



**Abeid & another v Osman (Environment and Land Appeal  
19 of 2022) [2022] KEELC 14868 (KLR) (9 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14868 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL 19 OF 2022  
LL NAIKUNI, J  
NOVEMBER 9, 2022**

**BETWEEN**

**SADUN ABEID ..... 1<sup>ST</sup> APPLICANT**

**FATUMA ABEID ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MOHAMED AYUB SULEMAN OSMAN ..... RESPONDENT**

**RULING**

**I. Introduction**

1. This matter comes up for ruling of Notice of Motion application dated May 18, 2022, by Sadun Abeid and Fatuma Abeid, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Applicants herein. It was brought under Sections 1A, 1B, 3A and 79 G of the *Civil Procedure Act*, Cap 21, Order 22 Rule 25, Order 42 Rule 6 & Order 51 Rule 1 of the *Civil Procedure Rules*, 2010.

**II. 1st & 2nd Appellant/Applicant case.**

2. The 1<sup>st</sup> and 2<sup>nd</sup> Appellant/Applicants are seeking the following:-
  - a. Spent.
  - b. Spent
  - c. That this Honorable court be pleased to extend the time for filing an Appeal against the Ruling in Mombasa CMCC ELC 701 of 2016 between “Mohamed Ayub Suleman Osman Versus Sadun Abed & Another” delivered by Honorable CN Ndegwa on October 14, 2019 and deem the Memorandum of Appeal dated May 10, 2022 and filed on May 13, 2022 in this cause to have been properly filed.



- d. That this Honorable court be pleased to order a stay of execution of the orders in the Ruling delivered on October 14, 2019 by Hon CN Ndegwa in Mombasa CMCC ELC 701 of 2016 between “Mohamed Ayub Suleman Osman Versus Sadun Abed & Another” pending the hearing and determination of the intended appeal.
  - e. That cost of this application be provided for.
3. The application is premised on the ground, testimonial facts and averment made under 21 Paragraphed Supporting Affidavit of Fatuma Abeidthe 2<sup>nd</sup> Appellant/Applicant herein. She deponed that, on October 14, 2019, pursuant to an application made by Mohamed Ayub Suleman Osman the Respondent herein, Honorable CN Ndegwa delivered a ruling in which he found both the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Applicants herein in contempt of Court orders and he directed for their arrest and brought before Court for punishment. They attached a copy of the Ruling Marked as “FA – 1”).
  4. The Appellants being dissatisfied with the aforesaid ruling, instructed their Advocates to file an appeal against the decision and the appeal was filed on October 16, 2019 at the Mombasa High Court as Mombasa High Court Appeal No 203 of 2019 together with an application to stay execution of the orders emanating from the Ruling delivered on October 14, 2019.
  5. The 2<sup>nd</sup> Appellant/Applicant deponed that when the application came up for hearing on February 6, 2020, the parties agreed by consent that *status quo* be maintained on the suit property pending the hearing of the appeal. The appeal was heard by way of written submissions and Judgment delivered on March 31, 2022 the same by Hon Lady Justice Njoki wherein the appeal was dismissed for lack of jurisdiction citing the appropriate court to hear the appeal as the Environment and Land Court Mombasa. She further deponed that Paragraph 33 of Judgement by Honorable Lady Justice Njoki stated that the appeal was only struck out as opposed to dismissing it to allow the Appellants/Applicants herein to move the appropriate court.
  6. The 2<sup>nd</sup> Appellant/Applicant deponed that the inadvertent mistake of filing the appeal at the High Court instead of the Environment and Land Court resulted in the delay of filing the appeal in time, that the mistake was on the part of her advocate and the Appellants/Applicants should not suffer the consequence and/or be denied a chance to be heard on merit. She further deponed that if the orders arising from the Ruling delivered on October 14, 2019 are enforced, both Appellants/Applicants herein are likely to suffer substantial loss and damage. Furthermore, she deponed that the Appellants’ appeal has good grounds and high chance of success and the Respondent would not suffer any prejudice.
  7. On May 26, 2022, through an order delivered in open court, the court ordered for the matter to be disposed off by way of written submission. The Respondent was granted leave of 14 days to file a Replying Affidavit.

### **III. The Replying Affidavit by the Respondent**

8. On June 10, 2022, Mohamed Ayub Suleman Osman, the Respondent herein, filed a 11 Paragraphed Replying Affidavit sworn and dated on June 9, 2022 wherein. He deponed that after the Ruling delivered by Honorable CN Ndegwa found the Appellants/Applicants in contempt, the Appellants opted to file an Appeal of the Ruling at the High Court despite it being a land matter. He further deponed that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Applicants were aware or ought to have been aware that the High Court lacked Jurisdiction to deal with land matters but despite this it also took them 43 days to file the Memorandum of Appeal and 48 days to file the Application for stay of execution after the appeal at the High Court was struck out on March 31, 2022.



9. The Respondent deponed that while the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Applicants had claimed substantial loss upon execution of the sub - ordinate's court ruling, they had failed to demonstrate the same. Furthermore, he deponed that the Appellants had not purged or attempted to purge their contempt, had showed no sufficient cause to warrant extension of time to file the appeal and grant of the order of stay and accordingly the application should be dismissed with costs.

#### **IV. Submissions**

10. On July 19, 2012 while all the parties were present in Court, it directed that the Notice of Motion application dated May 18, 2022 by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant/Respondents herein be disposed off by way of the parties file their written submissions. Pursuant to that, all parties fully complied and the Honorable Court reserved November 9, 2022 as the day for delivery of the Ruling thereof.

#### **A. The Written Submissions by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Applicants**

11. On June 28, 2022, the Learned Counsel for the Appellants/Applicants, the Messrs. Khalid Salim & Company filed their submissions. M/s Nafula Advocate submitted that there were three issues for determination of the court. These were:-
- a. Whether the Appellants had met the threshold for granting leave to appeal out of time;
  - b. Whether the Appellants had met the threshold for granting a stay of execution pending appeal; and
  - c. Whether the court should allow the Appellants' application.
12. On the 1<sup>st</sup> issue on leave to appeal out of time, the Learned Counsel submitted that though the Appellants had brought the appeal to the Environment and Land Court, out of time by a period of two (2) years before their delay was not occasioned by their mere indolence or malicious intentions but by a mistake on the part of their Advocate who mistakenly filed the appeal at the High Court. Thus, she submitted that the Appellants should not be made to suffer the consequence of their Advocate and that the ruling of contempt against the Appellants had grave consequences on them. She urged that they should be granted a chance to have their appeal heard and determined. In support of this argument, the Counsel relied on the provision of Section 79 G of the Civil Procedure Act, 2010 on the admission of appeals out of time if a court was satisfied that there was a good and sufficient cause for delay. She asserted that while Courts did have discretion in allowing Appellants to file their appeal out of time, this discretion was guided by certain legal principles as was held in the case of "Omar Shurie Versus Marian Rashe Yafar (Civil Application No 107 of 2020) to wit:- the length of delay; the reason for the delay; the chances of the appeal succeeding if the application is granted and the degree of prejudice to the Respondent if the application is general.
13. In applying these principles in this case, the Counsel held that the Appellant had initially filed an appeal against the Magistrate's Court ruling at the High Court, which was later held to be a Court without any jurisdiction over the said matter. She informed Court the Memorandum of Appeal at the high court was filed, on October 16, 2019, only two days after the delivery of the Judgement by the lower Court. She also relied on the case of "Andrew Kiplangat Chemaringo Versus Paul Kipkorir Kibet (2018) eKLR" which held that the law did not set out any minimum or maximum period for delay only that valid and clear reasons are given to the satisfaction of the court for the flow of its discretion to grant leave for an appeal out of time.
14. Additionally, the Counsel argued that the appeal had a high chance of succeeding. This was because it presented arguable issues of admissibility of evidence and the trial court's reliance of said evidence,



- even when the provisions of the *Evidence Act* called into question its admissibility. Further, the Counsel questioned the trial court’s decision to hold them in contempt without satisfying itself that the Respondent had met the standard of proof required in contempt proceedings.
15. She further contended that the Respondent herein would not suffer any prejudice, Indeed, if anything, it was the Appellants who stood to suffer prejudice if the court failed to grant leave for the appeal out of time. On this issue, she argued that the punishment for contempt was severe and the Appellants may be condemned to serve a prison term and ordered to pay hefty fines.
  16. On the 2<sup>nd</sup> issue of stay of execution pending appeal, the Counsel averred that the Court should exercise its discretion on whether to grant stay of execution orders judiciously and by balancing the interests of both parties as was held in the case of “*RWW Versus EKW* (2019) eKLR. She opined that the court should be guided by the provision of Order 42 Rule 6 (2) of the *Civil Procedure Rules*, 2010 whereby it is expected for the orders to be granted, an application of stay of execution ought to have fulfilled all of the following requirements - Substantial loss, unreasonable delay and security for due performance of the order.
  17. With regard to these requirements, she argued that the Appellants would suffer substantial loss if an order of stay of execution is not granted as it will render the appeal nugatory but also if imprisoned and the appeal turns out in their favor, the Appellants cannot be compensated for their loss of liberty by way of costs. In support of this argument, he relied on the case of “*Nation Media Group Versus Child Welfare Society of Kenya* (2021) eKLR” where the court held that there was likelihood of contemnors being denied their personal liberty through a custodial sentence and as such, they would suffer substantial loss if it failed to allow an application of stay of execution pending appeal.
  18. On the ground of unreasonable delay, the Counsel submitted that the application of stay was brought to the Environment and Land Court only 48 days after the High Court delivered its Judgment to strike out a similar application on stay. She argued that the delay of just over a month was not inordinate but excusable and should not dis-entitle the Appellants from being granted a stay of execution pending appeal.
  19. On the ground of security for the due performance of an order of stay, Counsel submitted that the court should exercise its discretion sparingly and judicially in appreciation of the peculiar circumstances of this case in that there was nothing to peg on what the amount of security should be as there are not orders to cost and the Appellants have not been ordered to pay any fine. She argued that the Respondent had the option of recovering his costs should the appeal fail and he has not demonstrated the Appellants’ inability to pay costs. In support of her argument, the Counsel relied on the case of “*Jackline Chepkemoi Kimeto Versus Shafi Grewal Kaka & 3 others* eKLR” where the Court held that an order for security was a matter of judicial discretion which ought to be exercised sparingly in plain obvious cases and tangible evidence must be presented to demonstrate either inability of the Respondent to pay costs if the Applicant became successful and an order for costs was made.
  20. Finally in support of the Appellants’ application, the Counsel urged the court to rely on the Court of Appeal case of “*Butt Versus Rent Restriction Tribunal* (1979) eKLR on the principles of granting stay of execution pending appeal.
  21. In the final analysis, the Counsel held that the Appellants had the right to have their appeal heard. In the event the Court did not grant them the orders for Stay, then their appeal would most likely be rendered nugatory and they have to go back to the trial Court for sentencing. She held this consequence would be irreversible, if their appeal succeeded. The Counsel prayed for the application and reliefs sought allowed with Costs.



## B. The Written Submission by the Respondent

22. On July 18, 2022, the Learned Counsel for the Respondent, the Law firm of Messrs Mwakireti & Asige Advocates filed their written submissions in opposition to the application dated even date. Mr Mwakireti stated they were strenuously opposing the application under the following grounds:-
23. Firstly, on the prayer for extension of time to appeal, the Counsel for the Respondent submitted that the Appellants' application for extension of time was made two and half (2 ½ ) years from the time the trial court delivered its Judgement on October 14, 2019. He submitted that the said delay was inordinate. It had not been satisfactorily explained. He argued that the explanation given by the Appellants that the delay was caused by a mistake of their Counsel in filing the appeal at high Court instead of the Environment & Land Court did not aid them as they had a remedy against their Counsel in another forum.
24. Additionally, he submitted that even after the appeal to the High Court was struck out on March 31, 2022, the Appellants filed the Memorandum of Appeal and the Application for extension of time 43 and 48 days respectively occasioning further delay without a satisfying explanation as to the cause. He added that the Appellants had been indolent and urged the court to not aid in their indolence. In support of this argument he relied on the case of "[\*County Executive of Kisumu Versus County Government of Kisumu & 8 others\*](#) (2017) eKLR", where the Supreme Court reiterated that any delay should be explained to the satisfaction of the Court and extension of time was not a right but an equitable remedy that was only available to a deserving party at the Court's discretion. In that case the said the Court declined to extend time of a delay of two months which the Applicant had failed to explain.
25. In further support of his argument, he relied on the Court of Appeal case of "[\*Kenya National Highway Authority v Joseph Ndolo Mutua\*](#) (2020) eKLR" which quoted in approval the case of "[\*Hamendra Mansukhalal Shah Versus Alnoor Kara & Another\*](#) (2000) eKLR where the Court held that a delay of forty Seven (47) days had not been sufficiently explained when the Applicant had claimed that delay had been caused by the registry as the file was missing. If indeed as claimed by the Appellant the fault laid with the registry of superior court there was nothing to stop the applicant from obtaining even a mere letter from the registry to the effect that the file was missing during the said period and therefore the notice could not be lodged.
26. On the prayer for stay of execution, the Counsel argued that the fact that the Appellants had failed to demonstrate that they met the threshold for extension of time, they were therefore, undeserving of an order for stay of execution as per Order 42 Rule 6 of the [\*Civil Procedure Rules\*](#), 2010. In other words, he averred that they had no competent appeal before. He stressed that an application seeking for stay of execution under the provision of Order 42 Rule 6 of the [\*Civil Procedure Rules\*](#), 2010, pre – supposes that the said Applicant had a competent appeal before this Court.
27. Furthermore, he argued that the Appellants had been held in contempt of Court orders but had failed to purge the contempt or remove the offending structures that were build in breach of the court order, blocking the Respondent from accessing his plot and causing immense prejudice. He argued that granting of the order of Stay herein would fortify the resolve of the Applicants that breaching of Court orders attracted no consequences. He urged the Court to dismiss the application with Costs.



## V. Analysis and Determination

28. I have carefully considered all the filed pleadings, the written submissions, the cited authorities and the relevant provisions of the Constitution and the law relied on by the parties with regard to the Appellants' Notice of Motion application dated May 18, 2022.
29. In order to reach an informed, fair, just, reasonable and equitable decision, the Honorable Court has condescend the subject matter into the following salient three (3) issues for its determination. These are: -
- a. Whether the Appellants through their filed Notice of Motion application dated May 18, 2022 meet the prerequisite laid - down requirements for granting leave to appeal out of time.
  - b. Whether the Appellants through their filed Notice of Motion application dated May 18, 2022 meets the pre - requisite laid - down requirements for granting a stay of execution pending appeal pursuant to the provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010.
  - c. Who will bear the costs of the Notice of Motion dated May 18, 2022?

### **ISSUE No a). Whether the Appellants through their filed Notice of Motion application dated May 18, 2022 meet the prerequisite laid - down requirements for granting leave to appeal out of time.**

30. Under this Sub heading, the Court wishes to deliberate on the relief sought by the 1<sup>st</sup> and 2<sup>nd</sup> Appellant/ Applicant for this Court to be pleased to allow them to appeal against the ruling in CMCC (Mombasa) ELC No 701 of 2016 delivered by Hon CN Ndegwa on October 14, 2021, out of time. The issue of extension of time to file appeal from the lower court to this Court are governed under the provision of Section 79G of the Civil Procedure Act, Cap 21. It provides that: -

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order. Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.”

31. The Court of Appeal in the case of “Thuita Mwangi Versus Kenya Airways Limited [2003] eKLR” quoted with approval the case of “Leo Sila Mutiso Versus Rose Hellen Wangari Mwangi, (Civil Application No Nai 255 of 1997) (unreported) where the court set out guidelines on applications for extension of time to file appeals: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the Respondent if the application is granted”.

32. The Appellants/Applicants herein submitted that whereas the application for extension of time was brought two (2) years after the trial court's orders, it was not occasioned by mere indolence but their advocate's mistake in filing the matter at the High Court. On the chances of appeal succeeding the



Appellants/Applicants stated that their main contention with the orders granted on October 14, 2019 is the trial court's reliance on evidence tendered by the Respondent. On prejudice, the Appellants/Applicants submitted that the Respondent would suffer no prejudice if they are allowed to file an appeal out of time.

33. In response the Respondent submitted that the application for extension was filed 2 ½ years after the orders delivered on October 14, 2019, that the delay was inordinate and the Appellants/Applicants failed to provide a satisfactory explanation as to the delay.
34. There is no doubt in the court's mind that the Appellants/Applicants Appeal on the order dated October 14, 2019 was ready as they had filed it at the High Court, a fact that is evident from my perusal of the file. However, it took the Appellants an additional 43 days and 48 days to file the Appeal and Application for extension respectively after their appeal was struck out at the High Court. I am also not satisfied with the Appellants/Applicants assertion that the delay was occasioned by their counsels. The Supreme Court was very clear in the famous case of "Republic Versus Karisa Chengo & 2 others [2017] eKLR" on jurisdiction of Courts, a fact that the Counsel for the Appellants/Applicants ought to have been aware.
35. The power of the court to grant leave to file an appeal out of time as stipulated in Section 79G of the Civil Procedure Act, Cap 21 is discretionary. But that discretion must be exercised judiciously as leave by itself is not a matter of right. Though the Appellants/Applicants have argued that no prejudice will be suffered by the Respondent, the fact is that this matter has stalled for almost four (4) years since the trial court's order on October 14, 2019 and the Appellants/Applicants' delay is to blame. The court cannot aid the Appellants/Applicants in their indolence.
36. For these reasons, I find that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/ Applicants have failed to persuade me having met the threshold for granting leave to file an appeal out of time.

**Issue No b). Whether the Appellants through their filed Notice of Motion application dated May 18, 2022 meets the pre - requisite laid - down requirements for granting a stay of execution pending appeal pursuant to the provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010.**

37. Under this Sub – heading and as discussed in this Ruling, the requirements for granting an order of stay of execution pending appeal are provided for in Order 42 Rule 6 of the Civil Procedure Rules, 2010. It provides, *inter alia*:-
  - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.



There has been a lot of growth of Jurisprudence in this area. Initially, the principles for granting stay of execution were set out in the famous case of “*Butt Versus Rent Restrictions Tribunal* (1979) eKLR, Madan, JJA held:-

- i. The power of the Court to grant or refuse an application for a Stay of execution is discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- ii. The general principles in granting or refusing a stay is; if there is no other overwhelming hindrance, a Stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverses the Judge’s discretion.
- iii. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- iv. The Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements.

Undoubtedly, from that time onwards, in my view towards the refining of the “special circumstances” envisaged from “the *Butt Versus Rent Restriction case* (*Supra*), there has been drastic growth of Jurisprudence in this area. The same is supported by myriad of precedents. First and foremost, even prior to considering the other four (4) ingredients for granting of the stay of execution orders pre - supposes the existence of a competent filed appeal. The Appellant must satisfy the Court that, they will suffer substantial loss unless the order is made, that they made the application without unreasonable delay and finally, that they have provided security for the due performance of the order as may be made by court. This is echoed by Gikonyo J in the case of “*James Wangalwa & Another Versus Agnes Naliaka Cheseto* [2012] eKLR where he stated that: -

“Sufficient cause being a technical as well as legal requirement will depend entirely on the Applicant satisfying the court that:

- a) Substantial loss may result to the applicant unless the order is made,
- b) The application has been made without unreasonable delay, and
- c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

38. On the 1<sup>st</sup> requirement of substantial loss, the Court of Appeal was very clear in the case of:- “*Rhoda Mukuma Versus John Abuoga*[1988] eKLR where in allowing the application for stay it stated that: -

“.....substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory. Therefore, it is necessary to preserve the *status quo*.”

39. Additionally, Warsame J in the case of “*Samvir Trustee Limited Versus Guardian Bank Limited* [2007] eKLR held that: -

“For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions



of substantial loss, there must be empirical or documentary evidence to support such contention. It means the Court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss.”

40. Evidently, in the instant case, the bottom line why the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Applicants are seeking for enlargement of time to file an appeal, plainly its indicative of the fact that there exist no appeal in the first place. By this stand alone fact, the application ought to collapse from the onset. Nonetheless, for the benefit of doubt, the Court will still proceed ahead to consider and apply the four ingredients. Firstly, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Applicants herein under the contents of Paragraph 15 of the Supporting Affidavit of the Deponent stated “*inter alia*”:-

“That should the Court proceed and enforce the said orders (read of October 14, 2019), we are likely to suffer substantial loss and damages, which cannot be compensated. Some of the substantial loss and damages that we are likely to suffer should the stay not be granted are as hereunder:-

- a. Our right to liberty will be curtailed in the inevitable event we are arrested. This right will be further curtailed in the event the trial Court decides to punish us for the alleged contempt by way of punishment.
- b. If the events set out in (a) above are to materialize, our appeal will be rendered nugatory and academic exercise, should it succeed as we may have already served prison term by the time Judgement on appeal is delivered.

In response, the Respondent states that the Appellants/Applicants have not demonstrated what substantial loss they will suffer as the subordinate court had not yet made a decision on what punishment to mete out on the Applicants.

41. From the filed pleadings, the Honorable Court while concurring with the contention advanced by the Counsel for the Respondent, but also makes a holding that the Appellants/Applicants have willfully failed, neglected and/or refused to provide Court with any empirical and/or documentary evidence of their assertion that they may be imprisoned and as a result of that suffer substantial loss. I have perused the proceedings from the trial court and agree with the Respondent that, from the year 2019 to date which is close to three (3) years down the line, the Court has not yet sentenced the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Applicants. The orders against the Appellants/Applicants on October 14, 2019 were for contempt of court orders. Thus, it is not conclusive that the Appellants may be imprisoned or even required to pay a fine. Be that as it may, I am persuaded by the argument advanced by the Learned Counsel for the respondent to the effect that granting of the order of Stay herein would fortify the resolve of the Applicants that breaching of Court orders attracted no consequences. For these reasons, therefore, I find that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Applicants have failed to prove substantial loss.
42. On the 2<sup>nd</sup> requirement of unreasonable delay, I stay guided by the case of “*James Wangalwa & Another Versus Agnes Naliaka Cheseto* [2012] eKLR”. The Appellants/Applicants filed an appeal at the High Court on October 16, 2019 two days after the trial court’s order on contempt against them. However, due to lack of jurisdiction the appeal was struck out by Njoki J to allow the Appellants/Applicants proceed to the Environment and Land Court. The Respondent claims that the Appellants/Applicants caused further delay on the litigation process by filing the application for stay 48 days after their appeal was struck out. The Appellants/Applicants claim that the delay was caused by their advocates who filed the matter at the High Court.



43. The court is not satisfied with the Appellants/Applicants assertion that the delay was caused by their Advocates who filed the appeal in the wrong forum. The Respondent claimed and the court agrees, that the Appellants/Applicants were indolent owing to the fact that they understood the repercussions of the orders against them by the trial court on October 14, 2019.
44. On the 3<sup>rd</sup> requirement on security, the Appellants/Applicants submitted that the orders appealed against are peculiar in nature, in that there is nothing to peg what the amount of security to be provided should be. They further urged the court to make a reasonable and modest order for security of costs to ensure that the outcome of the Appeal is not defeated.
45. On the issue of stay, I find that the Appellants/Applicants' application has failed to meet the threshold as per Order 42 Rule 6 and the requirements as set out in "*Tabro Transporters Limited Versus Absalom Dova Lumbasi* (2012) eKLR where the court stated: -
- “These conditions are the essence of Order 42 Rule 6 CPR. They however share an inextricable bond such that, if one is absent, it will affect the exercise of the discretion of the court in granting stay of execution.”

#### **Issue No c Who will bear the costs of the Notice of Motion application dated 18<sup>th</sup> May, 2022?**

46. It is now well established that the issue of Costs is at the discretion of the Court. Costs mean any award that a party is granted by Court at the conclusion of any legal action, process or proceedings in any litigation. The proviso of Section 27 (1) of the *Civil Procedure Rules*, 2010 provide Costs follow the events of any legal action, process or proceedings in any litigation. By events, it means the result of the said legal action.
47. In the instant case, the outcome of the Notice of Motion application filed by the 1<sup>st</sup> and 2<sup>nd</sup> Appellant/Applicant herein is that they have not been successful in prosecuting it from the elaborate reasons given in this detailed Ruling. In that case, the Respondent are entitled to be awarded Costs of the afore said application accordingly as a result.

#### **IV. Conclusion & Disposition**

48. Ultimately, having conducted such an extensive and indepth analysis of the framed issues herein in relation to the Notice of Motion application dated May 18, 2022 by the 1<sup>st</sup> and 2<sup>nd</sup> Appellant/Applicants herein, and based on the principles of preponderance of probability taking that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Applicants have failed to obtain the prayers sought from the said application, I proceed to grant the following Orders:-
- a. That an order be made to the effect the Notice of Motion application dated May 18, 2022 by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Applicants herein be and is hereby dismissed with costs.
  - b. That Costs of the application to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Applicants herein to be awarded to the Respondent herein.
49. It is so Ordered Accordingly.

**RULING DELIVERED, SIGNED AND DATED AT MOMBASA THIS 9<sup>TH</sup> THIS DAY OF NOVEMBER 2022.**

**HON. JUSTICE MR. L. L. NAIKUNI, (JUDGE),**

**ENVIROMNENT AND LAND COURT AT,**



**MOMBASA**

**In the presence of.**

- a. **M/s. Yumnah, the Court Assistant.**
- b. M/s. No appearance for the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Applicants.
- c. Mr. Mwakireti Advocate for the Respondent

