



Innovative Properties Limited v National Land Commission & 4 others (Constitutional Petition 49 of 2019) [2022] KEELC 3224 (KLR) (19 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3224 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION 49 OF 2019**

**LL NAIKUNI, J
JULY 19, 2022**

BETWEEN

INNOVATIVE PROPERTIES LIMITED PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

DIRECTOR OF SURVEY 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

COUNTY GOVERNMENT OF MOMBASA 5TH RESPONDENT

RULING

I. Introduction

1. For the determination of this honorable court are two (2) notice of motion applications. The first one is dated June 30, 2021 having been brought by the petitioner herein. Whilst the second one which is dated September 23, 2021 having been brought by the 5th respondent herein respectively. On January 26, 2022, the honorable court directed that both of these applications be heard simultaneously and they be disposed off by way of written submissions. Thus, the court shall be dealing with each of them separately for clarity sake.



II. The Petitioner's Application Dated June 30, 2021

2. As indicated above, the notice of motion application by the petitioner is dated June 30, 2021. It is brought under the dint of sections 1A, 3A and 80 of the *Civil Procedure Act*, cap 21 and the provision of article 159 of the *Constitution of Kenya 2010*. The petitioner herein seeks for the following orders:-
 - a. Spend.
 - b. That the judgement delivered on January 27, 2021 be and is hereby reviewed to include an order compelling the respondents herein and/or their agents, employees, assigns or any other person acting and/or authorized by them or through their authority to vacate the suit property known as Mombasa/Block XVII/1469 within 14 days from the date of this order in default thereof the petitioner be at liberty to lawfully evict them from.
 - c. That the Officer Commanding Station (OCS) Tononoka Police Station, Mombasa to ensure compliance with this court's order and to ensure that law and order is maintained and that peace prevails at all times that the order issued herein is being enforced.
 - d. Costs of this application be provided for.
3. The application is premised on the grounds, testimonial facts, and the averments of the 17 paragraphed support affidavit of Mohamedraza S Rashid sworn and dated June 30, 2021. He deposed that he was the Director of Innovative Properties Limited, the petitioner company herein. He averred that on January 27, 2021 this honorable court delivered its judgement whereby it ordered that the 1st, 2nd, 3rd, 4th and 5th respondents herein be restrained from occupying, trespassing or taking possession of all that property known as Mombasa/Block XVII/1469 and from interfering with the petitioner's title, leasehold interest, ownership, occupation, possession and use of the said property. He deposed that the decree was extracted and served upon the respondents' advocate on April 26, 2021 and April 27, 2021 respectively. He annexed a copy of the extracted decree and marked as "A" herein. He asserted that in addition to the decree, the petitioner's advocate on record wrote a letter dated April 26, 2021, a copy of which he annexed and marked as "B" herein, through which they advised the respondents to comply with the decree. Indeed, he averred that both the letter dated April 26, 2021 and the decree were both served upon the counsel for the respondent via email on May 3, 2021 annexed and marked as "C" herein. He maintained that despite being served with the decree and the forwarding letter, the respondents had continued to occupy and use the suit property which was currently occupied by their employees, agents, assigns, officers and/or persons authorized by the respondents to do.
4. The deponent stated and based on information from his advocates on record, the petitioner's advocates drafted and presented for signing warrant to give possession a copy of which was annexed and marked "C" herein. However, the deponent further averred that the Deputy Registrar had been unable to sign the said warrants to give possession for the sole reason that this honorable court had not issued express orders of eviction despite the orders issued against the respondents to restrain them and their employees, agents, officers and persons authorized by themselves from occupying the suit property. As a result, he argued that the petitioner was unable to enjoy the full fruits of the judgement which was in its favour due to the respondents' continued use and occupation of the suit property despite the restraining order. He held that there was need to review the judgement so as to provide for an express order compelling the respondents and/or their agents, employees or officers to vacate the suit property or in default of which they be lawfully evicted therefrom in addition to the restraining orders



already issued. The deponent contended that it was in the interest of justice that the order of review sought herein was granted otherwise the respondents and their employees and authorized agents would continue occupying and using the suit property in a manner that was not only detrimental to the petitioner's interest but also in violation of this honorable court's judgement. In so doing, it would enable the petitioner to fully enjoy the fruits of the judgement. He informed court that the application for review had not been filed earlier as they were hoping that the respondents would comply with the decree once served by advising their employees and officers to desist and cease from occupying the suit property once the decree was served upon them. Further, he posited that the reason the application could not have been brought earlier was that it had only been in the previous week on June 17, 2021 that the Deputy Registrar had indicated that he would not sign the Warrants for the reason aforesated herein. He wondered why the respondents could not comply with this honorable court contained in the decree until and unless the court intervened by making an express order requiring them to vacate the suit property or in default they were evicted therefrom. He contended that since the honorable court had already made a finding that the suit property belonged to the petitioner, the 1st, 2nd, 3rd, 4th and 5th respondents would not suffer any prejudice if the orders sought by the petitioner were granted herein. He urged court to allow the application and grant the of eviction as prayed since it had already held that the Petitioner was the owner of the suit property.

III. The Grounds Of Opposition By The 1st Respondent.

5. On April 27, 2022, the 1st respondent opposed the application dated June 30, 2021 filed by the petitioner through the 19 paragraphed grounds of opposition dated February 26, 2022. It brought out that the parameters for granting review orders had not been met and hence the same could not be issued. It urged court to consider that parties were bound by their own pleadings. Taking that the petitioners herein had failed and never moved court for orders of eviction in their pleaded and filed petition, they could not do so in the application for review.
6. The grounds of opposition held that no new evidence had been adduced or raised in the substratum of the application to warrant a grant of the orders sought in the instant application. It argued that the suit property was private property and that the amalgamation of property numbers Mombasa/Block XVII/1469 and Mombasa/Block/XVII/1717 was illegal, unconstitutional, null and void. and The Petitioner was accused of seeking eviction orders yet the same were not sought in their pleadings. The Counsel urged court to find in the interest of justice as the suit property was a public school and uphold the right to education.

He Grounds Of Opposition By The 2nd, 3rd And 4th Respondents

7. On September 27, 2021, the learned counsels, the State Law offices for the 2nd, 3rd and 4th respondents filed a six (6) points grounds of opposition against the application dated June 30, 2021 by the petitioner herein. It claimed:-
 - a. That the application was frivolous, vexatious and lacked substance, abusing the court process as it did not adhere to the procedural laws of execution.
 - b. That the application was an abuse of the court process and waste of time with no arguable points of law.
 - c. That the applicant had not demonstrated any urgency of the matter and would not suffer any prejudice or damage that could not be remedied if the application was not allowed;
 - d. That the application dated June 30, 2021 violated Civil Procedure Rules of execution of a Judgement and hence should be dismissed.



- e. That if at all the judgement was delivered on January 27, 2021, then applicant ought to have extracted an order and applied for execution of the judgement.
- f. That the provision of order 29 rule 3 of the [Civil Procedure Rules, 2010](#) provided that for the procedure to be followed when seeking execution against the [Government Proceedings Act](#) (cap 40) should be made to a registrar for a direction that a separate certificate be issued with respect to costs ordered to be paid to the applicant be made to the court.

They held that the petitioner failed to follow this procedure. On that ground, the 2nd, 3rd and 4th respondents urged court to find the application was void and dismiss it.

IV. The Replying Affidavit By The 5th Respondent

8. On September 23, 2021, the 5th respondent responded to the application dated June 30, 2021 filed by the petitioner herein through a 10 paragraphed replying affidavit sworn by Jimmy Waliaula. He deponed that he was the Director of Legal Services of the County Government of Mombasa and thus fully conversant with the facts of this case and duly authorized and competent to swear this affidavit on its behalf. He averred that the application was vexatious, frivolous and an abuse of the court process for failing to satisfy the conditions set out under the provisions of section 80 of the [Civil Procedure Act](#), cap 21 on review to warrant grant of orders sought. He claimed that the petitioner was using unorthodox means to amend its pleadings after the matter had been heard and Judgment delivered. He further claimed that the applicant was trying to lure the court and the parties to delve into issues that were not within the purview of the court through deception. He argued that the totality of the application was clearly intended to invite the court to consider and give a determination on issues where the court had become “*functus officio*” on the issues raised in the application, which called for reopening of a concluded matter. He further averred that the 5th respondent had filed an appeal against the said judgement and allowing the application would render the said appeal nugatory. He urged court to dismiss the application with costs to the respondents.
9. The notice of motion application dated September 23, 2021 by the 5th respondent was brought under the provision of section 7 of the [Appellate Jurisdiction Act](#), rule 4 of the [Court of Appeal Rules 2010](#), sections 1A, 1B, 3A and 63 (e) of the [Civil Procedure Act](#), cap 21 and order 51 rule 1 of the [Civil Procedure Rules, 2010](#). The orders sought were:
 - a. Spent.
 - b. That the honorable court be pleased to stay the judgment delivered on January 27, 2021 by Hon Justice CK Yano in Constitutional Petition No 49 of 2019 and/or execution of the judgment, decree and/or order herein passed pending the determination of this application and determination of the appeal filed herein.
 - c. That the honorable court be pleased to extend the time within which to file and serve the notice of appeal together with the letter bespeaking the request for typed and certified proceedings.
 - d. That the honorable court be pleased to have the notice of appeal filed herein deemed as properly on record.
 - e. That costs of this application be provided for.



10. The application was grounded on the facts and averments of the 14 paragraphed supporting affidavit Jimmy Waliula, sworn and dated September 23, 2021. He deponed that he was the Director of Legal Services for the County Government of Mombasa. He averred that although this honorable court delivered the judgement on January 27, 2021 without notice and in the absence of the parties, and that the 5th respondent became aware of the judgement through the petitioner's letter dated April 26, 2021. After receiving the letter, through the office of the County Attorney he instructed its advocate to lodge an appeal, who in turn prepared a notice of appeal and a letter requesting for typed proceedings, documents. Unfortunately, they were inadvertently misplaced by their court clerk and hence could not be filed on time. He held that they only learnt that the said documents were not served when the petitioners served them with the application dated June 30, 2021.
11. The deponent claimed that the 5th respondent had since filed the notice of appeal, written a letter requesting typed proceedings and has prepared the memorandum of appeal all marked as "JW – 1" of their annexures. He argued that allowing the execution of the judgement would be denying the 5th respondent their right to appeal due to the inadvertent mistake of the counsel. This would be against the spirit of the Constitution and the principle of natural Justice. He argued further that they had an arguable appeal which they were ready to prosecute and if the application was allowed then the appeal could be rendered nugatory. He urged court not find that mistake of counsel ought not be visited upon the litigant and allow the application as prayed.

V. The Replying Affidavit By The Petitioner

12. On October 18, 2021, the petitioner opposed the application dated September 23, 2021 by the 5th respondent herein. The petitioner filed a 21 paragraphed replying affidavit and two (2) annexures marked as "WO – 1 & 2". The affidavit was sworn by Willis O Oluga, the learned counsel for the petitioner herein. The counsel averred that being the advocate having the conduct of the matter he was well versed with the facts and thus authorised and competent to swear this affidavit. He deponed that the application was an afterthought brought after inordinate delay and with a sole view of defeating the application by the petitioner dated June 30, 2021. He deposed that the 5th respondent had lied on oath that the judgement was delivered without notice, the judgement date of January 27, 2021 was given by Justice Yano on November 5, 2020 in the presence of Mr Nguyo Wachira Advocate for the 2nd, 3rd & 4th respondents, Mr Onduso Advocate for the 5th respondent and himself for the petitioner after highlighting the submissions. He further claimed on March 11, 2021 he wrote a letter enclosing a draft decree for their approval. He served it upon the 5th respondent together with all the other counsel involved in the matter. He held that both the letter and the decree were well received as they bore the official stamps from those offices which he annexed hereto and marked as "WO – 1". Therefore, he averred that even if the 5th respondent was not aware of the delivery of the judgement, at least they became aware of it on March 11, 2021 when they were served with a copy of the draft decree and a fact which they concealed to disclose to this court. He argued that if the 5th respondent genuinely intended to appeal, they would have filed the application on March 11, 2021 after being served with the said letter. But on the contrary, they have filed it over six (6) months later with no explanation.
13. He averred that none of the counsels responded to his letter attaching the draft decree. Thus, he moved to the Deputy Registrar for the approval of the decree. After it was signed and sealed on April 20, 2021, he served it upon the 5th respondent with the said decree vide a letter dated April 26, 2021 requiring them to comply with the decree. He indicated that this would be the second time that the 5th respondent was being made aware of the judgement but they waited until the lapse of five months to purport to file an application for leave to appeal out of time without offering an explanation. He dismissed the explanation given by the 5th respondent that the notice of appeal and letter requesting



for typed proceedings were misplaced by the clerk. He argued that the said documents were prepared and filed on September 20, 2021, just three days before the application was filed, meaning that they were all afterthoughts as they clearly went to slumber all this period. The counsel maintained that the 5th respondent had neither an arguable appeal nor evidence that they intended to appeal within time. He urged court to dismiss the application with costs as it has no jurisdiction to grant the orders sought.

VI. Submissions

14. On January 26, 2022, while all the parties were present in court, directions were made to the effect that the two applications dated June 30, 2021 and September 23, 2021 respectively be disposed off simultaneously by way of written submission. Parties were provided with specific timelines upon which to file their submissions. Pursuant to that, all parties complied and ruling date was reserved for June 27, 2022.

A. The Written Submissions by the Petitioners for application Dated June 30, 2021 & September 23, 2021.

15. On December 3, 2021, the learned counsel for the petitioner the law firm of Messrs Oluga & Company Advocate filed written submissions. On their application dated June 30, 2021, the learned counsel submitted that the judgement of this court restrained the respondents from occupying the suit property, which meant that the respondents have no right to access, occupy or take possession of the suit property. It was submitted that the judgement essentially meant that the respondents ought to be evicted from the suit property, hence the need to make the application seeking an express order of eviction. The counsel argued that the application does not seek to amend the pleadings but rather to perfect the court's judgement.

16. On the application by the 5th respondent dated September 23, 2021, learned counsel submitted that the 5th respondent had not satisfied the conditions necessary to extent time as provided by rule 4 of the *Court of Appeal Rules*, which were further expounded in *Paul Musili Wambua v Attorney General & 2 other* [2015] eKLR, where the Court of Appeal stated that:

"In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted."

17. The learned counsel submitted that the application was filed almost nine (9) months after the judgement was entered and termed the delay inordinate with no explanation whatsoever. It was submitted that the 5th respondent lied on oath that the judgement was delivered without notice and that they were not aware of the judgment date on April 26, 2021. The counsel submitted that the judgement date was taken in open court, in the presence of their counsel. Further, he held the 5th respondent were notified of the judgement on March 11, 2021 when they served with the draft decree for their approval. The counsel argued that a party who lied on oath did not deserve favorable exercise of court's jurisdiction but instead they deserved punishment. On that issue he relied on the decision of *Farida Mohamed Salim v Mohamed Ali Salim* Matrimonial Cause No 9 of 2018 (unreported) where court stated:-

"28. In my view, the reasons advanced for the delay are not satisfactory and that extension of time is not a ritual but a serious legal provision which must be



supported by convincing reasons for the delay but not lies as it happened in this case”

The counsel urged court not to exercise its discretion in favor of the 5th respondent who had lied under oath. The reason given that the clerk misplaced the notice of appeal could not be used as a reason to seek extension of time since they were already out of the statutory time of fourteen (14) days when the filing was meant to be done on the flimsy reason that the advocates were not aware of the judgement which they kept on alleging was delivered without notice. By the time they claim to have learnt of the judgement it was already three months thereafter the delivery. He contended that in either way they were late in filing the appeal. The clerk’s failure to file the notice of appeal could not therefore be used as a reason to seek extension of time as at the time the clerk was being instructed the time for filing and serving the notice of appeal had already long lapsed. Besides, the clerk was never named nor did he ever swear an affidavit to indicate to court he had been instructed to file the notice of appeal and that he had lost the same. To buttress on this point he relied on the Court of Appeal case of *Jimcab Services Limited v Bartholomew Bernard Osodo & another* [2018] eKLR.

18. In considering two applications one seeking eviction after judgement and the other seeking stay pending appeal, the counsel urged court to consider the case of *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] eKLR. Justice Sila held that a delay of even a day can be unreasonable and declined the application for stay. The counsel submitted that the intended appeal was not arguable and the fact that the delay can be excused or replaced cannot be a reason to mean that the intended appeal is arguable. Further it was stated that the 5th respondent did not exhibit any memorandum of appeal to demonstrate the grounds of its intended appeal. Counsel argued that the petitioner stands to be prejudiced by the stay since the respondent would in occupation of the same and has no chance to use its suit property. Counsel was urged to all the petitioner’s application and dismiss the 5th respondent’s application which was termed as an afterthought.

(C) The 2nd, 3rd and 4th Respondents Written Submissions

19. On February 1, 2022, the learned counsels for the 2nd, 3rd and 4th respondents the Office of the Attorney General – through the Deputy Chief State Counsel, filed their written submissions dated February 8, 2022. M/s Langat State Learned Counsel submitted on the two (2) filed notice of motion applications dated June 30, 2021 and September 25, 2021 respectively. She submitted that the 1st and 2nd petitioners had not satisfied the condition of review of the Judgment delivered by this honorable court on January 27, 2021 to warrant grant of orders sought. She argued that the petitioners ought to have pursued the procedure of applications for execution of decree as provided for under order 22 rule 6 of the *Civil Procedure Rules*. Further, she referred court to the provisions of section 21 (4) of the *Government Proceedings Act* which serves as a condition precedent to the satisfaction or enforcement of decree issued against the Government and hence an application for a certificate of order against the Government ought to have been made issued upon the Attorney General.
20. Additionally, the learned counsel contended that the petitioners never satisfied the requirements inherent under section 80 of the *Civil Procedure Act* and order 45(1) of the *Civil Procedure Rules 2010* on review or setting aside of Court orders and/or decrees. She held that it was not worthy that the review proceedings were not applicable in this instant because the 5th respondents filed an appeal against the judgment and a notice of appeal dated September 21, 2021. She averred that the applicants were trying to lure this honorable court into an application that did not fall within the purview of the court. She argued the matter was “*res judicata*” offending the provisions of section 7(1) of the *Civil Procedure Act* in that procedural and substantive laws provided that a party could not try a matter before a court that had already rendered a judgment.



To buttress on this point she relied on the decision of *Henderson v Hendersen* (1843-60) ALL ER 378 and *Board of Governors Moi High School Kabarak & another v Malcolm Bell* Supreme Court Petitions Nos 6 & 7 of 2013 (unreported).

21. In conclusion, she was of the view that this court after it had rendered its judgment it became “functus Officio” without further authority or legal competence to perform further duties as the applicants were urging it to do. To her that jurisdiction lied before the Court of Appeal and as such the notice of motion application dated September 30, 2021 should be dismissed.

D. The 5th Respondents Written Submissions

22. On March 3, 2022, the learned counsel, for the 5th respondent, the law firm of Messrs Otieno BN & Associates filed their written submissions dated the same date on the filed applications for June 30, 2021 and September 25, 2021 respectively.
23. He submitted on the 1st application first – June 30, 2021 – to the effect that it was not tenable in law for not meeting the ingredients envisaged under the provisions of section 80 of the *Civil Procedure Act* and order 45 of *Civil Procedure Rules*. On this point they cited the cases of *Smartkar Enterprises & another v Mary Kemunto Ogendo* [2021] eKLR and Republic v Public Procurement Administrative Review Board & 2 others.

In the present case the petitioner had not demonstrated that there had been discovery of new and important mater or evidence or there was any error apparent on the face of the record.

24. Further an eviction order could not be said to have been discovered later, it was reasonably foreseen that in the event the court entered judgment in favour of the petitioner, they ought to be evicted. The petitioner should have sought a specific prayer for eviction and if it was never done then it could not be done in form of a review it would be an abuse of court process. Parties were bound by their own pleadings.
25. On the second application – dated September 23, 2021 seeking to stay the judgment delivered on January 27, 2021 and to enlarge time within which to file and serve notice of appeal based on the provisions of section 95 of the *Civil Procedure Act* cap 21. He submitted that this court had discretion to allow the orders prayed for from the said application to file the appeal out of time as the appeal was arguable. To buttress on this point they relied on the case of *Thuita Mwangi v Kenya Airways Limited* [2003] eKLR”

And the reasons for the delay in filing the appeal and for the orders of stay of execution under order 42 rule 6 of the *Civil Procedure Rules 2010*, they urged court to consider where the scales of justice tilted towards and allow the Notice of Motion application as prayed.

IV. Analysis and Determination

26. After having gone through all the pleadings, the affidavits, written submissions by the parties, the statures and the relevant parts of the *Constitution of Kenya*, the honorable court has framed the following issues for its determination. These are:-
 - a. Whether the honorable court can cause the review of its judgement delivered on January 27, 2021 and issue eviction orders against the respondents.
 - b. Whether the court ought to stay the judgement delivered on January 27, 2021 pending the hearing and determination of the 5th respondent’s intended appeal.



- c. Whether the court ought to extend time within which the 5th respondent could file and serve the notice of appeal.
- d. Who will bear the costs of both the applications?

Issue No a). Whether The Honorable Court Can Cause The Review of its Judgement Delivered On January 27, 2021 And Issue Eviction Orders Against The Respondents.

27. The power of court to review its own judgment must be done so within the provisions of section 80 of the *Civil Procedure Act*. Order 45 of the *Civil Procedure Rules* sets out the rules, it provides:-
1. Any person considering himself aggrieved—
 - a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
 2. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.
28. The petitioner prays court to review its judgement delivered on January 27, 2021 and issue eviction orders, in order to perfect the permanent injunction orders. The petitioner claims that the orders granted do not exclusively provide for the eviction of the respondents from the suit property and hence the need to review the said judgement. The respondents have objected to the review of the judgment on the basis that the petitioner seeks eviction orders which were not initially sought in the petition and that the review was basically the court seating on an appeal of its own judgement. The respondents maintained that the petitioners ought to have made an application for eviction orders or simply initiated execution of the decree. A perusal of the prayers sought in the petition dated November 20, 2019, indicates that there was no eviction orders against the respondents. Prayer 7 which was granted by court sought a permanent injunction to restrain the respondents or any person acting on their behalf from occupying, trespassing or taking possession of the suit property. In my view, this order is sufficient to warrant the petitioners execute their decree and ripe the fruits of their judgment.
29. Justice Mativo in *Nasibwa Wakenya Moses v University of Nairobi & another* [2019] eKLR held that the power to review can be exercised only for correction of a parent error of law or fact which stares in the face without any elaborate argument needed for stabling it. In this case, the first two grounds for review cannot stand, on the ground neither has there been new evidence discovered by the petitioners nor has there been a mistake or error apparent on the face of record pointed out by the petitioner. The last ground that may be applied would be a review for any other sufficient reason, which is left to the court to exercise its discretion, discretion that can only be exercised on very strong grounds that have the effect of reopening the case afresh.



30. The petitioner has argued that the need to review is to provide an express order compelling the respondent to vacate the suit property in default they be lawfully evicted in addition to the restraining orders already issued. In my view, the eviction orders sought by the petitioner come in form of mandatory injunction, whose purpose is to restore a wrongful state of things to their former rightful order. Restraining orders, as rightfully granted by court are permanent injunction that are meant to prohibit a party from doing a specific thing in a particular manner. The jurisdiction to issue a mandatory injunction is a discretionary in nature and therefore its cannot be granted during review proceedings. The invitation by the petitioner of court to grant mandatory injunction orders is simply reappraising the entire evidence presented during trial and asking court to reevaluate how the trial judge applied and interpreted the law. That would amount to this trial court seating on its own judgement as an appellant court, jurisdiction which it lacks in totality.

Issue No b). Whether The Court Ought To Stay The Judgement Delivered On January 27, 2021 Pending The Hearing And Determination Of The 5th Respondent's Intended Appeal.

31. The second issue for court to determine is whether the 5th respondent's application meets the threshold set for granting of orders of stay of execution pending appeal. The legal basis for grant of stay pending appeal is order 42 rule 6 of the [Civil Procedure Rules 2010](#). The 5th respondent is required to demonstrate that;

"substantial loss may result unless the order is made, the application has been made without unreasonable delay, such security as the court orders for the due performance of the decree has been given by the applicant."

In order for court to warrant stay, which is basically the status quo before judgement, the applicant must prove specific details and in particular the loss that will result if the stay is not granted. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay.

32. The grant of stay is a delicate balance between the rights of a successful party to enjoy the fruits of his judgement and those of the defeated party to appeal against the said judgement. In [Suraya Property Group Limited & another VW & K Estate Limited & 2 others](#) [2020] eKLR, it was held that courts have to balance the interest of both the decree holder to the fruits of his decree and the appellant, to the right of appeal. The two competing interests must be considered and weighed against each other and at the end they ought to balance. The court cannot grant stay of execution without giving the petitioner the safety net of security of the amount awarded to them.
33. The 5th respondent has not made any proposition on what they are willing to offer as security in lieu of deposit of the decretal sum. The purpose of security under order 42 is to guarantee the due performance of the decree, which ought to bind the respondents. While in [Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others](#) [2014] eKLR,

"I, therefore hold that the security offered is not suitable for purpose of order 42 rule 6 of the [CPR](#). The court should always remember that both the applicants and the respondents have rights. The applicant has a right to his appeal and the prospects that it shall not be reduced to pious aspiration or a barren result if they pay out the decretal sum to a person who may not make a refund. The respondent on the other hand has a right to the fruits of its judgement which should not be taken away; and when the right is postponed; it can only be upon adequate security for the due performance of such decree as may be ultimately binding on the applicant."



In the circumstances the 5th respondent has not offered any sufficient reason or alternative security to warrant court to stay the execution pending appeal.

34. On the issue of undue and inordinate delay in filing the application for stay of execution pending the hearing of appeal. The petitioners claim that the application for stay was an afterthought and was made after unreasonable delay. The 5th respondent filed the application on September 23, 2021, while Judgement was delivered on January 27, 2021, close to eight (8) months down the line. However, the 5th respondent insists that the judgement was delivered without notice and hence they were not aware. They claim to have been aware of the said judgement only on April 26, 2021. From the records, it is graphically indicative that on November 5, 2020 Mr Wachira Advocate for the 2nd, 3rd & 4th respondents, Mr. Onduso Advocate for the 5th respondent and Mr Oluga were all in court and indeed highlighted their written Submission. Immediately, thereafter my brother Justice Hon C Yano made this direction verbatim –

“.....Judgement to be delivered on January 27, 2021.....” .

So for the advocate for the 5th respondent to state that they were not aware of the judgement date is blatant lies and i fully concur with the petitioner’s advocate on that issue and the decision cited of Farida Mohamed Salim (*supra*) is in all fours. This practice must stop. Besides, they were again made aware of the judgement when the Advocate for the petitioner served the 5th respondent and other counsels in the matter with a letter dated March 11, 2021 and a copy of the draft decree for their approval. Still they took no steps at all to file the notice of appeal until the September 20, 2021. All said and done, they still took over five (5) months to have filed this application. They claim that immediately they instructed their advocates to file notice of appeal and request for typed proceedings, but the same were never filed since the counsel’s court clerk misplaced the pleadings. They only got to file the notice of appeal on September 20, 2021. I find that explanation rather deceiving, treacherous and unhelpful. Why would it take a law firm almost five (5) months to note that documents meant to be filed were yet to be filed? Why didn’t the clerk who lost the documents swear an affidavit to the truth of the events? I am not inclined to believe the mere statements that the documents were lost. I fully concur with the advocate for the petitioner that indeed the application is graphically an afterthought to defeat the wheels of justice. Clearly, the 5th respondent went to slumber after the delivery of judgement by this honorable court. It has not shown any evidence of any steps taken to file the application for stay of execution. They are not ready to prosecute their appeal at all but to unfairly continue denying the petitioners from enjoying the fruits of their Judgement. For these reasons the application must fail.

35. On whether court ought to extend time for filing notice of appeal I hold the same opinion. The 5th respondent is guilty of delay and laches. The question of the matter is what is the reason for delay? The Court of Appeal in *African Airlines International Limited v Eastern & Southern African Trade & Development Bank* CACA 50 of 2002 held that:

"In our judgement, all the relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendants if time is extended."

36. I have to take into account all the relevant factors, the length of delay here is nine (9) months, which in my view is a long and inordinate delay. The reason given for delay is that the 5th respondent was not aware of the judgment as it was delivered with no notice. When I peruse the court proceedings, the judgement date was taken in open court on November 5, 2020, after parties highlighted their submissions. This was done in the presence of Mr Ouduso, who held brief for Mr Otieno for the 5th



respondent. Mr Otieno addressed court, who addressed court and informed court that they would be relying on their written submissions. It is therefore deceitful for the 5th respondent's Mr Jimmy Waliaula, to state in his affidavit that the judgment was delivered without notice, despite the court's record stating otherwise.

37. In the case of *African Airlines International Ltd (supra)*, the court of appeal did not consider the draft memorandum of appeal and held that:-

And in that situation, there was, in our judgement, absolutely no need to go into the complex and time-consuming question as to whether or not there is a good arguable case on appeal. There is no invariable rule which requires that consideration, and it would be obviously involve the very reverse of what is desired to be achieved if on every application to extend time there was a pre-appeal hearing in order to consider what was the prospects of success.'

38. The petitioner is bound to suffer prejudice if time is extended, the question is to what degree? The petitioner in their submissions, argued that they stand to suffer prejudice as they have no chance to use the suit property and enjoy the fruits of their judgment. The Respondents have simply stated in their submissions that the petitioners will not suffer any prejudice or injustice if the time to appeal is granted.

XII. Conclusion & Disposition

39. In conclusion, and upon conducting an indepth analysis of all the frame issues herein, the honorable court now proceeds to render its ruling and grant the file orders as follows:-

- a. That the notice of motion dated June 30, 2021 by the petitioners be and is hereby allowed but strictly to the extent that the petitioner moves this court formally within the next seven (7) days and serves the 1st, 2nd, 3rd, 4th and 5th respondents herein accordingly seeking for express orders for execution of the decree emanating from the judgement of this court delivered on January 27, 2021 compelling the respondents herein and/or their agents, employees, assigns or any other person acting and/or authorized by them or through their authority to vacate the suit property known as Mombasa/Block XVII/1469.
- b. That the 1st, 2nd, 3rd, 4th and 5th respondents be and are hereby granted 7 days leave to file their replies to the said application.
- c. That thereafter the petitioner herein be accorded seven (7) days file and serve written submissions and likewise upon service the 1st, 2nd, 3rd 4th and 5th respondents herein granted seven (7) days leave to file their written submissions.
- d. That there shall be "*inter partes*" hearing on October 18, 2022 and further directions thereof.
- e. That the notice of motion application dated September 23, 2021 be and is hereby dismissed with no order as to costs.
- f. That in the meantime the *status quo* be maintained there be no evictions of the respondents herein.
- g. That each party to be their own costs.

It is ordered accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF JULY, 2022.

HON JUSTICE MR LL NAIKUNI (JUDGE)



ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:-

- a. M/s Yumnah Court Assistant.
- b. M/s Kinuva Advocate holding brief for Mr Oluga Advocate for the petitioner.
- c. Mr Mbuthia Advocate for the 1st respondent.
- d. Mr Makuto Advocate for the 2nd, the 3rd & the 4th respondents.

