Ghadialy v Maera & another (Environment & Land Case 633 of 2014)
[2022] KEELC 15372 (KLR) (21 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15372 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 633 OF 2014

JO MBOYA, J

NOVEMBER 21, 2022

BETWEEN

BHANUMATI ISHWARLAL GHADIALY ..... PLAINTIFF

AND

THOMAS MASEKI MAERA ..... 1ST DEFENDANT

COMMISSIONER OF LANDS ..... 2ND DEFENDANT

RULING

1. Vide Notice of Motion Application dated the August 23, 2022, the 1st Defendant/Applicant herein has approached the Honourable court seeking for the following Reliefs:

    i. (Spent).

    ii. That this Honourable court be pleased to grant an order of Stay of Execution of the. Decree issued to the Plaintiff/Respondent on August 5, 2022 pending the Inter-Parties hearing and determination of this Application.

    iii. That this Honourable court be pleased to grant an Order of Stay of Execution of the Decree issued to the Plaintiff/ Respondent on August 5, 2022 pending the hearing and determination of Civil Appeal No E451 of 2021.

    iv. That costs of this Application be in cause.

2. The subject Application is premised and anchored on the various grounds that have been enumerated at the foot thereof and same is further supported by the affidavit of Thomas Maseki Maera sworn on the August 23, 2022.

3. For completeness, the deponent has attached or annexed a couple of documents to the supporting affidavit, inter-alia, a copy of the Certificate of Taxation issued on June 22, 2022 and a Decree dated the August 5, 2022.

4. Upon being served with the subject Application, the Plaintiff/Respondent filed a Replying Affidavit sworn on the September 29, 2022 and to which the Plaintiff/Respondent has annexed assorted documents, inter-alia, a copy of an Application for stay of execution of the Judgment and Decree, which was mounted before the Court of Appeal.

5. Additionally, the Plaintiff/Respondent has also annexed a copy of the Ruling of the Court of Appeal relating to the execution of stay of execution and in respect of which the Court of Appeal dismissed the Application for stay of execution, which been filed and mounted by the same Applicant herein.

6. Be that as it may, the Application herein came for hearing on the October 19, 2022, whereupon it was agreed that the Application be canvassed and disposed of by way of written submissions.

7. Suffice it to point out that the Advocates for the respective Parties thereafter proceeded to and filed their written submissions. For clarity, the Written Submissions filed by the respective Parties form part and parcel of the record of the Honourable Court.

Submissions By The Parties:

a. 1st Defendant's/Applicant's Submissions:

8. The 1st Defendant/Applicant filed written submissions and same has highlighted four pertinent issues for consideration by the court.

9. First and foremost, counsel for the 1st Defendant/Applicant has submitted that upon the delivery of the Judgment in respect of the subject matter, the 1st Defendant/Applicant was aggrieved and dissatisfied. In this regard, counsel has added that the 1st Defendant/Applicant thereafter proceeded to and filed the requisite Notice of Appeal to the Court of Appeal.

10. On the other hand, counsel for the 1st Defendant/Applicant has also submitted that the Applicant thereafter proceeded to and lodged the Substantive Appeal, to wit, Civil Appeal No E451 of 2021.

11. In the premises, counsel for the 1st Defendant/Applicant has submitted that the Applicant has a pending Appeal before the Court of Appeal, which has overwhelming chances of success.

12. Secondly, counsel for the Applicant has submitted that despite the pendency of the said Appeal, the Plaintiff/Respondent herein has since lodged a Bill of Costs and caused same to be taxed, culminating into the issuance of a certificate of taxation.

13. Further, counsel for the Applicant has contended that having procured and obtained the certificate of taxation, the Plaintiff/Respondent is now disposed to commence execution proceedings.

14. Thirdly, it has been submitted that the imminent execution proceedings by and at the instance of the Plaintiff/Respondent shall occasion substantial loss to the 1st Defendant/Applicant.

15. For clarity, it has been contended that the execution of the decree and the consequential certificate of cost shall deprive the Applicant of the monies certified at the foot of the Certificate of Taxation.

16. Fourthly, counsel for the 1st Defendant/Applicant has submitted that if the monies at the foot of the Decree and the certificate of costs are paid to and in favor of the Plaintiff/Respondent, then

the Plaintiff/Respondent may not refund the monies upon the determination and conclusion of the Appeal.

17. In the premises, counsel for the 1st Defendant/Applicant has therefore contended that the Applicant has established and proved the requisite conditions necessary for the grant of the orders sought at the foot of the instant Application.

18. In support of the foregoing submissions, counsel for the 1st Defendant/Applicant has relied on various decisions inter-alia *National Industrial Credit Bank Ltd versus Acquinas Francis Wasike & Another (2006)eKLR*, *Kenya Post & Telecommunication Corporation versus Paul Gachanga Ndarua (2001)eKLR*, *Dickson Isabua Angaluki & 2 Others versus Ukwala Supermarket Ltd & 2 Others (2013)eKLR*, *Magnet Ventures versus Simon Mutua Mwatha (2018)eKLR*, *Halai & Another versus Thornton & Turpin (1963) Ltd (1990)eKLR* and *Kenya Orient Insurance Company Ltd versus Paul Mathenge Gichuki & Another (2014)eKLR*.

b. Plaintiff's/Respondent's Submissions:

19. On behalf of the Plaintiff/Respondent, written submissions dated the October 19, 2022 have been filed. For clarity, the Plaintiff/Respondent has also raised, highlighted and canvassed four issues for consideration.

20. The first issue that has been raised by counsel for the Plaintiff/Respondent touches on and concerns the doctrine of Res-judicata.

21. According to counsel for the Respondent, the 1st Defendant/Applicant had hitherto filed and lodged an Application before the Court of Appeal wherein same sought an order of stay of execution of the Judgment and consequential orders issued by this court on July 2, 2019.

22. For completeness, counsel for the Plaintiff/Respondent added that the Application which was filed before the Court of Appeal was serialized and assigned as Court of Appeal Civil Application No 218 of 2019 (UR 201 of 2019).

23. On the other hand, counsel for the Respondent submitted that the said Application was ultimately heard and disposed of vide Ruling rendered on the September 25, 2022, when same was dismissed.

24. Based on the foregoing, counsel for the Plaintiff/Respondent has therefore submitted that the current Application seeking orders of stay of execution of the Judgment and Decree of this Honourable court is therefore Res-judicata.

25. Secondly, counsel for the Plaintiff/Respondent has submitted that the current Application constitutes and amounts to an abuse of the Due process of the court. In this regard, counsel has pointed out that the application herein is intended to invite this Honourable court to impeach and review the decision of the Court of Appeal, which declined to grant stay.

26. Thirdly, counsel for the Plaintiff/Respondent has submitted that the 1st Defendant/Applicant has also not laid before the court any evidence of substantial loss, that is likely to arise or accrue, if the orders of stay of execution are not granted.

27. For coherence, counsel for the Plaintiff/Respondent has added that the mere fact that execution is about to be commenced or has been commenced, does not by itself constitute substantial loss.

28. Be that as it may, counsel for the Plaintiff/Respondent has added that a claimant who seeks an order of stay of execution, must strictly demonstrate and prove the likelihood of substantial loss arising.

29. Finally, counsel for the Plaintiff/Respondent has submitted that the instant Application has been mounted and lodged with unreasonable and inordinate delay, which has neither been explained nor accounted for.

30. In the premises, counsel for the Plaintiff/Respondent has invoked and relied on the Doctrine of Laches.

31. In support of the foregoing submissions, counsel for the Plaintiff/Respondent has quoted and cited various decisions, inter-alia *Charity Njanja Mwaniki versus James Mwaniki Gaturu & Another (2017)eKLR*, *Bernard Mugo Ndegwa versus James Nderitu Githae & 2 Others (2010)eKLR*, *Ruto Kimng'etich Arap Cheruiyot versus Peter Kiprop Rotich (2006)eKLR* and *Suleiman v Amboseli Resort Ltd (2004) 2KLR 589*, *Michael Ntouthi Mitheo versus Abraham Kivondo Musao (2021)eKLR*, *Kenya Shell Ltd versus Benjamin Kibiru (1986)eKLR* and *Gianfranco Manenthi & Another versus Africa Merchant Assurance Company Ltd (2019)eKLR*.

Issues For Determination

32. Having reviewed the Application dated the August 23, 2022, the Supporting Affidavit thereto and the response filed on behalf of the Plaintiff/Respondent; and upon considering the written submissions filed by the Parties, the following issues do arise and are worthy of determination:

    i. Whether the instant Application is barred by the Doctrine of Res-Judicata and the provision of Section 7 of the *Civil Procedure Act* Chapter 21 Laws of Kenya?

    ii. Whether the subject Application constitutes and amounts to an abuse of the Due process of the Honourable court?

    iii. Whether the Application has been mounted by a Stranger, albeit without compliance with the provisions of Order 9 Rule 6 and 9 of the Civil Procedure Rules,2010?

    iv. Whether the Applicant has established and proved that same is disposed to suffer Substantial loss?

Analysis And Determination

Issue Number 1

Whether the instant Application is barred by the Doctrine of Res-Judicata and the provision of Section 7 of the *Civil Procedure Act* Chapter 21 Laws of Kenya.

33. The Plaintiff/Respondent herein has deponed that upon the delivery of the Judgment rendered on the July 2, 2019, the 1st Defendant/Applicant proceeded to and lodged a Notice of Appeal to the Court of Appeal.

34. On the other hand, the Plaintiff/Respondent has also supplied and availed evidence that the Applicant also took out and filed an Application for stay of execution of the Judgment and Decree issued on the July 2, 2019. For clarity, it was pointed out that the Application to the Court of Appeal was serialized and numbered as Civil Application No 201 of 2019 (UR 201 of 2019).

35. Be that as it may, it was also contended that the said Application for stay, was duly prosecuted and ultimately disposed of vide a Ruling of the court dated and delivered on September 25, 2022.

36. Suffice it to point out that the Honourable Court of Appeal did not find any merits in the Application for stay and hence same was dismissed.

37. It is imperative to note and observe that the deposition alluding to the filing of a previous Application before the Court of Appeal and the ultimate dismissal of same, have neither been denied nor disputed by the 1st Defendant/Applicant.

38. Essentially, the facts pertaining to the filing of the previous Application before the Court of Appeal and the ultimate dismissal thereof, are therefore deemed as admitted and conceded.

39. To this end, it is appropriate to take cognizance of the decision in the case of *Mohamed & Another versus Haidara (1972)EA*, where the court stated as hereunder:

> ' The respondent made no attempt to reply to these allegations and they therefore remain unrebutted. Here, the respondent's affidavit gives no material facts and the only real evidence of facts is that contained in the appellant's affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix but it should have made clear which of the facts alleged by the appellants were denied.'

40. Duly guided by the holding in the decision quoted in the preceding paragraph, I come to the conclusion that indeed a previous Application for stay of execution had been lodged before the Court of Appeal.

41. Additionally, I also find and hold that the Application for stay of execution which was lodged before the Court of Appeal, to wit, Civil Application no 218 of 2019, was indeed heard and ultimately dismissed vide Ruling of the court rendered on September 25, 2022.

42. To the extent that the Honourable Court of Appeal had dealt with and disposed of an Application for stay of execution of the Decree issued by the Honourable court, it is obvious and common knowledge that this court cannot thereafter purport to entertain and adjudicate upon a similar Application.

43. To my mind, the issues pertaining to the grant or otherwise of an order of stay of execution have been duly prosecuted, agitated and adjudicated upon by a court of competent jurisdiction. In this regard, the subject Application is therefore Res-judicata.

44. As concerns the doctrine of Res-judicata, it is appropriate to state that same applies where the issues being raised and ventilated in the current suit (including Application) have hitherto been adjudicated upon by a court of competent jurisdiction.

45. To anchor the foregoing observations/ holding, it suffices to invoke and reiterate the dictum of the Court of Appeal in the case of *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR*, where the court stated as hereunder:

> ' Cognizant of the above principles, the courts called upon to decide suits or issues previously canvassed or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. As was stated in Henderson v Henderson (1843) 67 ER 313, res judicata applies not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. In the case of Mburu Kinyua v Gachini Tutu (1978) KLR 69 Madan, J Quoting with approval Wilgram VC in Henderson v Henderson (supra) stated:
>
> 'Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except in special circumstances) permit the same parties to open

the same subject of ligation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time'.

We have no doubt at all that the suits filed by Benjoh and Muiri raised issues that were previously raised or could with reasonable diligence have been raised in the previous suits. This is the basis upon which we will eventually determine whether the judge erred in not upholding KCB and Bidii contention that issues raised in the suit had already been raised and finally determined in the previous suits; that the former suits involved the same parties, and that the courts which handled those previous suits were competent.

46. Additionally, the parameters and the scope of the doctrine of Res-judicata were also delineated in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR*, where the court stated:

> ' The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.'

47. In a nutshell, I come to the conclusion that the Application for stay of execution of the Judgment and Decree issued by the Honorable Court is Res-judicata and thus barred by the provision of Section 7 of the *Civil Procedure Act*, Chapter 21 laws of Kenya.

Issue Number 2

Whether the subject Application constitutes and amounts to an abuse of the Due process of the court.

48. Other than the relevance and applicability of the doctrine of Res-judicata, it is also imperative to underscore that a claimant cannot move to the Court of Appeal seeking an order of stay and once same is declined, to revert back to the court of first instance for similar orders.

49. Notwithstanding the foregoing, it would have been acceptable if the Applicant herein had first mounted the Application for stay of execution before this Honourable court and subject to the outcome thereof, to approach the Honourable Court of Appeal.

50. To my mind, such an approach is acceptable and legally sanctioned by dint of the provisions of Order 42 Rule 6 (1) of the *Civil Procedure Rules*.

51. For coherence, the provisions of Order 42 Rule 6(1) are reproduced as hereunder:

> 6. Stay in case of appeal [Order 42, rule 6.]

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.

52. However, in respect of this matter, the Applicant chose to go to the Court of Appeal and having failed to procure and obtain favorable orders, same has now reverted to this court for purposes of procuring what he failed to obtained before the Court of Appeal.

53. In my considered view, the law does not countenance such an approach and behavior.

54. Contrarily, the law deprecates and frowns upon such a conduct, where a party approaches a higher court and after failing to obtain orders, reverts to the lower court, in this case, the superior court and seeks to invite the superior court to upset the decision of the Court of Appeal.

55. Surely, the 1st Defendant/Applicant and his counsel are playing lottery with the Due process of the court and by extension the rule of law.

56. In my humble view, the conduct being propagated by the 1st Defendant/Applicant, is calculated to bring disrepute to the corridors of justice and to cause anarchy, which is legally unacceptable.

57. Nevertheless, I must point out that the impugned conduct and the current Application constitute and amount to an abuse of the Due process of the court.

58. Without belaboring the point, it is appropriate to invite the attention of the 1st Defendant/Applicant and his counsel to the holding in the case of *Muchanga Investment Ltd vs Safaris Unlimited (Africa) Limited & 2 others [2009]* where the Court addressed the meaning and import of abuse of Due process of the Court as hereunder:

> ' To re-inforce the point, abuse of process has been defined in WIKIPEDIA, the free encyclopedia:
>
> 'The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice.'
>
> In *BEINOSI v WIYLEY 1973 SA 721 [SCA] at page 734F-G* a South African case heard by the Appeal Court of South Africa, Mohomad CJ, set out the applicable legal principle as follows: -
>
> 'What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of 'abuse of process.' It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.'
>
> Again, the Court of Appeal in Abuja, Nigeria in the case of *ATTAHIRO v BAGUDO 1998 3 NWLL* pt 545 page 656, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the

efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

In the Nigerian Case of *KARIBU-WHYTIE J Sc in SARAK v KOTOYE (1992) 9 NWLR* 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined: -

'The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice.'

The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process: -

(a) 'Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.

(d) (sic) meaning not clear))

(e) Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness.'

Issue Number 3

Whether the Application has been mounted by a stranger, albeit without compliance with the provisions of Order 9 Rule 6 and 9 of the Civil Procedure Rules, 2010?

59. It is common ground that the proceedings up to and including the filing of the final submissions on behalf of the 1st Defendant/Applicant and eventual delivery of the Judgment herein, were taken by the firm of M/s Migos Ogamba & Company Advocates.

60. Nevertheless, the current Application has been crafted and filed by the firm of M/s Migos Ogamba & Waudo Advocates.

61. Clearly, the initial proceedings were being taken and defended by a separate and distinct law firm.

62. On the other hand the current law firm, who has filed and mounted the Application is also separate and distinct from the previous law firm.

63. To the extent that the current law firm is separate and distinct from the previous law firm (irrespective of whether one partner remains constant), it behooved the current law firm to file the requisite Notice of change prior to and before mounting the current Application.

64. To this end, it is imperative to take cognizance of the provisions of Order 9 Rule 5 and 6 of the Civil Procedure Rules 2010.

65. For convenience, the said provisions are reproduced as hereunder:

5. Change of advocate [Order 9, rule 5.]

A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.

6. Service of notice of change of advocate [Order 9, rule 6.]

The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it).

66. On the other hand, it is also imperative to note that Judgment had hitherto been rendered and delivered in respect of the subject matter. For clarity, judgment was delivered on the July 2, 2019.

67. To the extent that Judgment had hitherto been delivered, it also behooved the incoming advocates (who have crafted the subject application), to procure and obtain leave of the court beforehand.

68. Alternatively, it was incumbent upon the incoming advocate to procure and obtain a consent from the outgoing advocate and thereafter to file same alongside a Notice of change of advocates.

69. Nevertheless, in respect of the subject matter, no leave was ever sought or procured. In any event, no Notice of change was also filed.

70. To my mind, the current Application which has been filed by M/s Migos Ogamba & Waudo Advocates, has been filed by a law firm who are not properly on record.

71. Essentially, the pleadings and court process crafted and drawn by the firm of M/s Migos Ogamba & Waudo Advocates are in contravention of the provisions of Order 9 Rule 9 of the Civil Procedure Rule 2010. For completeness, the said provisions are reproduced as hereunder:

'Change to be effected by order of court or consent of parties [Order 9, rule 9.]'

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.

72. Without due compliance with and adherence to the provisions of Order 9 Rule 5, 6 and 9 of the Civil Procedure Rules, 2010, the instant Application and the consequential proceedings have therefore been taken by a stranger without the requisite locus standi.

73. In a nutshell, I find and hold that the Application dated the August 23, 2022 is not only pre-mature and incompetent, but similarly, stillborn.

Issue Number 4

Whether the Applicant has established and proved that same is disposed to suffer Substantial loss.

74. The crux/gravamen of the subject Application relates to and touches on stay of execution of the Decree pending the hearing and determination of an Appeal.

75. To the extent that the Applicant herein seeks an order of stay, it was incumbent upon the Applicant to comply with and to establish the requisite conditions envisaged under the provisions of Order 42 Rule 6(2) of The Civil Procedure Rules 2010.

76. Under the foregoing provisions, one of the cardinal conditions that the Applicant was obligated to establish and prove is the likelihood of substantial loss arising and occurring, if the orders sought are not granted.

77. In this respect, the Applicant was duty bound to plead and depone to the evidence of substantial loss in the Supporting Affidavit.

78. Suffice it to note that the evidence of substantial loss must be expressly stated and alluded to. For clarity, such evidence cannot be the basis of inference.

79. Be that as it may, the Applicant herein has neither deponed to nor expressly supplied evidence of substantial loss, either as required under the law or at all.

80. To my mind, the only thing that the Applicant has stated and variously repeated is that if the execution proceed then the Respondent herein shall not be able to refund the costs at the foot of the certificate of taxation.

81. To this end, it is appropriate to state that execution proceedings is a lawful court process and the fact that the execution is about to be commence or better still, has been commenced, does not by itself occasion, constitutes or amounts to substantial loss.

82. Contrarily, the burden of establishing and proving substantial loss is laid on the shoulders of the Applicant. In this regard, it behooved the Applicant to discharge the evidential burden in the first instance.

83. However, I beg to point out that despite being aware of his obligation, prior to and before procuring an order of stay of execution, the Applicant herein has failed to discharge the statutory obligation.

84. Simply put, without proving and establishing that substantial loss, in its various perspectives, is bound to occur/arise, no order of stay of execution can issue or be granted.

85. In this regard, the dictum of the Court of Appeal in the case of Kenya Shell Ltd v Benjamin Karuga Kibiru & Another (1986)eKLR, is still apt and relevant.

86. For convenience, the Court of Appeal stated and observed as hereunder:

> ' It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. 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.'

87. In the absence of evidence of substantial loss, I am afraid that the 1st Defendant/Applicant would also not be entitled to an order of stay of execution, either in the manner sought or at all.

88. Nevertheless, it is important to add that during the course of the proceedings before this court, the 1st Defendant/Applicant herein mounted an Application for provision of security for Costs and the said Application was heard and allowed.

89. For coherence, the Honourable court ordered and directed that the Plaintiff/Respondent do provide security for costs in the sum of Kes 1,000,000/= only, prior and before proceeding with the subject matter.

90. Suffice it to observe that the Plaintiff/Respondent duly complied and paid in to court the sum of Kes 1,000,000/= Only, on account of security for costs, which amount was ultimately refunded to the Plaintiff/Respondent pursuant to an order of the court made on the February 9, 2021.

91. What is the import of the foregoing observation? Clearly, the Plaintiff/Respondent is a person of means and hence same would be disposed to refund the costs which are the subject of the impugned Application for stay.

92. Either way, I come to the Conclusion that the 1st Defendant/Applicant has failed to discharge the evidentiary burden that was laid in his shoulders.

Final Disposition

93. Having analyzed and evaluated the issues that were alluded to in the body of the Ruling, it must have become apparent and evident that the subject Application, is not only premature and misconceived, but similarly bad in law.

94. In the premises, it is my finding and holding that the entire Application is ripe for dismissal.

95. Consequently and in the premises, the Application dated the August 23, 2022 be and is hereby Dismissed with costs certified in the sum of Kes 30,000/- only payable to the Plaintiff/Respondent.

96. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2022.

HON. JUSTICE OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson - Court Assistant.

Mr. S M Muhia for the Plaintiff/Respondent

Mr. Waudo for the 1st Defendant/Applicant

N/A for the 2nd Defendant/Respondent