



**Kanyeki & another (the registered trustees suing on behalf of Kenya Railway Staff Retirement Benefits Scheme) v Blue Water Properties Limited & another (Environment & Land Case E002 of 2021) [2023] KEELC 22023 (KLR) (5 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22023 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E002 OF 2021  
LL NAIKUNI, J  
DECEMBER 5, 2023**

**BETWEEN**

**JAMES KARIUKI KANYEKI ..... 1<sup>ST</sup> PLAINTIFF**

**WAMAKOTA TOILI ..... 2<sup>ND</sup> PLAINTIFF**

**THE REGISTERED TRUSTEES SUING ON BEHALF OF KENYA RAILWAY  
STAFF RETIREMENT BENEFITS SCHEME**

**AND**

**BLUE WATER PROPERTIES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**I&M BANK LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. The Ruling of this Honourable Court regards the Notice of Motion application dated 4<sup>th</sup> April, 2023. It was filed by James Kariuki Kanyeki, on behalf of the Plaintiffs/Applicants herein. The motion was based under the provision on the *Judicature Act*, Cap 8 of the Laws of Kenya, as well as the High Court (Practice and Procedure) Rules of 2023 — specifically, Part 1, rules 2 and 3a of the *Civil Procedure Act*, Cap 21, Laws of Kenya.
2. Upon service, the Defendants by way of opposing it, filed their replies accordingly.

**II. The Plaintiffs/Applicants' case**

3. The Plaintiffs/Applicants herein sought for the following orders:
  - a) Spent.



- b) This Honorable Court be pleased to issue an order of stay of execution if its ruling delivered on 21<sup>st</sup> March 2023 and orders emanating therefrom pending inter-parties hearing and determination of the appeal.
  - c) Costs of this application be provided for.
4. The application was based on the grounds, testimonial facts and the averments made out under the Supporting Affidavit of James Kariuki Kanyeki, sworn and dated even date together with annexures marked as “JKK” annexed hereto. He deponed as follows:-
- a) He was a registered trustee of the Plaintiffs/Applicants and knowledgeable in the relevant matters.
  - b) The Plaintiffs/Applicants held registered ownership of property Land Reference numbered Mombasa/Block[particulars withheld] (Hereinafter referred as “The Suit Property”), with a copy of the title annexed and marked as “JKK – 1”.
  - c) He deponed that the 2<sup>nd</sup> Defendant, I & M Bank Limited filed an application seeking to be joined in the suit and attached their intended Defence annexed and marked as “JKK – 2” and “JKK – 3” respectively.
  - d) The Defence never arose from the Lease agreement dated 28<sup>th</sup> May 2014 but from a Charge involving the suit property, wherein the parties to the Charge were Blue Water Properties Limited and I & M Bank Limited. The Court ruled on 21<sup>st</sup> March 2023, allowing the 2<sup>nd</sup> Defendant’s application dated 24<sup>th</sup> June 2023.
  - e) Being dissatisfied with the ruling, the Plaintiffs/Appellants instructed their Advocate on record to file a Notice of Appeal dated 30<sup>th</sup> March 2023 as per the attached copy marked as “JKK – 4”. At the same time, the Plaintiff/Applicant through his Advocates also requested for true and certified copies of the proceedings for purposes of lodging the appeal and provided evidence of payment of the requisite court fees, marked as “JKK - 5(a) and (b)”.
  - f) Pursuant to this, and from the delivered Ruling the Honourable Court directed that the Plaintiffs/Applicants amends their Complaint accordingly to include the 2<sup>nd</sup> Respondent (I & M Bank Ltd.) as a 2<sup>nd</sup> Defendant herein. However, the Plaintiffs/Applicants were aggrieved by this order taking that the subject matter before the Court was on the lease agreement dated 28<sup>th</sup> May 2014, in which the 2<sup>nd</sup> Defendant/Respondent was not a party.
  - g) The Plaintiffs/Applicants had also lodge an appeal and was concerned about the execution of Court orders, the inclusion of non - parties in the Lease Agreement dated 28<sup>th</sup> May 2014 and the continuation of proceedings with the 2<sup>nd</sup> Defendant/Respondent.
  - h) The Plaintiffs/Applicants believed there was arguable grounds of appeal, which were attached and marked as “JKK – 6”. The Plaintiffs/Applicants feared that if the orders granted by this Honourable Court on 21<sup>st</sup> March 2023 were not stayed pending the hearing and determination of the appeal, the same would be rendered nugatory and an academic exercise.
  - i) The Plaintiffs/Applicants contended that the ruling of 21<sup>st</sup> March 2023 was highly detrimental as it had included a non -party to the Lease Agreement dated 28<sup>th</sup> May 2014, leading to potential prejudice and irreparable loss and damage to the Plaintiffs/Applicants herein.
  - j) The Plaintiffs/Applicants urged for the Honourable Court to hear and grant the orders sought from the filed application. They urged for it to be heard and determined swiftly, and that



the orders requested be granted both temporarily and in substance, pending the determination of the appeal. Failure to grant the orders sought would render the appeal moot and merely an academic exercise.

### **III. The Responses by the 1<sup>st</sup> Defendant/Respondent**

5. The 1<sup>st</sup> Defendant/Respondent, through the Law firm of Messrs. Wainana Ireri Advocates LLP, filed grounds of opposition dated 29<sup>th</sup> May 2023. Central to their opposition was the contention that the Plaintiffs/Applicants never satisfied the criteria set by the provision Order 42 Rule 6 of the Civil Procedure Rules, 2010. Specifically, the Plaintiffs/Applicants neither demonstrated that they had the substantial case, bore the potential for substantial loss nor furnished any requisite security.
6. Further, it was argued that the application was both misguided and premature under the purview of the provision of Order 1 Rule 3 of the Civil Procedure Rules, 2010. Additionally, the provision of Order 1 Rule 5 of the Civil Procedure Rules, 2010 clarified that the 2<sup>nd</sup> Defendant/Respondent never needed to have a guaranteed successful outcome in the lawsuit to be included as a party. Given that the 2<sup>nd</sup> Defendant/Respondent's legal charge, their inclusion in the matter was justifiable, as the lawsuit's final verdict would undoubtedly impact their interests.
7. In essence, the Court made an informed choice in allowing the 2<sup>nd</sup> Defendant/Respondent's participation in the suit. Thus, the current application was not only premature, legally flawed but also an exploitation of the court's procedures. It was the position by the 1<sup>st</sup> Defendant/Respondent herein that this application ought to be dismissed outright.

### **IV. The Responses by the 2<sup>nd</sup> Defendant/Respondent**

8. The application by the Plaintiffs/Applicants was also opposed through the Replying Affidavit by the 2<sup>nd</sup> Defendant/Respondent dated 30<sup>th</sup> June 2023. The 2<sup>nd</sup> Respondent, submitted via the sworn statement of Mr. Andrew K. Muchina, P.o. Box [particulars withheld], Nairobi, Kenya. Mr. Muchina deposed as follows that:-
  - a) He served as the Senior Legal Manager and was duly authorized to swear the affidavit. He reiterated the contents of his affidavit dated 24<sup>th</sup> June, 2022 in support of the Bank's application.
  - b) The application by the Plaintiffs/Applicants for a stay, pending the intended appeal lacked merit. The Plaintiffs/Applicants had not satisfied the necessary conditions required for the granting of such orders.
  - c) They had failed to demonstrate that there existed an arguable appeal. Furthermore, the Plaintiffs/Applicants had not shown that a refusal of the stay would render the appeal nugatory.
  - d) It was further deposed that the Plaintiffs/Applicants had not demonstrated any potential for irreparable loss which could not be compensated by damages if the stay was denied. Moreover, they had not adequately illustrated how they would endure such irreparable loss.
  - e) It was emphatically asserted that, should the intended appeal be sought, the Bank believed it would suffer a greater hardship. This was premised on the fact that the Bank had already advanced a facility of a sum of Kenya Shillings Two Billion Two Seventy Two Million One hundred and Seven Thousand Seven Seventy Five Hundred and Sixty Two (Kshs.



2,272,107,775.62/=) to the 1<sup>st</sup> Defendant/Respondent, which was outstanding as of 2<sup>nd</sup> July, 2021.

- f) The loan was secured against the 1<sup>st</sup> Defendant/Respondent's title No. Mombasa/Block [particulars withheld]. The appellate ruling reinstated the property's title, which had been cancelled by the Judgment dated 15<sup>th</sup> December, 2021. Granting the stay would mean this Judgment would be upheld and the title remained cancelled, thereby compromising the Bank's position.
- g) If the stay was granted, the Bank's charge would lack security for the above stated loan advanced to the 1<sup>st</sup> Defendant/Respondent.
- h) Furthermore, the Bank continued to incur losses in terms of litigation costs, including costs related to this application and the proposed appeal.
- i) The Bank would suffer significantly more hardship than the Plaintiffs/Applicants, especially considering that the Plaintiffs/Applicants had not shown any willingness to deposit security amounting to the afore stated sum as loan should the appeal prove unsuccessful.
- j) In conclusion, the application should be dismissed to ensure the Bank's interests as a chargee was safeguarded.

#### **IV. Submissions**

- 9. The parties appeared in Court and by consensus it as directed that the application by the Plaintiffs/Applicants be disposed off by way of written Submissions. Pursuant to that all parties complied and a date for the delivery of the Ruling was reserved according.

#### **A. The Written Submissions by the Plaintiffs/Applicants**

- 10. On the 17<sup>th</sup> of July 2023, the Learned Counsel for the Plaintiffs/Applicants, through the Law firm of Messrs. O.M. Robinson & Company, presented detailed submissions concerning the matter at hand. Mr. Mukaya Advocate in his submissions articulated the profound concerns by the Plaintiffs/Applicants in support of this application. The Learned Counsel expressed that they feared the consequences should there be no stay on the execution of the Court's ruling delivered on 21<sup>st</sup> March 2023, along with the subsequent orders arising from it, pending the inter-parties hearing and determination of the appeal.
- 11. As a testament to the validity of their concerns, the Learned Counsel drew the Court's attention to the stipulations made out under the provision of Order 42 Rule 6 of the Civil Procedure Rules 2010. Furthermore, to buttress his point, the Learned Counsel Plaintiffs/Applicant made reference to the precedent set in the case of RWW v EKW (2019) eKLR, asserting that their appeal bore substantial merit. Additionally, in bolstering their position, they urged the Court to reflect upon the decisions made out in the cases of:- Joseph Leboo & 2 others v Director Kenya Forest Services & Another (2013) eKLR; Evanson Waitiki v Kenya Power & Lighting Co Limited [2018] eKLR and Civicon Limited v Kivuwatt limited & 2 others [2015] eKLR. The Learned Counsel contended that from these cases underscored the fundamental principle that it was paramount for Courts not to impose upon an Applicant as a party against whom they had not established cause of action.
- 12. Additionally, the Learned Counsel emphasized that the core of the appeal was not connected to the security provided by the 1<sup>st</sup> Defendant/Respondent to the 2<sup>nd</sup> Defendant/Respondent. The substantial amount cited by the 2<sup>nd</sup> Defendant/Respondent, in their sworn affidavit dated 30<sup>th</sup> June 2023 being as sum of which stood at a sum of Kenya Shillings Two Billion Two Seventy Two



Million One hundred and Seven Thousand Seven Seventy Five Hundred and Sixty Two (Kshs. 2,272,107,775.62/=) bore no relevance to the main issue of the appeal. According to the Learned Counsel, the essence of the appeal was it sought to challenge the inclusion of the 2<sup>nd</sup> intended Defendant in the suit and all subsequent proceedings.

13. In summation, the Learned Counsel earnestly beseeched the Court to weigh their submissions heavily and grant the Plaintiffs/Applicants' application dated 4<sup>th</sup> April 2023.

#### **B. The Written Submissions by the 1<sup>st</sup> Defendant/Respondent**

14. The 1<sup>st</sup> Defendant/Respondent, represented by the Law firm of Messrs. Wainana Ireri Advocates LLP, filed their submissions dated 29<sup>th</sup> April 2023 in response to the application dated 4<sup>th</sup> April 2023. Mr. Kabaiko Advocate from the very onset drew the Court's attention to the provision of Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010.
15. The Learned Counsel contended that the application failed to meet criteria set under this provision of the law. He made reference to the case of:- Winfred Nyawira Maina v Peterson Onyiego Gichana [2015] eKLR. Here, it was asserted that in cases involving monetary decrees, the onus of demonstrating the Respondent's inability to refund the decretal sum rests with the applicant, and this burden never shifted. Similarly, he cited the case of:- Jason Ngumba Kagau & 2 Others v Intra Africa Assurance Co. Limited [2014] eKLR, the court upheld the precedent set by the case of:- Joseph Seraphine Wadegu v Kenya Power & Lighting Co. Limited (2013) eKLR, stating that without proving the Respondent's inability to repay, the claim remained conjectural. Moreover, the Learned Counsel argued that the Plaintiffs/Applicants bore the responsibility of proving a significant loss. Their current application appeared baseless, particularly when:
  - a) The primary concern was the revocation of an interlocutory Judgment and the addition of parties.
  - b) The grounds for appeal appeared premature.
  - c) The stakes involved only nominal costs that had already been paid by the 1<sup>st</sup> Defendant/Respondent.
  - d) The Plaintiffs/Applicants' claim of significant loss due to the addition of the 2<sup>nd</sup> Defendant/Respondent was inadequately substantiated.
  - e) As per the provision of Order 1 Rule 3 of the Civil Procedure Rules, 2010 parties may be included if it promoted a fair resolution.
16. On these issues, the Learned Counsel placed more reliance onto the case of:- Francis Kariuki Muruatetu & Another v Republic & 5 Others [2016] eKLR where the criteria for adding parties were clarified, emphasizing the tangible stake a party possesses in the proceedings. This interest must be clearly articulated in the application and must be distinguishable from peripheral concerns. It was submitted that the Plaintiffs/Applicants' assertion against including the 2<sup>nd</sup> Defendant/Respondent on the basis of not being involved in the initial agreement with the 1<sup>st</sup> Defendant/Respondent was misguided, lacked honesty, and was not legally supported. It was evident to all parties that the 2<sup>nd</sup> Defendant/Respondent held a legal Charge over the suit property. Any final verdict would influence its secured rights, making the Applicants' denial of the 2<sup>nd</sup> Defendant/Respondent's involvement questionable.
17. Furthermore, the Learned Counsel averred that as per Order 1 Rule 5 of the Civil Procedure Rules, 2010 the likelihood of the 2<sup>nd</sup> Defendant/Respondent's success was not a prerequisite for their inclusion in the proceedings. The 1<sup>st</sup> Defendant/Respondent also pointed out that the Plaintiffs/



Applicants had neither provided nor proposed any security to support their stay application. Therefore, based on the aforementioned reasons, they sought the dismissal of the Plaintiff/Applicants' application and urge Court to award them with costs be levied against the Plaintiffs/Applicants.

### **C. The Written Submissions by the 2<sup>nd</sup> Defendant/Respondent**

18. The 2<sup>nd</sup> Defendant/Respondent represented by the Law firm of Messrs. Wamae & Allen Advocates filed their submissions dated 20<sup>th</sup> July 2023 against the application dated 4<sup>th</sup> April 2023 by the Plaintiffs/Applicants. Mr. Wawire Advocate submitted that the Plaintiffs/Applicants had not shown that the stay would render the appeal frivolous and further they had not demonstrated that they had an arguable appeal. It was contended that they had failed to illustrate any irreparable loss that would be suffered if the injunction or stay was granted. The Plaintiffs/Applicants merely cited the provision of Paragraphs 15 and 17 of the Supporting Affidavit, suggesting they would suffer irreparable loss without demonstrating and proving the said loss.
19. According to the Learned Counsel, to prove a loss the Plaintiffs/Applicants needed to do more than merely establish factors that suggest irreparable harm. To support its point, the Learned Counsel place reliance was sought in the case of: James Wangwela & another v Agnes Naliaka Cheso (2012) eKLR, where the Court held that substantial loss, which would render the appeal nugatory, must be prevented by preserving the status quo. Plaintiffs/Applicants needed to provide more than just a repetition of the court's words or relevant statutory rules. The Learned Counsel argued that the Plaintiffs/Applicants were required to specify details that proved irreparable loss would ensue. He further cited the case of:- Machira T/A Mahira & Co. Advocates v East African Standard (2002)
20. It was also argued that if the stay was granted, the title would remain cancelled, prejudicing the Bank and the Bank's charge would lack security for the loan advanced to the 1<sup>st</sup> Defendant on the above loan amount as of 2<sup>nd</sup> July 2021. Furthermore, the Bank continued to incur losses in terms of litigation costs, including this application and the forthcoming appeal. To support his point, the Learned Counsel further cited the case of: Madhupaper International Limited – Versus - S Kerr (1985) eKLR wherein the refusal of an injunction was due to the undue hardship it would cause the other party.
21. Moreover, it was contended that the Plaintiffs/ Applicants had not provided any substantial evidence to demonstrate that a successful appeal would merely result in a pyrrhic victory. An award of damages, it was argued, would be adequate compensation should the Plaintiffs/Applicants succeeded. The Learned Counsel cited the case of: Julius Musili Kyunga v Kenya Commercial Bank Limited & 2 others (2016) eKLR. It was further asserted that the 2<sup>nd</sup> Defendant/Respondent, being a reputable institution, would refund the amount recovered from the sale of the charged properties if the appeal was successful. The case of: Kenya National Highway Authority v Ahmednasir Maalim Abdullahi [2020] eKLR was cited in support.
22. Lastly, the Learned Counsel highlighted that the Plaintiffs/Applicants had not offered any security, which was a cornerstone under the provision of Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, 2010. In this instance, the security should cover the amount of a sum of Kenya Shillings Two Billion Two Seventy Two Million One hundred and Seven Thousand Seven Seventy Five Hundred and Sixty Two (Kshs. 2,272,107,775.62/=). To buttress on this point, the Learned Counsel referred Court to the case of:- Equity Bank Limited – Versus - Taiga Adams Company Limited (2006) eKLR where it was opined that to qualify for a stay, all the four (4) requirements mas set out under the provision of Order 42 Rules (1) and (2) of the Civil Procedures Rules, 2010 was must be met.
23. In conclusion, the Learned Counsel urged the Honourable Court to have the application by the Plaintiffs/Applicants and the reliefs sought be dismissed with costs.



## V. Analysis and Determination

24. I have thoroughly considered and reviewed of the application dated 4<sup>th</sup> April 2023 by the Plaintiffs/Applicants herein, the responses and written submissions and the myriad of authorities cited herein by all three parties, the relevant and appropriate provision of *the Constitution* of Kenya and the statutes herein.
25. To arrive at an informed, reasonable, Just and Fair decision, the Honourable Court has condensed the main subject matter into four (4) issues. These are:
- a) What are the fundamental legal principles to be considered while granting the orders for stay of execution.
  - b) Whether the Notice of Motion application dated 4<sup>th</sup> April, 2023 by the Plaintiffs/Applicants herein meets has any merit and meets the threshold of the laid - down requirements by law.
  - c) Whether the parties herein are entitled to the reliefs sought.
  - d) Who will bear the costs of the application

### **Issue No. a). What are the fundamental legal principles to be considered while granting the orders for stay of execution.**

26. Under this Sub – heading, the pivotal issue for determination hinges on whether the Plaintiffs/Applicants should be granted or not stay of execution pending the hearing of an intended appeal against the Ruling of this Court delivered on 21<sup>st</sup> March, 2023. Being partially aggrieved by the said decision, the Plaintiffs/Applicants decided to prefer an appeal before the Court of Appeal.
27. To begin with, the principles governing Stay of Execution are founded under the provision of Order 42 Rule 6 (1), (2), (3), (4), (5) & (6) of the Civil Procedure Rules, 2010. These provisions prescribes as follows:
- a) No appeal or second appeal will not act as a stay of execution or proceedings under the decree or order being appealed unless the court from which the appeal is made orders so. For justifiable reasons, the originating court may order a stay of execution. Regardless of whether the application for such a stay is accepted or denied by the original court, the appellate court has the discretion, upon receiving an application, to review and issue a ruling as it deems appropriate. Any individual dissatisfied by a stay order issued by the original court can request the appellate court to overturn it.
  - b) Under sub - rule (1), an order for stay of execution will only be granted if: (a) the court is convinced that not issuing the order may lead to significant loss for the applicant and that the application was timely submitted; and (b) the applicant has provided the necessary security as determined by the court, ensuring compliance with any final decree or order.
  - c) Regardless of the stipulations in sub - rule (2), the court retains the authority to impose a stay of execution, on terms it finds appropriate, even in the absence of a formal application, while awaiting a formal request's hearing.
  - d) Within the context of this rule, an appeal to the Court of Appeal is considered lodged once the appeal notice aligns with that Court's rules.
  - e) Following a judgment or ruling, a request for a stay of execution can be informally submitted.



- f) Despite the provisions in sub - rule (1), the High Court, while exercising its appellate jurisdiction, possesses the authority to...
28. That is to say, an appeal is not a mere filing of a Notice of Appeal. There ought to be an appeal filed. In the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR where the court held thus:-
- “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.”
29. At the very initial stages of building jurisprudence on this issue at hand, the Court of Appeal in the case of *Butt v Rent Restriction Tribunal* {1982} KLR 417 gave guidance on how a court should exercise the said discretion and held that:
- “ 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  2. 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 that appeal Court reverse the Judge’s discretion.
  3. 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.
  4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
  5. 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 for costs as ordered will cause the order for stay of execution to lapse.”
30. Additionally, from the above provision of the law – Order 42 Rule 6 ( 1 ) of the Civil Procedure Rules, 2010, a number of ingredients ought to be in existence for the granting of orders of stay of execution to be considered. These are:
- a) Sufficient cause of action.
  - b) Substantial loss may result to him unless the order is made;
  - c) That the application has been made without unreasonable delay; and
  - d) 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.



The purpose of stay of execution is to preserve and safeguard 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”.

While the provisions of Order 42 Rule (6)(6) of the Civil Procedure Rules, 2010 which provides:-

“Notwithstanding anything contained in Sub-rule (1) of the rule the High Court shall have power in exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from the sub-ordinate Court or tribunal has been complied with.”

31. Regarding the granting of stay of execution pending appeal, there are plethora of decided cases and hence a well set out principles based on precedents. For instance, below are the leading ones. In the Civil Appeal No. 107 of 2015 - Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR where the court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another v Thornton & Turpin Ltd. where the Court of Appeal Gicheru J.A., Chesoni & Coker AG 1A) held that:

“The High Courts discretion to order stay of execution of its order or Decree is fettered by three (3) conditions namely:- Sufficient Cause, substantial loss would ensue from a refusal to grant stay the Applicant must furnish security, the application may be made without unreasonable delay. In addition the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakolo v Straman E.A. Ltd.[2013] as follows:-

“In addition the Appellant must prove that if the orders sought are not granted and his Appeal eventually succeeded them the same shall have been rendered nugatory”.

These twin principles go hand in hand and failure to prove one dislodges the other. The court notes with great humility the Plaintiff/Applicant agrees with it by citing the case of Vishram Rouji Halal v Thornton & Turpour Civil Appeal No. 15 of [1990] KLR 365.

And in yet another case of:- Canvass manufacturers Limited v Stephen Reuben Korunditu Civil application No. 158 of 1994 [1994] LLR 4853 - where the court held that:-

“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised”

Further in the case of Stephen Wanjiku –Versus - Central Glass Industries Limited Nbi) HCC No. 6726 of 1991 the court held that:-

For the court to order a stay of execution there must be:-

- i. Sufficient cause;



- ii. Substantial loss
- iii. No unreasonable delay.
- iv. Security and the grant of stay is discretionary.

31. It is evident from the above provisions of law that the court has discretion to issue an order of stay of execution. However, the said discretion must be exercised judicially and not capriciously. In exercising its discretion, court should therefore always opt for the lower rather than the highest risk of injustice. The court is to weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that the successful party is not impeded from enjoying the fruits of judgement. Always, there is need for equal level footing or playing ground.
32. Despite of these principles, courts have also argued that the four (4) principles above are not binding on this court in view of the overriding principles (or what has been termed as the Oxygen rule) being the courts inherent powers as founded under the provisions of Sections 1, 1A, 3, 3A of the CPA and Section 3 of the *Environment and Land Court Act* No. 19 of 2012. These inherent powers emphasize on having land dispute being justly, expeditiously, proportionately and assessible determination of dispute without impending on to undue technicalities. While considering whether to grant the orders for stay court has to weigh all these considerations without taking the risk of leading to undesirable or absurd outcome.
33. Furthermore, based on the above clear four (4) principles, this court will then proceed to determine whether the Applicant herein has satisfied the required standard for granting of stay orders pending appeal as follows:-

Firstly, the Applicant must show that they will suffer substantial loss. Apparently, this seem to be the main issue out of the four set out principles. There must be empirical or documentary evidence of the substantial loss to support the contention and not just in face value.

In the case of *Victory Constructions v BM (a minor suing through next friend one PMM) (2019)eKLR*, Odunga J discussed what Court ought to consider when faced by an application for stay pending appeal, he stated that:

“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 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 principle 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 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 apt for the lower rather than the higher risk of injustice.”

In the case of:- *Samvir Trustee Limited v 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."

34. On the issue of Security, various court cases have underscored the importance of demonstrating the necessity to furnish security. For instance: in the case of:- Jason Ngumba Kagu & 2 others v Intra Africa Assurance Co. Limited [2014] eKLR, the court elucidated:

"The test of whether to grant a stay of execution is fairly settled. Central among the considerations is the potential substantial loss to the applicant and if the applicant has provided security. The applicant heavily emphasized its financial capability and described itself as a corporation of significant financial stature. However, it was also noted that the respondents might not be able to refund the decretal sum if paid to them. Are these claims valid grounds for substantial loss?"

Furthermore, in the notable Judgment of Kenya Shell Limited v Benjamin Karuga Kibiru and Another (1986) eKLR, Platt, Ag. J.A. emphasized the importance of demonstrating substantial loss when requesting a stay pending appeal, asserting:

"It's a general rule to examine if Order XLI Rule 4 of the Civil Procedure Rules is fulfilled. Without evidence of substantial loss to the Applicant, it's seldom that an appeal becomes ineffective due to another event. Substantial loss, in its varied manifestations, is foundational in both jurisdictions when granting a stay. This potential harm must be mitigated. Hence, without this proof, it's challenging to understand why Respondents should be denied their due."

36. Additionally, in the case of:- Equity Bank Limited v Taiga Adams Company Limited (2006) eKLR, the Court opined:

"In the matter before me, the applicant hasn't demonstrated or established the substantial loss that might result if the stay isn't granted. The primary means to indicate or establish substantial loss is by demonstrating that if the decretal amount is paid to the respondent - implying execution takes place - and should the appeal prevail, the Respondent would be financially incapacitated to reimburse, indicating their lack of substantial means. Here, the appellant/applicant neither alleged nor established this."

37. Further clarity was provided as follows:

"It's evident that proving substantial loss is paramount for an order of stay under Order 42 of the Civil Procedure Rules. The pressing query is the nature of the substantial loss the applicant might endure if the stay isn't granted. The applicant didn't outline any such potential detriment. Merely asserting that a substantial loss might occur if a stay isn't sanctioned is insufficient. An applicant must distinctly show the type of substantial loss that might transpire before the court can hinder a victorious party from reaping the rewards of their Judgment per Order 42 Rule 6."

38. Based on the above, the Honourable Court is of the view that it has adequately spelt out on all the fundamental legal principles with regard to the stay of execution.



**Issue No. b). Whether the Notice of Motion application dated 4<sup>th</sup> April, 2023 by the Plaintiffs/Applicants herein meets has any merit and meets the threshold of the laid - down requirements by law.**

39. Under this Sub heading, the Honourable Court will be directly making an attempt to fit and implement the set out legal principles herein to the facts of the case to see to it the application is merited or not. Essentially, a pivotal criterion for an application for stay pending appeal is the establishment by the Plaintiffs/Applicants of potential irreparable damage and significant loss and the provision of security. The Judgement by this Honourable Court delivered on 15<sup>th</sup> December, 2021 was to the favour of the Plaintiffs/Applicants. However, from the ruling of this Court dated 21<sup>st</sup> March, 2023 was basically to set aside the said Judgement and essentially joinder of the 2<sup>nd</sup> Defendant in the matter. In my own view, I see no substantial loss that the Plaintiffs/Applicants will incur or suffer from that decision. Hence, clearly the application fails on the ingredient of the substantial loss.
40. With regard to security, no such security has been mentioned in their pleadings. In the detailed submissions presented before the court, the Plaintiffs/Applicants notably emphasized that the crux of the appeal does not revolve around the security provided by the 1<sup>st</sup> Defendant/Respondent. Such a posture, while strategic, raises concerns as it potentially foretells issues the court may not have had an opportunity to delve into in future hearings. This assertion, though central to the Plaintiffs/Applicant's case, does not absolve them of their obligations. A salient obligation that remains, irrespective of their argument, is the provision of security. It's imperative to underline that the Plaintiffs/Applicants has not fulfilled this crucial requirement.

**Issue No. c). Whether the parties herein are entitled to the reliefs sought.**

41. Having caused an elaborate analysis of the concept of stay of execution and the implementation to the filed application, the Honourable Court under this Sub heading now critically checks on the reliefs sought and the entitlements to the parties herein. Delving deeper into the instant case, the Plaintiffs/Applicants holds a strong view that their interests could be severely jeopardized if the court does not grant a stay. Their contention rests primarily on the fact that the 2<sup>nd</sup> Defendant/Respondent is an external party to the lease agreement, which in their perspective, introduces potential complications. In a contrasting viewpoint, the 2<sup>nd</sup> Defendant maintains that they facilitated a loan to the 1<sup>st</sup> Defendant, quantified at a sum of a sum of Kenya Shillings Two Billion Two Seventy Two Million One hundred and Seven Thousand Seven Seventy Five Hundred and Sixty Two (Kshs. 2,272,107,775.62/=). This loan, they argue, was secured against Title No. Mombasa/Block/[particulars withheld], a title that forms the bedrock of this litigation. This Honourable Court holds a totally different view from the one held by the Plaintiffs/Applicants herein. While concurring with the Learned Counsels for both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents herein, a projection into the possible implications of the court's decision reveals that if a stay is granted and the extant judgment remains unchanged, the implications would be the invalidation of the title in question. Such a development stands to detrimentally impact the bank's interests. In simple terms, it's the 2<sup>nd</sup> Defendant/Respondent whose stake here is at an extremely high risk.
42. Assessing the scenario from a broader lens, the potential ramifications for the 2<sup>nd</sup> Defendant/Applicant appear more pronounced. They stand on the precipice of losing the security associated with the hefty loan they extended to the 1<sup>st</sup> Defendant/Respondent and the financial amount, summing up to a colossal sum of Kenya Shillings a sum of Kenya Shillings Two Billion Two Seventy Two Million One hundred and Seven Thousand Seven Seventy Five Hundred and Sixty Two (Kshs. 2,272,107,775.62/=). A thorough contemplation of the circumstances suggests that the challenges and potential losses



that the 2<sup>nd</sup> Defendant/Respondent could face, in the event of an injunction, might very well eclipse the concerns raised by the Plaintiffs/Applicants. Nonetheless, it is prudent to acknowledge that if the legal tides turn in favor of the Plaintiffs/Applicants in subsequent appeal stages, there exists the avenue of monetary compensation to rectify any grievances.

43. From the pleadings and attached evidence, it's evident that the Plaintiffs/Applicants filed a notice of appeal as per Rule 75(1) of the Appeal Rules 2010, dated 30<sup>th</sup> March 2023. The Plaintiffs/Applicants acted promptly post the ruling on 21<sup>st</sup> March 2023. There is no doubt there was no inordinate nor unreasonable delay in moving Court seeking for the orders of Stay of execution against the decision of this Court as required by law.
44. Finally, drawing this analysis to a close and upon synthesizing all the facets of the case, it is my considered ruling that out of the four (4) ingredients set out herein, the Plaintiffs/Applicants falls short of meeting the benchmarks set for a stay of execution and/or proceedings pending the hearing and determination of the appeal, benchmarks enshrined in Order 42 Rule 6 (1) & (2) of the [Civil Procedure Act](#) 2010. For these reasons, therefore, the application by the Plaintiffs/Applicants is declined. It must fail forthwith.

#### **Issue No. d). Who will bear the costs of the application.**

45. It is trite law that the issue of costs is at the discretion of the Court. Costs is the award that is granted at the conclusion of the legal action in any litigation. The proviso of Section 27 (1) of the [Civil Procedure Act](#), cap. 21 holds that costs follow the events.
46. The Plaintiffs/Applicants, in their submissions, emphasized their belief that the issue of costs should be addressed and resolved only at the culmination of the proceedings, a stance captured by the legal phrase "costs in the cause." Conversely, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents, in their representations, contended that the responsibility of bearing the costs should squarely fall upon the Plaintiffs/Applicants.
47. This deliberation brings to the fore a fundamental tenet of legal practice: the court's prerogative in determining costs. This pivotal doctrine is eloquently articulated in the renowned legal commentary, Halsbury's Laws of England, 4<sup>th</sup> Edition (Re-issue), {2010}, Vol.10, para 16. The extract elucidates:-

“The court, in its wisdom and authority, reserves the discretion to decide if costs should be borne by one party or apportioned differently, the precise amount of these costs, and the stipulated timeframe for their settlement. Intrinsically, when costs hinge on the court's discretion, no party can lay an unequivocal claim to such costs absent a definitive decree from the court in their favor. It is paramount to appreciate that while this discretion vested in the court is expansive, it is not unfettered. The exercise of this discretion must be guided by, and firmly anchored in, overarching principles of fairness, equity, and justice.”
48. Considering the evolving dynamics of this case and in appreciation of the submissions made by all parties involved, it appears most prudent, at this juncture, to adopt a circumspect approach. Consequently, taking the Plaintiffs'/Applicants application has not been successful, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents are entitled to costs of the application only that it shall be reserved to be determined "in the cause" as the proceedings reach their logical conclusion.



## **V. Conclusion & disposition**

49. In the long analysis, upon conducting an indepth consideration of the framed issues herein, based on the principles of Preponderance of Probabilities and balance of Convenience, the Honourable Court now specifically orders as follows:-

- a) That the Notice of Motion application dated 4<sup>th</sup> June, 2023 by the Plaintiffs/Applicants herein be and is hereby found to lack merit and hence dismissed.
- b) That for expediency sake, the case be fixed for full hearing on 6<sup>th</sup> June, 2024 and there be a mention on 4<sup>th</sup> March, 2024 for purposes of:-
  - i) Conducting a Pre – Trial Conference and ascertain compliance of Order 11 of the Civil Procedure Rules, 2010.
  - ii) Compliance of the orders and/or directions made out from the Ruling delivered by this Court on 21<sup>st</sup> March, 2023.
- c) That costs of this application to be in cause.

It is ordered accordingly

**RULING DELIVERED VIA EMAIL AS PER THE DISPATCHED NOTICES TO ALL THE PARTIES, SIGNED AND DATED THIS 5<sup>TH</sup> DAY OF DECEMBER 2023**

**HON. JUSTICE L.L. NAIKUNI (MR.)**

**ENVIRONMENT & LAND COURT AT MOMBASA**

Copy sent by M/s. Joan Ndwiga (Office Admin) to:

O.M. Robinson & Co. Advocates; Email: [particulars withheld]

Wainaina Ireri Advocates LLP; Email: [particulars withheld]

Wamae & Allen Advocates; Email: [particulars withheld]

