



**Ochieng (Suing in her Capacity as Administrator Of The Estate of
Cornel Onyango Ochieng (Deceased)) v Kinyanjui (Miscellaneous Civil
Application 47 of 2021) [2022] KEELC 2297 (KLR) (18 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2297 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION 47 OF 2021**

LL NAIKUNI, J

MAY 18, 2022

BETWEEN

JOAN ANYANGO OCHIENG APPLICANT

**SUING IN HER CAPACITY AS ADMINISTRATOR OF THE ESTATE OF
CORNEL ONYANGO OCHIENG (DECEASED)**

AND

CHRISTOPHER KAMAU KINYANJUI RESPONDENT

RULING

I. Preliminaries.

1. What is before this Honorable Court for determination are two Notices of Motion applications dated 11th and 16th November 2021 respectively filed by the Applicant under a certificate of urgency. They were brought under the provisions of Sections 1A & B, 3A, 79G, and 95 of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya, and Order 42 Rule 6, Order 50 Rule 6, Order 51 Rule 1 and Order 52 Rule 3 of the *Civil Procedure Rules, 2010*.

II. The Applicant's Case

2. The Applicant in the application dated 11th November, 2021 (hereinafter referred to "The first application") sought for the following orders: -
 - a. Spent;
 - b. That the intended Appellant herein prays to this Honourable court to grant her leave to Appeal out of time against the whole decision and judgment of Hon. G. Kiage delivered on May 21, 2021.



- c. That the grounds of appeal filed herein with the copy of the judgment be regarded as filed appeal to await the full record to be filed after the proceedings are typed out.
 - d. That this Honourable court do issue temporary stay of execution of the judgment and decree of Hon. Kiage given at Mombasa on May 21, 2021
 - e. That this Honourable court do grant any further orders as it deems necessary in the circumstances cost be provided for.
3. The Applicant in the application dated 16th November, 2021 (hereinafter referred to “The second application”) sought for the following orders:-
 - a) Spent.
 - b) That this Honourable Court do order a stay of execution of the Judgment and order made by this Honourable Court on the 21st of May 2021 pending the hearing and final determination of this application and the Applicant’s subsequent appeal.
 - c) Spent.
 - d) Spent.
 - e) The costs of this application be provided for.
 4. The first Application dated 11th November, 2021 is founded on the grounds, testimony and averments in the 23rd Paragraphed Supporting Affidavit of Joan Mercy Anyango Onyango, the duly appointed Legal administrator of the estate of the late Connel Onyango Ochieng (hereinafter referred to as “The deceased”) who is now deceased, sworn and dated 11th November, 21 and the nine (9) annexures annexed herein and marked as “JMAO -1 to 9”. She deponed having instructed her Advocates to file for stay of execution and an against the main judgment and a ruling on stay delivered on 5th November, 2021 - she attached copies marked as “JMAO – 2” and “JMAO – 3” respectively. She urged this Honourable Court to extend the time for filing the appeal as the statutory thirty (30) days lapsed when they were still getting the Grand Letters of Administration and the proceedings had also not been typed. She averred that their father lived in the suit premises until his death for over twenty (20) years. She knew from her father that he owned no money to the property and kept on paying in instalments intermittently. According to her, at his death he had no debt to pay on the house and she also knew that when her father died on April 17, 2021 he had not received any default notice.
 5. She stated that there could have been no rightful claimant to the house without defaulters’ notice being served on the deceased. She opined that she would have been in a position to know because when he was sick, she was bestowed with the Power of Attorney attached and marked as “JMAO-4”. She stated that both her siblings and herself had nowhere to go if the claimant was allowed to evict them with due process and without following the law as they had been served with a letter dated 8th November, 2021 giving them only ten (10) days to vacate from the house. The letter is attached and marked as “JMAO – 5”.
 6. She averred that through her advocates on record, she had written several letters requesting for the typed proceedings. She stated that the delay in filing the appeal was caused by the delay in the production of the records of proceedings. They had been waiting for the typed proceedings so that they would make the application for extension of time when they already had fully complied with the and upon receiving the typed proceedings that they promptly applied for the records. She deponed that all her brothers and sisters were beneficiaries of the deceased’s estate and that they only had that property. They lived there. She further deponed that the decree in their favour had not been signed but they had



filed and had been taken to the chamber of the magistrate to be signed and that they were informed it would take time.

7. The second Application dated November 16, 2021 is founded on the grounds, testimony and averments in the 10th Paragraphed Supporting Affidavit of Joan Anyango Ochieng, sworn and dated 16th November, 21 and the Three (3) annexures marked as “JAO-1 to 3”. There was a judgment in this matter was read on the 21st May, 2021 ordering vacant possession of the suit property. The Applicant was aggrieved and dissatisfied with the said judgment, she filed an application for extension of time to file appeal since time to appeal had lapsed, and which application is slated for hearing on December 15, 2021; annexed as “JAO – 2”.
8. That the Respondent had threatened to levy execution against me through a letter dated 8th November, 2021 and in view of the foregoing, unless the Application for stay is heard urgently on a priority basis, the Appeal in effect will be rendered nugatory and she stood to suffer irremediable loss and damage; a copy of the said letter annexed and marked as JAO-3

III. The Respondent’s case

9. Both applications by the Applicant are opposed by the Respondent’s through two 18th and 11th Paragraphed Replying Affidavits dated December 10, 2021 annexed herein sworn by Cecilia Mango, an advocate of the High Court of Kenya. She stated that there is no appeal to warrant the Court to issue the orders sought by the Applicant. She averred that the extension of time is not a right but an equitable remedy available to a deserving party; that obtaining proceedings has no bearing to lodging the Appeal. That the Applicant had obtained 11th June, 2021 and the judgment was delivered on 21st May, 2021 so she had enough time to apply for the Appeal. She further stated that the Applicant had not demonstrated what substantial that she is likely to suffer to warrant issuance for the orders sought. She deponed that the suit property having been put up as security for money advanced means that the value is quantifiable and should an Appeal be successful the Respondent is well able to refund; the applicant had not offered any security as provided by the law. She stated that the application had been overtaken by events as vacant possession has since given to the Respondent as per the Certificate of the Court Bailiff marked ‘CM-1’. She stated that the Applicant is guilty of laches and the delay of 5 months from 11th June, 2021 when the letters of administration were issued to the filing of the instant Application on November 11, 2021 is inordinate and inexcusable.

IV. Submissions

10. On 15th December, 2021, court directed that the application to be disposed by way of written submissions. All parties fully complied a ruling dated was reserved thereof.

N A. The Applicant Written Submissions

11. On 31st January, 2022, the Learned Counsel for the Applicant, the Law firm of Messrs. A. I Hayanga & Associates filed their submissions in support of the notice of motion application. Mr. Hayanga (Retd, Judge) Advocate submitted that the Applicant had come to court under the provisions of Order 42 Rule 6 of the Civil procedure Rules, 2010 the court may grant a stay pending appeal and the applicant has to fulfil conditions set out including the following:-
 - a) That a substantial loss may result to application unless the order is made
 - b) That the application has been made without delay
 - c) That applicant has offered security for due performance of the decree.



The Learned Counsel stated that in their case they had made the application at the time judgment was read as is allowed under Order 6 Rule 3(3) which allows for oral application for stay of execution pending the hearing of a formal application which was also made immediately by the applicant.

12. The Learned Counsel for the Applicant stated that the applicant is required to give such security as the court orders for the due performance of such decree or order as may be ultimately be binding on them. In this case the court in his judgment on 21st May, 2021 found that the title over the property belonged to the respondent and gave to the respondent vacant possession and ownership.
13. The Learned Counsel further submitted that with the title on him there is nothing that would threaten his position of ownership when the order of stay is given, any order for security in circumstances would be superfluous and merely prohibitive. The subject matter being land whose title is in the respondent would remain unaffected as the order of stay is merely interlocutory order which would not interfere with the judgment until the appeal is decided.
14. The Learned Counsel maintained that if the order of stay is not granted then the Respondent will remain the owner of the property and will be at liberty to dispose of it out of his reach while the applicants even if she succeeds on the appeal will have lost the house completely.
15. The Learned Counsel, to buttress on this point, relied on the case of “[*Kenya Shell Limited v Benjamin Karuga & Ano*](#) [1987] – [1988] CA NO NAI 97 of 196 where it was held that: -
“substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay”

16. The Learned Counsel referred court to the case of “*Butt – Versus - Rent Restriction Tribunal* [1979] KLR, where the Court of Appeal stated that:-
“it is the discretion of the court to grant or refuse a stay but what is to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution.
It has been said that the court as general rule ought to exercise its best discretion in a way so as not to prevent the appeal out of time.”

The Learned Counsel stated that they had asked in their application for a stay and an extension of time to file an appeal out of time. That they had also filed an appeal late and the annexed grounds of appeal show that the applicant had grounds of appeal which are not frivolous and she had given a good reason for extension to file the appeal late. She relied on the case of [*Msisi Mvita v Damaris Wanjiru Njeru*](#) [2016] eKLR where the court confirmed the position that there is independent substantiation of sufficient reason without proof of Order 42 rule 6(2) of the Civil Procedure Rules, 2010.

17. The Learned Counsel submitted the applicant does not feel that the extension of time is her right but a question of the Honorable Court’s discretion. He referred to the provisions of Section 79G of the [*Civil Procedure Act*](#), Cap 21 which states that: -
“79G. Every appeal from subordinate court to High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:



Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good reason and sufficient cause for not filing the appeal in time.”

18. The applicant also submitted that in the registrar’s certificate of delay had not been written so it was premature to oppose the application for extension making reference to the provision of Section 95 of the Civil Procedure Act, cap. 21 which states that: -

“95. “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.”

19. The Learned Counsel for the Applicant also submitted that the Respondent had sought and had evicted the Appellant/Applicant but this is illegal eviction. The attachment was done without application and was done without application for attachment to court under Order 22 Rule 7 of the Civil Procedure Rules, 2010. He submitted that this shouldn’t have been done against the representatives of the deceased judgment debtor giving them an opportunity to show cause a requirement provided for by Order 22 Rule 18 of the Civil Procedure Rules, 2010. The Learned Counsel stated that the deceased was not given the chance to exercise his legal right.

20. The Learned Counsel urged the court that the execution was a fraud and done with disregard of the stay of execution application and the judgment debtor was not given a notice to show cause besides it stops the court because exercising its discretion under the provisions of Order 22 Rule 22 of the Civil procedure Rules, 2010 in deciding whether its sufficient. The counsel directed the court by through the provision of Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010, which provides that no appeal or 2nd appeal should operate as stay of execution or proceedings under appeal from except in so far as the court appealed from a decree may order but the court appealed from may order Civil Procedure Rules Order 42(6), inter alia:-

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) The court is satisfied that substantial loss may result to the Applicants unless the order is made, and that the application has been made without unreasonable delay; and
 - (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicants”.

21. The Learned Counsel cited the excerpts from the *Bullen & Leak & Jacobs on precedents and pleadings* 13th Edition page 1154 which says: -

“That the doctrine of laches may be raised as a defense to deny relief to the plaintiff who has not been reasonably diligent in seeking relief.....the equitable doctrine is of course not



arbitrary or technical. It does not avail where a statutory limitation provision is applicable directly or by and an important question is the extent to which the relevant delay on the part of the Plaintiff has occasioned any and if so what prejudice to the Defendants”.

22. According to the learned counsel in this case the prejudice did it case the Respondent, who from the reading of the judgment knew the Applicant was going to appeal. When they said so on applying orally for stay at the reading of the judgment; they relied on the case of “*Alucard v Skinner* [1887]36 ch D145. The Learned Counsel for the Applicant concluded his submissions by stating that the overriding objective, in the administration of justice was to do substantive justice, and that it is prudent on the part of the Honourable Court to reach a just and fair finding in the merits.

B.The Respondent Written Submissions

23. On 14th March, 2022 the Learned Counsel for the Respondent, the law firm of Kanyi & Company Advocates filed their submissions in opposition of the application. M/s. Mango Advocate submitted that the requirements for granting leave to file an appeal out of time were laid down in the case of “*Leo Sila Mutiso v Rose Hellen Wangari*, and quoted the case of “*Gerald Kithu Muchanje v Catherine Muthoni Ngare & another* (2020) eKLR:

Clearly, “*Leo Sila Mutiso (supra)* which is the locus classicus, laid down the parameters as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled 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 reason 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”.

Be that as it may the issues to consider as a single Judge are both discretionary and non-exhaustive as was explained in the case of “*Fakir Mohammed v Joseph Mugambi & 2 others* [2005] eKLR” where it was held that:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path.....as it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factor.”

She held that this legal proposition was reiterated further in the case of “*Muringa Company Limited v Archdiocese of Nairobi Registered Trustees*, Civil Application No. 190 of 2019” where it was explained that:

“Some of the considerations, which are by no means exhaustive in any application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely



resolution of disputes; the public interest issues implicated in the appeal or intended appeal; whether, prima facie, the intended appeal has chances of success or is mere frivolity.”

.....the reason or reasons for the delay must be reasonable and plausible. In *Andrew Kiplagat Chemarigo v Paul Kiporir Kibet* [2018] eKLR this court stated:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

24. The Learned Counsel directed court to the provision of section 79G of the *Civil Procedure Act* and relied on the case of *Dilpack Kenya Limited v William Muthama Kitonyi* (2018) eKLR, stating that before leave to appeal out of time is granted, good and sufficient reason for the delay must be shown. He continued to submit that the reasons must be plausible and satisfactory as was in the case of *Gerald Kitbu Muchanje v Catherine Muthoni Ngare & another* (2020) eKLR. She submitted that the applicant has failed to demonstrate that it has a good and sufficient reason.
25. The Learned Counsel stated that there is no mandatory requirement for a memorandum of appeal to be accompanied by typed proceedings. That Order 42(2) of the Civil Procedure Rules is a certified copy of the decree or order appealed against. He guided the court to confirm this position by referencing the case in *Hannab Wambui Nyoike – Versus - Labanson Njuguna & Njoroge Njuguna* (2018) eKLR. She also referred Court to the case of *Mary Jonathan Katumo v Nzomo* (2008) eKLR, where whilst dismissing an application for extension of time the learned judge stated that the application was made some 7 months after the subordinate court had delivered the judgment. The reason for the delay is still obtaining and even if leave is granted, the learned judge did not see what will change if the proceedings are still not ready. The Learned Counsel also made reference to the case of *Savings and Loans Limited v Susan Wanjiru Muritu* Nairobi (Milimani) HCCS No. 397 of 2002.
26. The Learned Counsel submitted that the intended appeal had no chances of success and was frivolous. He referenced Section 107 of the *Land Registration Act* and Section 68 (b) of the ITP Act (now repealed) while stating that the suit before the court was for inter alia vacant possession. She submitted that section 68(b) of the ITP Act does not provide that a purchaser needs to inquire on who is on the property or whether the charge exercised his powers as per the law.
27. The Counsel for the Respondent stated that applicant had not shown what prejudice they will suffer if the application is disallowed or any special circumstances that would make them suffer prejudice. She cited referenced the case of Dilpack supra:

“In the interest of the public courts ought to take care that appeals are brought before it in proper time and before the proper court or registry and when the judgment has been pronounced and the time for appeal has elapsed without an appeal the successful party has a vested right to the judgment which ought, except under special circumstances, to be made effectual. And the Legislature intended that appeals from judgments should be brought within the prescribed time and no extension of time should be granted except under very special circumstance”.



She stated that the Respondent was entitled to the fruits of the judgment. She informed the court that the matter was filed in court in 2009 and it was not until 2021 that the matter was finally determined after lapse of twelve (12) years; this whole time the Respondent has kept out of the property.

28. The Learned Counsel concluded by stating that the court should not exercise its jurisdiction in favour of the Applicant as they are not worthy of that discretion. She stated that the order for stay was a nullity in law as what was sought to be stayed had already taken place. She submitted that the Applicant was duly evicted from the suit premises by an order of the honourable court on 8th December, 2021 after the lapse of the 30 days that she had requested to vacate which fact the applicant had admitted. To buttress on this point, she cited the case of “[Raphael Kakena Muloki & Peter Kavita v The Cabinet Secretary of Lands & others](#) (2021) eKLR, where the learned judges dismissed an application for stay pending appeal. She submitted that Order 22 Rule of the Civil Procedure Rules is not applicable to the case as the judgment in the matter was delivered on 21st May, 2021 stating that the applicant had notice of the judgment. She urged the court to dismiss the applications with costs to the Respondent.

IV. Analysis and Determination

29. I have read and considered all the filed pleadings, the articulate written submissions made, the myriad authorities cited by the parties herein, the relevant provisions of law and [the Constitution](#) of Kenya, 2010.

In order to arrive at an informed, just and fair decision, the Honorable Court has framed the following three (3) salient issues for its determination. These are:-

- a. Whether the two Notices of Motions applications filed by the Applicant meet the thresholds of law to be granted on the extension of time and stay of execution of the lower Court Judgment pending the heading and final determination of the appeal;
- b) Whether the parties are entitled to the orders sought.
- c) Who will bear costs of the filed applications?

Issue No. a). Whether the two Notices of Motions applications filed by the Applicant meet the thresholds of law to be granted on the extension of time and stay of execution of the lower Court Judgment pending the heading and final determination of the appeal;

30. The legal basis for grant extension and/or enlargement of time is founded under the provisions of Section 95 of the [Civil Procedure Act](#), Cap 21 and under Order 50 Rule 6 of the Civil Procedure Rules, 2010. As indicated this powers are discretionary. The applicant has provided this court with very weighty reasons and reasonable grounds as the cause of the delay in moving this court on an appeal and this applications. The Honorable Court has also taken judicial notice that the disputed property involves the family of the deceased and the Respondents over its legal ownership. From the facts they Applicant claims to be their only belonging. The applicant submitted that they were not able to have obtained the Grand letters of Administration for the estate of the deceased on time due to the delays at the Courts.
31. Further, the registrar’s certificate of delay had not been written so it was premature to oppose the application for extension making reference to the provision of Section 95 of the [Civil Procedure Act](#), Cap. 21. In other words, the main cause of the delay in moving court was caused largely by bureaucracies of the Honorable Court and which should not be visited upon the Applicant.

Notwithstanding and with all due respect to the robust submissions tendered by the Learned Counsel for the Respondent on this issue, the Honourable Court is duty bound to apply its discretion, the



overriding objectives founded under the provisions of Articles 159 (1) and (2) of *the Constitution* of Kenya, 2010, Sections 3 & 13 of the *Environment and land Act*, No 19 of 2012, Sections 150 of the *Land Act*, No 6 of 2013 and Section 101 of the *Land Registration Act*, No 3 of 2012 has agreed to enlarge the said statutory period accordingly. In the given circumstances, the Respondent in whose favour the Judgement of the lower court was delivered will not be prejudiced in anyway.

32. As regards the provisions of the order for stay of execution pending appeal is Order 42 Rule 6 of the *Civil Procedure Rules*, 2010. Basically, the Applicant is required to demonstrate that:

“Substantial loss may result unless the order is made; the application has been mad without unreasonable delay; such security as the court orders for the due performance of the decree has been given before the applicant”.

The purpose of stay pending appeal is to preserve the substratum of the case especially in land matters where the character of the suit property may be changed while the appeal is pending. The applicant must establish the he/or she will suffer substantial loss if the order of stay is not granted. The applications before this court herein are competent and meritorious.

33. In the case of *Mohammed Salim T/A Choice Butchery v Nasserpuria Memon Jamat* (2013)eKLR, the court upheld the decision of *M/s Portreitz Maternity v James Karanga Kabia* Civil Appeal No. 63 of 1997 and stated that:

“That right of appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right

In the case of *Meteine Ole Kilelu & 10 others v Moses K. Nailole*, Civil Appeal No 340 of 2008, the court opined that where the decree appealed against is a monetary decree, the applicant has to show that either once the execution is done, after refusal of the application, the applicant may never get back that money even if his appeal succeeds or that the decretal sum is so large vis a vis his status, or business that the execution would in itself ruin his business or threaten his very existence.

34. In the case of “*RWW v EKW* [2019] eKLR, the court stated the purpose of stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

35. The court has the discretion to grant of refuse to grant an order of stay but the discretion must be applied judiciously. In the case of *Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi* [2014] eKLR, where the court held that;

“Order 46 Rule 6(2) lays down the conditions which an applicant must satisfy in order to deserve the orders of stay of execution pending appeal. However, the court stated that it



noted that the conditions set out in Order Rule 6 (2) only serve as guidelines which the court can use as beacons in exercising its unfettered discretion in deciding whether or not to grant stay of execution pending appeal depending on the circumstances of each case.”

36. It should also be borne in mind that the court has to balance the right of the applicant to appeal and that of the successful litigant to enjoy the fruits of his/her judgment as was held in the case of “ *Machira T/A Machira & Co Advocates v East African Standard (No 2)* [2002] KLR 63 it was held that:

“ to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

For the reasons adduced herein, therefore, the Court is satisfied that the orders sought from the two application by the Applicant are worth being granted in the interest of Justice, equity and Conscience.

Issue No. b). Whether the parties are entitled to the orders sought.

37. The court has gone through the application, supporting affidavits and replies thereto. The court finds that it will be in the interest of justice for the appeal to be filed especially being a land that the parties should be given an opportunity to be heard again. Further the motions in court is based under Order 42 Rule 6 of the *Civil Procedure Rules, 2010* which has thus as per the set parameters therein.
38. Despite of the fact that has been demonstrated that the motions were filed with unreasonable delay, but the cogent reasons granted by the Applicant calls for the court to apply its own discretion in enlarging the time. Definitely, using its own discretion, the Court perceives that should this not happen, the substantial loss may occur. It is imperative that the stay of execution pending appeal is allowed.

Issue No. c). Who will bear the Costs

39. The provision of Section 27 (1) of the *Civil Procedure Act*. Cap. 21 provides that Costs follow the events. The events are ordinarily the results of the litigations by the parties. In this case, the out come of this litigation would be assessed by the facts that the Applicant has succeeded in obtaining the orders prayed for from the two Notices of Motion application and hence it follows that they should be granted the costs of the application. However, for good order, the Honorable Court holds that the Costs to be in the cause.

V .Conclusion & Disposition

40. Based on the in depth analysis of the framed issues hereof, in conclusion, I wish to now make the following findings with regard to the two applications filed by the Applicant. These are:-
- a. That the two Notices of Motion applications dated 11th and 16 November 2021 be and are hereby allowed.



- b. That the Applicant be and is hereby granted Sixty (60) days stay of execution to compile, file and serve the Memorandum of Appeal and/or the Records of Appeal failure to which the order automatically lapse.
- c. That in order to preserve the suit property pending the hearing and final determination of the Appeal, the Land Registrar, Mombasa to register an inhibition Pursuant to the provisions of Section 68 (1) (2) and (3) of the Land Registration Act, No. 3 of 2012 and Regulation 79 (1), (2) and (3) of the Land Regulation Unit, 2017 to be facilitated and undertaken by the Applicant/Appellant herein.
- d. That the costs of the applications will be in the cause.

It is ordered accordingly.

RULING DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF MAY, 2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:-

- a. **M/s. Yumna, Court Assistant.**
- b. **Mr. Hayanga (Retd. Judge) Advocate for the Applicant/Appellant.**
- c. **M/s. Cecilia Mango Advocate for the Respondent.**

