



**Kabiri v Githinji & another (Environment and Land Appeal
E009 of 2021) [2022] KEELC 2320 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2320 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E009 OF 2021**

LN GACHERU, J

MAY 12, 2022

BETWEEN

PETER NGUGI KABIRI APPLICANT

AND

ESTHER WANGARI GITHINJI 1ST RESPONDENT

FLORAH WANJIKU GITHINJI 2ND RESPONDENT

RULING

1. Vide a Notice of Motion Application dated 10th August, 2021, and filed on 11th August, 2021 the Appellant/Applicant sought orders; -
 1. That there be a stay of execution of judgment delivered on 13th May 2021, and all consequential orders thereto pending hearing and determination of this application
 2. That there be a stay of execution of judgment delivered on 13th May 2021, and all consequential orders thereto pending hearing and determination of Murang'a Civil Appeal No. E009 OF 2021.
 3. That a temporary injunction be and is hereby issued against the Respondent from evicting the Appellant/ Applicant from the suit property being Maragwa/ Ridge/ 18, which has since been subdivided into two plots that is Maragwa/ Ridge/ 599 And Maragwa/ Ridge/ 560.
 4. That the cost of the application be in the cause.
2. The Application is premised on the *Grounds stated on the face of the Application and the Supporting Affidavit of Peter Ngugi Kabiri, sworn on 10th August, 2021. It is the Applicant's disposition that he filed a suit against the Respondent at Kigumo Law Courts, and Judgment was entered against him on 3th May, 2021. Being dissatisfied with the said judgment, he preferred the instant Appeal. That the Respondent has already commenced the process of execution against him by filing an application for



- eviction dated 29th July, 2021. Further that he has been living on the suit property since 1962 and will suffer irreparable harm if stay is not granted. It is his contention that the Appeal will be rendered nugatory should the application for stay not be allowed.
3. In response to the application, the 1st Respondent Esther Wangari Githinji filed a Replying Affidavit dated 23rd November, 2021. It is the 1st Respondent's disposition that the 2nd Respondent was her co-wife and she is now deceased. In respect to the Application, she contended that the Applicant filed a similar application for stay of Execution vide ELC No. 20 of 2018, in Kigumo Law Courts, but later withdrew the application. Additionally, the 1st Respondent avers that they filed for eviction orders in SPMCC No. E24 of 2021, against the Applicant, but the Applicant failed to prosecute the said application and instead moved this Court for the instant orders. Further, the 1st Respondent deponed that the Applicant continues to unlawfully occupy the suit property and should eviction orders be issued, the same would be in accordance with the Judgment and there is no prejudice that the Applicant herein will suffer.
 4. The 1st Respondent further contended that there is no proper Appeal that has been filed that will be rendered nugatory. That the application is not brought in good faith, but is a mechanism to engage in unending litigation which has been on course for decades to the extent that the 2nd Respondent was not able to enjoy the fruits of the judgment. Alongside the Replying Affidavit, the 1st Respondent filed a Notice of Preliminary Objection dated 23rd November, 2021 raising two grounds
 - a) The appeal is fatally and incurably defective as the Appellant offends Order 9 Rule 9 of the [Civil Procedure Rules](#).
 - b) *Locus* of the Appeal is wanting if the party that appealed does not have audience before this Court. Article 159(2)(d) cannot cure express legal pronouncement on procedural law.
 5. The Applicant responded to the Preliminary Objection by filing a Replying Affidavit sworn on the 25th January 2022, to the effect that the said Preliminary Objection is unmerited. He averred that he took out a notice to act in person, but instructed the Law Firm of Kanyi Kiruchi Co. Advocates to institute the appeal whereby they signed consent. That the consent was filed on 10th June 2021, while the Memorandum of Appeal was filed on 9th June 2021, and he attributes the delay in filing the consent to the e-filing system. Further that the delay is not prejudicial and can be rectified by this Court since the right to representation takes precedence.
 6. The Court directed parties to canvass the application and the Preliminary Objection by way of written submissions. The Applicant filed his submissions on the 27th January 2022, and raised two issues for determination.
 7. On whether the Appellant's/Applicant's advocate is properly on record, the Applicant submitted that the Court should consider the irregularities as a technicality and reiterated the contents of the Replying Affidavit of 25th January, 2022. Reliance was placed on the case of [Peter Nganga Kimani v Francis Njenga & Another](#), Thika ELC No. 44 of 2017, where the trial Court based on the circumstances therein elaborated the importance of Order 9 Rule 9, of the [Civil Procedure Rules](#) and found that the same concerned outgoing and incoming advocates and not opposing counsel.
 8. On whether an order of stay should be granted, the Applicant submitted that he has been in occupation of the suit property since 1962 and should stay not be granted, he will be evicted. That the eviction will result in substantial loss that no amount of compensation will suffice and he relied on the case of [James Wangila & Another v Agnes Naliaka Cheseto](#)[2012]eKLR, where the trial Court observed that the issue of substantial loss should be prevented by preserving status quo to avoid rendering an appeal nugatory.



9. On security for costs, the Applicant submitted that this being a land matter, the issue of costs may not be granted.
10. The 1st Respondent filed her submissions on the 18th February, 2022 and raised four issues for determination.
11. It is the 1st Respondent's submissions that there should be compliance with rules of procedure and that non-compliance with Order 9 Rule 9 of the Civil Procedure Rules should not be entertained as it is not cured by Article 159(20(d) of the Constitution. She relied on the case of Lalji Bhimji Shangani Builders & Contractors vs City Council of Nairobi (2012)eKLR, where the Court cautioned on the need to observe the rules of procedure.
12. On the Notice of Motion, the 1st Respondent submitted that the same is incompetent for non-compliance with Order 9 Rule 9, of the Civil Procedure Rules and that the advocate on record lacks the locus to prosecute the application. Further, 1st she submitted that the application is founded on the wrong provisions of Law as it is brought under the auspice of Order 22 Rule 22 of the Civil Procedure Rules.
13. In submitting that the suit is *Res judicata*, the 1st Respondent gave history of the various suits touching on the suit property which culminated to the filing of the Kigumo ELC No. 20 of 2018, the substance of this Appeal. On grant of injunction, the Respondent submitted that the same cannot be issued as it will scuttle the orders of the trial Court and that the Applicant has not met the threshold for grant of the orders sought.
14. From the available evidence. It is clear that; -
 - i. Judgment was delivered on the 13th May 2021, against the Appellant/Applicant herein.
 - ii. The Appellant preferred an Appeal and filed a Memorandum of Appeal dated 7th June 2021, and filed in this Court on 8th June, 2021.
 - iii. On the 13th May, 2021, the Appellant was represented by Counsel and one Mr. T. M Njoroge, held brief for Mr. Muguku for the Plaintiff now the Appellant.
 - iv. The Appellant instructed the Law Firm of Kanyi Kiruchi Advocates after judgment was entered and filed a Notice of Appointment of Advocates dated 7th June 2021, and filed on 8th June, 2021.
 - v. By a letter dated 9th June, 2021 the Appellant and the Law Firm of Kanyi Kiruchi Advocates entered consent to allow the said Law Firm of Advocates to come on record for the Appellant herein.
 - vi. A perusal of the proceedings in the lower Court indicates that the Appellant remained represented throughout the suit by the Law Firm of V.E MUGUKU MURIU & Co Advocates.
15. The Appellant has now moved this Court for stay of execution of the Judgment, but which application has been opposed by the 1st Respondent. The issues for determination; -
 - i. Whether the Preliminary Objection dated 23rd November, 2021 is merited.
 - ii. Whether non-compliance with Order 9 Rule 9 of the Civil Procedure Rules renders this Appeal fatally defective.
 - iii. Whether the application dated 10th August, 2021 is merited.



i. Whether the Preliminary Objection dated 23rd November, 2021 is merited

16. The 1st Respondent filed a Preliminary Objection alleging that the Appeal herein is fatally defective as it offends the Provisions of Order 9 Rule 9 of the Civil Procedure Rules to the extent that the Law Firm of Kanyi Kiruchi Advocates, is not properly on record. That the Appeal cannot be cured by the provisions of Article 159(2)(d) of the Constitution.
17. It is trite that a Preliminary Objection must raise pure points of law as settled in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, where it was held that:
- “ a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”
18. It is of the essence to set out the provisions of Order 9 Rule 9 of the Civil Procedure Rules to determine the issues in dispute. The said order provides as follows: -
- “When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—
- (a) Upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing Advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
19. In order to determine compliance with the above provisions, the Court will have to consider and go through the proceedings. A Preliminary Objection can only suffice on pure points of law, and does not require the Court to carry out any investigation of facts for it to stand. The Supreme Court in the Application No 50 of 2014 Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others [2015] eKLR, stated; -
- “Thus a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”
20. While the Appellant allege compliance, the Respondent’s allege otherwise. It is the Appellant’s contention that he filed in this Court a copy of consent as by law required. Undoubtedly, there is a contest of facts which requires this Court to investigate and ascertain. Therefore, the Preliminary Objection herein does not meet the threshold set out in the Mukhisa Biscuit Case, supra.
21. The upshot of the above is that this Court finds and holds that the Preliminary Objection dated 23rd November, 2021 is not merited and the same is dismissed accordingly.



ii. Whether non-compliance with Order 9 Rule 9 of the Civil Procedure Rules renders this Appeal fatally defective.

22. The right to legal representation enjoys Constitutional protection. In *Tom Kusienya & Others v Kenya Railways Corporation & others* [2013] eKLR, Mumbi Ngugi J. (as she then was stated as follows:-

“However, I believe that the right to legal representation by counsel of one’s choice in civil matters is implicit in the constitutional provisions with regard to access to justice, particularly Articles 48, 50 (1) and 159(2)(a) of the Constitution, and it is only in exceptional circumstances that this right should be taken away.”

23. Similarly, the Court of Appeal in Civil Application No. 136 of 2005 *Delphis Bank Ltd v Channan Singh Chatthe & 6 others* [2005] eKLR, observed as follows:

“The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases however particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/ client fiduciary relationship or where the advocate would double up as a witness.

24. The procedure for representation after judgment has been entered is provided for under Order 9 Rule 9 of the *Civil Procedure Rules*. The said Order envisages two modes one is with leave of Court and the other is by consent between the proposed incoming and outgoing Advocates and which consent must be adopted as an order of Court. The purpose of Order 9 Rule 9, is to safeguard the interest of an advocate who may have been shortchange by the parties as was held by this Court in *Peter Nganga Kimani*, supra.

25. In the instant Appeal, the Appellant is represented by the Law Firm of Kanyi Kiruchi Advocates who filed a Notice of Appointment of Advocates dated 7th June, 2021. A perusal of the proceedings indicates that the Law Firm of Kanyi Kiruchi Advocates, was taking over the Appellant’s case from the Law Firm of V.E Murugu Muriu & Co. Advocates, who represented the Appellant up and until the date of judgment in Kigumo ELC No. 20 of 2018. What is not clear is whether the takeover was done procedurally and in compliance with Order 9 Rule 9 of the *Civil Procedure Rules*.

26. The Appellant avers that he was acting in person, but later instructed the Law Firm of Kanyi Kiruchi Advocates, to file and prosecute the instant Appeal on his behalf. There is no evidence that the Appellant filed a Notice to act in person. However, this Court has perused a letter dated 9th June 2021, which contents thereof indicates that it is a consent between the Appellant and the Law Firm of Kanyi Kiruchi Advocates allowing the said Law Firm to come on record for him.

27. Although the said consent was filed, there is no Court record of the same having been adopted as an order of Court. A reading of Order 9 Rule 9(b) of the *Civil Procedure Rules*, contemplates that consent be signed between the outgoing and proposed incoming advocates or between the outgoing advocates and the person intending to act in person. Presently, the consent dated 9th June, 2021, is between the Appellant and the proposed incoming advocates. This is short of the above provisions of the Law. It is no doubt that the said consent was filed before this Court on 10th June, 2021 though unprocedurally. Essentially what the Law Firm of Kanyi Kiruchi Advocates ought to have done was either seek leave to come on record for the Appellant if the Appellant was unrepresented, or file a consent between the outgoing advocates and themselves, if the Appellant was represented and have the said consent adopted



as an order of Court. In HCCC No. 810 of 2001 *Microsoft Corporation v Mitsumi Computer Garage Ltd & another* [2001] eKLR, the Court stated; -

“...Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue...The purpose for verifying the contents of the plaint may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on the record.”

28. The provisions of Order 9 of the *Civil Procedure Rules*, are couched in mandatory terms, which require strict compliance by parties. The Appellant was therefore bound to comply with the above provisions before the Law Firm of Kanyi Kiruchi Advocates could enter appearance. This Court aligns itself with the sentiments of the Court in ELCA 17 of 2016 *James Ndonyu Njogu v Muriuki Macharia* [2020] eKLR where it held;

“Clearly the provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that for any change of Advocates after judgment has been entered to be effected, then there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate.”

29. This Court notes the non-compliance by the Appellant herein with Order 9 Rule 9 of the *Civil Procedure Rules*. The 1st Respondent avers that the non-compliance cannot be cured by Article 159(2) (d) of the *Constitution*. He further avers that the said non-compliance is prejudicial to her. The Court notes that the 1st Respondent did not substantiate the prejudice she would suffer if the Law Firm of Kanyi Kiruchi Advocates continues to represent the Appellant. This Court appreciates the Appellant’s constitutional right to representation which cannot be limited and which right must be held in equal regard with the 1st Respondent’s constitutional right to fair hearing.

30. 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;

31. 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...”

32. Guided by the above pronouncements, this Court finds and holds that the non-compliance by the Appellant does not prejudice the 1st Respondent in any way, and does not oust the jurisdiction of this Court, and does not go to the root of the proceedings and also does not take away the Respondent’s constitutional right to fair hearing.
33. The role of this Court is to do justice, and guided by the provisions of Article 159(2)(d) of the Constitution and Sections 3A and 3B of the Civil Procedure Act, this Court finds and holds that non-compliance with Order 9 Rule 9 of the Civil Procedure Rules by the Appellant does not render the Appeal fatally defective.

iii. Whether the application dated 10th August, 2021 is merited

34. The Appellant/Applicant has moved this Court for stay of execution pending appeal on the basis that the 1st Respondent has sought eviction orders against him. As found above, the 1st Respondent was the successful party in the lower Court and it is only fair that she be given an opportunity to enjoy the fruits of her judgment. On the other hand, the Appellant/Applicant enjoys a right of Appeal, which right he avers will be curtailed if stay of execution pending Appeal is not granted.
35. It is trite that no Appeal can operate as stay, hence an application for stay shall be made to court by desiring parties. Grant of stay of execution pending Appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules, the relevant part of which states as follows:

- “(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 applicant 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 applicant.
- (3) ...
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.



- (5) ...
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the 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 a subordinate court or tribunal has been complied with.”
36. The Supreme Court in Application No 5 of 2014 *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others* [2014] eKLR held that the applicant must satisfy court that (i) the appeal or intended appeal is arguable and not frivolous; and that (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory. The principles were also echoed in the Court of Appeal Case of *Butt v Rent Restriction Tribunal* [1982] KLR 417.
37. The foregoing provision enunciates three conditions for granting of stay to wit, substantial loss on the part of the applicant, application is made without delay and the Applicant to furnish such security as will be directed by court. Being an Appeal, the court ought to also consider the principles laid down in the *Gatirau Peter Case*(Supra), the appeal will be rendered nugatory.
38. Substantial loss is the basis upon which a Court should grant an order for stay of execution. In *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR the Court held; -
- “Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence, it is difficult to see why the respondents should be kept out of their money”
39. There is no definite definition of what amounts to substantial loss, but various Courts have come up with what constitutes substantial loss. The High Court of Uganda in *Tropical Commodities Suppliers Ltd & Others v International Credit Bank Ltd (in liquidation)* [2004] 2 E.A. 335 held;
- “Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”
40. In Miscellaneous Application 42 of 2011 *James Wangalwa & Another v Agnes Naliaka Cheseto*[2012]eKLR
- “The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal”
41. The subject matter herein is land, and the Appellant/Applicant contends that he has lived on the suit land since 1962. This Court has no reason to doubt the same. In fact, the 1st Respondent admitted to commencing eviction proceedings against the Appellant. The Appellant/Applicant avers that he lives on the suit land and if stay is not granted, he will be evicted and will be rendered vagabond. An eviction order if granted, will have the effect of removing the Appellant/Applicant from the suit land permanently and it matters not if this Appeal will be subsisting. Based on the above, the Court finds and holds that the Appellant/Applicant has demonstrated that he will suffer substantial loss if stay is not granted.



42. Another facet, that this Court has to consider is whether the application was brought timely. Judgment was delivered on 13th May, 2021, while the instant application was filed on the 11th August, 2021, which is about 2 ½ months. What amounts to inordinate delay differs from case to case. In *Utalii Transport Company Limited & 3 others v Nic Bank Limited & another* [2014] eKLR, the Court in considering what amounted to inordinate delay had this to say
- “Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to 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” I associate myself fully with this.”
43. The Appellant/Applicant was jolted to action by the 1st Respondent’s application for eviction orders in SPMCC No. E24 of 2021. However, the 1st Respondent averred that the Appellant had filed an application for stay orders in the trial Court and withdrew the same and thereafter filed the instant application. Once a Court delivers judgment, there is always an existing uncertainty as to what time execution can issue as a result therefore; an aggrieved party is required to take immediate action to avoid execution by staying the orders of Court. It is trite that court orders cannot be issued in vain. This Court agrees with the learned judge in Eldoret ELC No. 200 of 2012;- *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] eKLR, where he opined that a delay even for a day is delay. In the said case, the Applicant filed an application for stay pending an appeal and the court considered that a delay for four days was inordinate.
44. The Appellant/Applicant herein did not give any reason for the delay occasioned before filing the instant application. The 1st Respondent on the other hand did not address the issue of delay in her submissions. Time begun running when Judgment was entered, and nothing stopped it. Time only stops running within the provisions of Order 50 Rule 4 of the *Civil Procedure Rules* or as directed by Court, and this was not the case.
45. The Court of Appeal in Nakuru Civil Appeal No. 1/07 *William K. Too v Simion K. Langat* [2007] eKLR, refused to interfere with the ruling of the High Court where the learned judge found that an unexplained delay of forty two days was inordinate. Even if this court was to invoke the provisions of Article 159(2) (d), of the Constitution, such disregard on the rules of procedure cannot be ignored. The provision is not a panacea for the abuse of court process. Land is an emotive issue in Kenya and litigating parties ought to judicially and expeditiously adjudicate on them.
46. Preserving the subject matter of the intended appeal is important so as not to render an Appeal nugatory. The onus is on the Applicant to demonstrate that the Appeal will be rendered nugatory. The Court of Appeal in Nairobi Civil Appeal No. 211 of 2016;- *Shah Munge & Partners Ltd v National Social Security Fund Board of Trustees & 3 others* [2018] eKLR, when considering whether to allow an application for injunction and stay pending appeal looked at the definition of “nugatory” as was defined in *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232, and opined that nugatory has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling, essentially one which is of little or no legal consequence.
47. Based on the above, this Court finds and holds that there was an unexplained and inordinate delay on the part of the Appellant in filing the instant application.



48. On the last condition as to provision of security, the Court finds that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay Order pending Appeal is that (s)he must furnish security. The Appellant/Applicant avers that this being a land matter, the issue of security cannot suffice. In the case of Arun C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates (2015) eKLR, the Court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

49. The demised land is registered in the name of the Respondents and they are in possession of the title. The value of this property is unknown to the Court as it would have directed the Appellant/Applicant to deposit a monetary amount as security for costs. As such this Court will exercise its discretion in favor of granting stay on condition that the Appellant/Applicant shall continue to occupy the suit land but shall not conduct any farming and/ or economic activity on the said until this Appeal is heard and determined. The 1st Respondent on the other hand shall not sale, alienate and/ or sub-divide the suit land.

50. On costs, it is trite that costs follow the event and this Court has the discretion to award Costs. Having found that the Appellant/Applicant was guilty of inordinate delay, this Court shall not exercise its discretion in favor of the Appellant/Applicant. However, the Court will find and hold that the Application dated 10th August 2021, is allowed on condition that the Applicant does not farm and/or engage in any economic activities thereon. Further, there will be no orders as to costs.

51. The Applicant is directed to prosecute this Appeal expeditiously and without any delay.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 12 TH DAY OF MAY, 2022.

L. GACHERU

JUDGE

Delivered virtually;

In the presence of;

M/s Muchemi H/B for Kanyi for the Appellant/Applicant

Mr Ogechi H/B for Mr Nyaberi for the 1st and 2nd Respondent

Alex Mugo - Court Assistant

L. GACHERU

JUDGE

