Deputy Registrar of the Honourable court.

93. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF NOVEMBER 2023.**

**OGUTTU MBOYA**

**JUDGE**

**In the presence of:**

Benson – Court Assistant.

Ms Avuga h/b for Mr. Litoro for the Petitioners/Applicants

Ms. Joy Impano for the Respondents

Ms. Katana h/b for Mr. George Kithi for the 2<sup>nd</sup> Interested Party

