REPUBLIC OF KENA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MURANG'A

ELC NO. 437 OF 2017

BAKARI SHABAN GAKERE..PLAINTIFF/ APPLICANT

VERSUS

MWANA IDD GUCHU..1ST DEFENDANT/ RESPONDENT

MURANGA COUNTY GOVERNMENT..................2ND DEFENDANT RESPONDENT

THE NATIONAL LAND COMMISSION................3RD DEFENDANT/ RESPONDENT

THE HON. ATTORNEY GENERAL........................4TH DEFENDANT/ RESPONDENT

RULING

The Plaintiff/Applicant filed an application dated **9th August 2021,** seeking orders; -

> **a. THAT the Honorable Court be pleased to extend the time for lodging and serving the Notice of Appeal by the Applicant.**
>
> **b. THAT this Honorable Court be pleased to make an order that status quo be maintained in regards to all that property known as Plot. No. Mjini/69 pending the filing of the intended appeal.**
>
> **c. THAT the costs of this application be provided for.**

The application is premised on nine **GROUNDS** stated thereon and the Supporting Affidavit of the Applicant sworn on the **5th August, 2022.** It is the Applicant's case that his suit was dismissed for want of prosecution and his counsel on record then failed to file an Appeal against the said Orders. That the Applicant's case was not heard on merit and now he wishes to appeal against the Order of the Court of **22nd February 2021,** of dismissing the Plaintiff's case. Further that the time for filing the **Appeal**, has since lapsed and the Plaintiff wishes that this Court extends time. Additionally, the Applicant deponed that the mistake of his advocate should not be visited on him as an innocent litigant. That he has an arguable **Appeal**, with a probability of success, as he instituted the Appeal without delay. It is also the Applicant's contention that he is ready to abide by any terms that the Court will give in the interest of justice.

The 1st Defendant/Respondent filed a response through **Abdillahi Ali** on the reason that he has a **Power of Attorney** on behalf of the 1st Respondent. The 1st Respondent averred that the application is **vexatious, malicious** and an **abuse** of the **process of Court**, as it is an afterthought and that the same should be dismissed. The 1st Respondent requested this Court to take judicial notice of the Applicant's conduct during the hearing and find that the Applicant is undeserving of the orders. Further, he contended that he has already taken possession of the suit property, and granting an order of **status quo,** will deny him the fruits of the judgment.

The 2nd Defendant/Respondent in opposing the application filed their Grounds of Opposition stating that the Applicant cannot feign ignorance of the law, yet he had counsel on record. Further that the application has no sufficient reasons and that the **status quo** sought by the Applicant should not be granted to reinstate illegal occupation.

The Applicant filed a Further Affidavit in response to the 1st and 2nd Defendants/Respondents responses to his application. He deponds that the previous advocate was aware that his father was testifying on his behalf and invites the 1st Defendant to proof of the contrary. Further that his case was not heard on merits and he is keen on having the Appeal heard and determined, his place of residence notwithstanding. On status quo, the Applicant contended that none of the parties is in occupation of the suit and the said order may issue. Importantly, the Applicant deponed that he was out of the country and there is no way he was advised by his former counsel.

The 1st Defendant filed a Supplementary Affidavit raising an issue with the Applicant's Further Affidavit and the glaring discrepancies and

asked the Court to expunge it. He pointed out that the Applicant is shifting blame to his advocate and allowing the application will result in litigation thereby leading to waste of time.

Parties filed and exchanged their written submissions as advised by Court. The Applicant filed his submissions and raised two issues for determination wit;- with whether time should be extended and whether status quo should be maintained.

On extension of time, the Applicant maintained that his advocate failed to take the appropriate legal action and it was not until judgment was delivered that he sought the guidance of his present counsel. He asked this Court to be guided by the case of **Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others, SC Appl. No. 16/2014,** where the Court laid down the principles that will guide the Court in granting the orders for extension of time. The Applicant further submitted that that case involves land and they should not be pushed from the seat of justice. He relied on the case of **Noah Nisiko & 26 Others vs Registered Trustees of Christ the King Catholic Church Kibera(2015)eKLR.**

The Applicant submitted that if the application should be allowed, it will not occasion the Respondents any prejudice and this Court should exercise the discretion in his favor. Reliance was placed on the cases of **Edward Kamau & another Vs Hannah Mukui Gichuki & Another (2015) eKLR** and on the Indian **Supreme Court Case; *Civil Appeal 1467 of 2011 Parimal vs Veena Bharti (2011).*** On status quo, the Applicant maintained that the suit land is not occupied and an order of status quo will preserve the property.

The 1st Defendant filed his written submissions and raised an issue with change of advocates as provided by **Order 9 Rule 9** of the **Civil Procedure Rules** and submitted that the Applicant did not seek the leave of Court and relied on a number of cases in support of his claim. On extension of time, the 1st Defendant urged this Court to look at the principles that guide a Court in considering such application as laid in **Karny Zaharya & Another vs. Shalo, Levi. Civil Appeal No. 80 of 2018.**

The 1st Defendant submitted that the Application was brought after a lengthy delay without sufficient reasons, the meaning of which is laid in **Abdul Azizi Ngoma vrs. Mungai Mathayo [1976] Kenya LR 61, 62**, Further, the 1st Defendant submitted that the fact that the Applicant's previous counsel applied for Review, then **Order 45,** barred the Applicant from filing the instant application. On status quo, the 1st Defendant submitted that granting the Order will have the effect of setting aside the judgment of Court.

The 2nd Defendant filed and submitted that the Applicant did not give the reasons for the delay in filing the application as was required in the case of **Mwangi vs Kenya Airways (2003)KLR and Stanley Kahoro Mwangi vs Kanyamwi Trading and Co Ltd.(2015) eKLR.** That the Applicant's indolence should not be visited on the previous advocate and the application should be dismissed. The 3rd and 4th Defendants never filed any response to the application.

The hearing of the main suit was by consent set for **22nd February 2021,** and counsel for the Applicant herein sought an adjournment and made application to have his witness stood down on the premise that he was not the Plaintiff. The application was contested by the 1st Defendant and the Court declined to grant adjournment, but allowed the prayer to have the witness stood down. The matter proceeded for hearing of the 1st Defendant's case and on **9th March, 2021**, when the matter came up for hearing of the 2nd Defendant's case, counsel informed Court that he was not calling any witness marking close of Defence hearing.

Parties were directed to file and exchange their submissions and on several occasions when the matter came up for mention for compliance, the Plaintiff was not present in Court. Judgment was delivered on **5th July 2021,** in the absence of the Plaintiff, dismissing the Plaintiff's suit and allowing the 1st Defendant's counter-claim partially. The Court further gave orders that the Plaintiff be evicted from the suit property.

The Applicant then filed the instant application which was filed a month after the delivery of judgment. He also filed a Notice of Appeal which was lodged at the Court on **19th July, 2021**. Having looked at the record, analyzed the application and submissions, the issues for determination by this Court are;

*i. **Whether the Applicant's Further Affidavit should be expunged***

*ii. **Whether the Applicant made an application for review***

*iii. **Whether the Law Firm of Mutundu Wallace, was properly on record***

*iv. **Whether time for lodging appeal should be extended***

*v. **Whether status quo should be maintained***

*vi. **Who should pay costs***

I. <u>Whether the Applicant's Further Affidavit should be expunged</u>

The 1st Defendant has raised an issue with the Applicant's further Affidavit filed on **25th November, 2021**. The 1st Defendant deponed that the Affidavit does not indicate where the Applicant resides or his address and that while it was sworn in Nairobi it was notarized in America.

Order 19 Rule 4 of the **Civil Procedure Rules**, lays down what shall be contained in an Affidavit to include *the description, true place of abode and postal address of the deponent, and if the deponent is a minor shall state his age"* The Further Affidavit as drawn does not

indicate the minimum's set above. However, **Rule 7,** gives a reprieve and provides as follows: ***The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by mis-description of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality"***

The irregularities do not go to the substance of the case, and they are mere technicalities that can be cured by **Rule 7,** as well as **Article 159(2)** of the **Constitution.**

The 1st Defendant also has an issue on the swearing of the Affidavit. This Court has noted that the Affidavit was sworn before **Rachael R Holl**, and there is a notary stamp along the Deponent's signature.

Section 5 of the Oaths and Statutory Declarations Act provides "***Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made"*** The notaries dully signed as required by law and practice, the signature of the Applicant is not disputed.

The irregularity pointed out by the 1st Defendant is of form and not substance and this Court finds no reason to expunge it.

II. Whether the Applicant made an application for Review

The 1st Defendant has pointed out that the Applicant had made an application for **Review** and the instant application injures the provisions of **Order 45(2).** The impetus of **Order 45(2)**, is to prevent litigating parties for seeking two remedies at the same time.

The 1st Defendant's assertion flows from paragraph 9 of the Judgment of this Court. I have perused the file and pleadings and I have not seen any application for Review. Paragraph 9 of the Judgment makes reference to an application for adjournment made by the Applicant's counsel. This Court finds the allegation by the 1st Defendant is baseless and finds that there was no application for review ever filed.

III. Whether the Law Firm of Mutundu Wallace Advocates was properly on record

The Applicant was previously represented by the **Law Firm** of **Karanja Kangiri & Company Advocates.** The 1st Defendant submitted that the Applicant failed to seek leave, before filing the instant application. That since the Applicant blames the former advocate, it was prudent that procedure be followed. The Court agrees with the 1st Defendant and affirms that Rules of procedure ought to be followed to the latter. **Order 9 Rule 9 of the Civil Procedure Rules**, requires that change of advocate can be by consent or Court order. The rule provides:

> ***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 by order of the court—***
>
> ***(a) upon an application with notice to all the parties; or***
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> ***(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.***

The above provisions makes it mandatory to either have a Court order effecting the change upon notifying all parties or with consent between the outgoing and incoming counsel. The intent of the provision was to protect advocates from unscrupulous and mischievous clients, and therefore rules of procedure on representation cannot be overlooked. The procedure does not impede the right of representation, but protects the sanctity of Court and enhances the administration of justice. Judgment in the case was already delivered so the provisions above applied.

Presently, consent was filed on the **19th July, 2021,** and served on all parties before the instant application was filed. Such consent ought to be endorsed by the Court and it becomes an order of Court so that change is effected. The Court has perused the file, and notes that the consent was not endorsed and technically the Court was under duty to endorse the consent, but failed to do so. Be that as it may, the Applicant was under duty to do a follow up. There was therefore no compliance with the above provisions of law.

However in ***Tobias M. Wafubwa v Ben Butali [2017] eKLR*** ,the Court of Appeal held;

> ***"We would go further to add that, provided that where the failure to comply with the Rule 9, did not undermine the jurisdiction of the court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then, Article 159 of the Constitution and the overriding principles could be called upon to aid the court to dispense substantive justice through just, efficient and timely disposal of proceedings. A similar approach was invoked in the case of Boniface Kiragu Waweru vs James K. Mulinge [2015] eKLR where in addressing the issue of non-compliance with order 9 rule 9 this Court observed thus;***

The Court further held:

> ***"All in all we are not persuaded that non-compliance with Order III rule 9A of the Civil Procedure Rules was meant to make the following proceedings incompetent or a nullity, efficacious as the provision was meant to be. Indeed all times, the set procedures ought to be followed or complied with. However, we find that non-compliance, in the present matter, did not go to the root of the***

proceedings. The non-compliance we may say, was procedural and not fundamental. It did not cause prejudice to the appellant at all…")

The consent though not adopted was sufficiently served on all parties and filed in Court at the earliest and failure to endorse it does not affect the substance of the case. This Court will be so guided in finding and holding that the Law Firm of Mutundu Wallace Advocates is properly on record.

IV. <u>Whether time for lodging an Appeal should be extended</u>

Section 66 of the Civil Procedure Act provides:

"Except where otherwise expressly provided in this Act, and subject to such provision as to the furnishing of security as may be prescribed, an Appeal shall lie from the decrees or any part of decrees and from the orders of the High Court to the Court of Appeal".

The time provided for lodging an Appeal to the Court of Appeal is normally 14 Days as provided for by Order 43(3) of the Civil Procedure Rules and Rule 75(2) of the Court of Appeal Rules. Where time has lapsed a party can move Court for the extension of time, this power is donated to this Court by Section 7 of the Appellate Jurisdiction Act. Similarly, by Order 50 Rule 5 of the Civil Procedure Rules, which is replicated under Section 95 of the Civil Procedure Act which states:

"Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

In **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** the Court stated:

"***It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the Respondent if the application is granted***."

The principles that guide the court in exercising this discretion were well settled in Supreme Court Application No. **16 of 2014 Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR (*Supra*).** The principles include:

a. ***Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;***

b. ***A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***

c. ***Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;***

d. ***Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;***

e. ***Whether there will be any prejudice suffered by the Respondents if the extension is granted;***

f. ***Whether the application has been brought without undue delay*; and**

g. ***Whether in certain cases, like election petitions, public interest should be a consideration for extending time.***

Similarly, in First **American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65, (***SEE Machakos Civ Appeal No. 142 of 2013* **Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR)** The court considered the foregoing principles:

a. ***The explanation if any for the delay;***

b. ***The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;***

c. ***Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favour of the Applicant***.

The Applicant has grounded his application majorly on the basis that his advocate on record did not advise him accordingly. As to whether the Applicant is deserving of this equitable remedy, is a fact that must be established from the Applicant's conduct towards filing the application.

The orders sought to be appealed against were issued on **22nd February 2021,** which technically closed the Plaintiff's case. This meant that the Notice of Appeal ought to have been filed by **8th March, 2021.** The matter was still ongoing as judgment was delivered on **5th July, 2021,** which means the Applicant had time within when to make an application to the **Superior Court** to arrest judgment. However, no step was taken by the Applicant and relevantly, counsel did not appear in Court on several occasions when the matter came up for mention for compliance on filing of submissions or even judgment.

It is trite that a delay is delay even after one day, and a party seeking the indulgence of court must endeavor to give reasons for the delay. The Respondents have alluded to the Applicant's delay as inordinate, which this Court should take note of. In determining whether there was delay, this Court will be guided by the litmus test of inordinate delay as held by the Court in **Mwangi S. Kimenyi v Attorney General & another [2014] eKLR,** where the Court held:

"There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. Caution is, however, advised for courts not to take the word ''inordinate'' in its dictionary meaning, but to apply it in the sense of excessive as compared to normality".

To determine whether the delay was inordinate, this Court must examine the reason for the delay. Prior to the orders of **22nd February, 2021**, counsel for the Applicant was actively involved in the proceedings. It depicts a worrying trend when he stopped attending to the matter thereafter. It appears the Applicant might have fallen out with his counsel, which is also a reason the Applicant places blame entirely on him. The Applicant deponed that his counsel did not advise him accordingly and hence the reason he took another advocate.

The Court of Appeal in **Mombasa Civil Appeal No. 41 of 2014**; **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR** had this to say on mistakes of advocates;

> ***"Thus, there is a corollary to the hallowed maxim that mistakes of counsel should not be visited on a client. This is to be found in the case Ketteman & others v. Hansel Properties Ltd [1988] 1 All ER 38; in which an application was brought for belated amendment of the defence; an amendment which had been necessitated by mistake of counsel. In his judgment, Lord Griffith stated that***
>
> > ***"Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at*** **a very late stage in the proceedings."**

Whereas it is a general principle that mistakes of an advocate should not be visited on his client, the indolence of a litigant may not be pardoned. The Applicant ought to demonstrate the steps he took to ensure the matter is determined expeditiously. As held by the Court in **Savings and Loans Limited -vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCS No.397 of 2002;**

> "It is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present Case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal."

The Applicant has told this Court it was not until he sought the services of another advocate that he filed the instant application. What is not in dispute is that the Applicant does not reside within the Country. While this Court is not aware whether he was in the Country at the time judgment was delivered, the Court will grant him the benefit of doubt and consider the step taken to file for change of advocate. The 1st Respondent on the other hand submits that the Applicant was an indolent party as he misled the Court. The Court may not entirely agreed with the 1st Respondent, and therefore, it takes cue from the above judgment, the Applicant was under duty to follow up his case to know the developments.

The Court of Appeal in ***Mombasa Civil Appeal No. 111 of 2005 EDWARD MAINA NJANGA T/A MAINA NJANGA & CO. ADVOCATES v NATIONAL BANK OF KENYA LIMITED [2009] eKLR*** quoted the case of ***Murai & Others vs. Wainaina [1978] LLR 2782 (CA):-*** where the Court held:

> ***"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel though in the case of a junior counsel, the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better."***

The Court notes the mistake of counsel who was better placed to advise his clients and opines that such mistake should not be a bar to the Applicant to sit on the seat of justice. This Court holds and finds that the delay though **inordinate** is **excusable.**

There has been attached no **Memorandum** of **Appeal** that this Court will look at to determine whether the appeal is merited or not. However, this Court appreciates the Applicant's right of appeal and notes that this is a land matter which is emotive and the effect of the judgment of this Court means the Applicant risks eviction. In **Vishva Stone Suppliers Company Limited v RSR Stone [2006] limited [2020] eKLR** It is appreciated no draft memorandum of appeal is annexed.

"That default notwithstanding the principle of law set out above on this issue indicates clearly that in the absence of a draft memorandum of appeal the Court can gauge the arguability of an intended appeal from other supportive evidence"

The Court in the foregoing case considered the principles laid out in **Richard Nchapi Leiyagu vs. IEBC & 2 Others (supra); Mbaki & Others vs. Macharia & Another [2005] 2EA 206; and the Tanzanian case of Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003; f**or the holding inter alia that:

i. The right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;

ii. The right to be heard is a valued right; and

iii. That the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;

The 1st Defendant was the successful party and it is only fair that he be allowed to enjoy the fruits of his judgment. The Applicant and the 1st Defendant are at loggerheads as to the current state of the suit land and this Court concludes that none of the parties is in occupation. The 2nd Defendant on the other hand seemingly has no claim over the land. To this end, this Court finds that there is no prejudice that would be occasioned on the Defendants should leave be granted. This Court shall exercise discretion in favour of the Applicant. However, the Court takes judicial notice of the Applicant's conduct towards this cause and issue conditional leave.

V. <u>Whether status quo should be maintained</u>

An order for status quo technically means that things be left as they are until the determination of a certain facts. The meaning of status quo was defined by the Court in ***Nairobi Civil Appeal No. 33 of 2012 Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR*** "*the present situation, the way things stand as at the time the order is made, the existing state of things. It cannot therefore relate to the past or future occurrences or events*". The purpose of which is to maintain the substratum of the suit.

The 1st Defendant deponed that as per the eviction orders of the Court, the Applicant was evicted and he took possession. The Applicant on the other hands maintains that the land is unoccupied. The 1st Respondent in paragraph 12 of his Replying Affidavit avers that he is in the process of enjoying the fruits of the judgment, which means he has not fully realized it. The Court of Appeal in the case of **Mugah Vs Kunga [1988] KLR 748**, upheld the practice of issuing status quo orders in land matters status.

> "Status quo orders should always be issued for purposes of preserving the subject matter. This court's practice direction vide Gazette Notice No. 5178/2014 have followed suit. Practice direction No. 28(k) is relatively clear. It gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case."

The 1st Defendant submits that granting the order for status quo would amount to granting injunctive orders. To answer this, the Court will adopted the distinction of status quo and injunction by **Murithi J**in ***Mombasa Misc. Civil Application (JR) No.26 of 2010 Republic –vs- The Chairperson Business Premises Rent Tribunal at Mombasa (Bench Mochache) Exparte Baobab Beach Resort (Mombasa Limited) & Monica Clara Schriel*** the Court opined:

> "In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint." (see in The Matter Of An Application By Saifudeen Abdullabhai & 4 Others For Leave To Apply For Judicial Review And For Orders Of Certiorari And Prohibition[2013]eKLR)

The Applicant attached a letter dated **16th August, 2021,** from **Ministry of Agriculture, Livestock and Fisheries** from **Murang'a County.** Flowing from the said letter, this Court draws a conclusion that the 1st Defendant has begun the process of executing the Decree and it is right to conclude that the land is currently in his possession. The position as it is right now is that the land is in possession of the 1st Defendant and should remain so pending the filing of the intended appeal.

VI. <u>Who should pay costs</u>

It is trite that costs follow the events and a successful party is entitles to costs. This a discretionary power donated to this Court by **Section 27,** of the **Civil Procedure Act**, but such discretion must be judiciously exercised and the reasons thereof given. The Court has noted the circumstances that resulted in the filing of this Application was occasioned by the Applicant. Subjecting the Defendants to pay costs because the Applicant was the successful party will not only be burdening on the 1st Defendant, but will be unfair. It is inevitable to conclude that the filing of the Appeal will not only cause litigation process to hang over the heads of the Defendants, but will also deny the 1st Defendant the right to enjoy the fruits of his judgment. This Court shall order that each party to bear its own costs.

To this end, this Court finds and holds as follows:

i. The time for lodging and serving the Notice of Appeal by the Applicant be and is extended for a period of 30 Days, from the date hereof. In default, the leave granted will lapse automatically.

ii. Status quo be maintained to the extent that the suit land shall remain in possession of the 1st Defendant pending the filing of the intended appeal. However, the 1st Defendant should not dispose it off or charge the same until the intended Appeal is filed.

iii. Each party shall bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 17TH DAY OF FEBRUARY, 2022.

L. GACHERU

JUDGE

DELIVERED ONLINE

IN THE PRESENCE OF;

M/S MWANGI H/B MR CHEGE FOR THE PLAINTIFF/APPLICANT

ABDILLAHI ALI FOR THE 1ST DEFENDANT/RESPONDENT

N/A FOR THE 2ND DEFENDANT/RESPONDENT

N/A FOR THE 3RD DEFENDANT/RESPONDENT

KUIYAKI - COURT ASSISTANT

L. GACHERU

JUDGE