



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wambui & another v Equity Bank Kenya Limited (Environment and Land Case Civil Suit 181 of 2017) [2022] KEELC 15458 (KLR) (9 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15458 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENT AND LAND CASE CIVIL SUIT 181 OF 2017**  
**LL NAIKUNI, J**  
**DECEMBER 9, 2022**

**BETWEEN**

**HANNAH WAMBUI ..... 1<sup>ST</sup> PLAINTIFF**

**EAST AFRICA CARGO LOGISTICS LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**EQUITY BANK KENYA LIMITED ..... DEFENDANT**

**RULING**

**I. Introduction**

1. The plaintiffs/applicants herein, Hannah Wambui and the East Africa Cargo Logistics Limited moved this honorable court by filing a notice of motion application dated October 31, 2022. It was filed on even date under the certificate of urgency for its determination. The applicant was brought under the provision of order 42 rule 6 of the [Civil Procedure Rules, 2010](#), sections 1A, IB and 3A of [Civil Procedure Act](#), cap 21 and article 159 (1) and (2) of the [Constitution](#) of Kenya, 2010.

**II. The Plaintiffs/Applicants Case**

2. The plaintiffs/applicants sought for the following orders that:
  - a. Spent.
  - b. That pending the hearing and determination of this application, the honourable court be pleased to make an order restraining the respondent by itself, its servants and/or agents from alienating, selling or in any other way dealing with the applicant's properties known as LR No Mainland North Section 1/6023 (orig No 1399 & 9474) (CR 32445) Shanzu area Mombasa and plot No Kilifi/Kawala 'A'/Kadzongo/36.



- c. That pending the hearing and determination of the appeal this honourable court be pleased to make an order restraining the respondent by itself, its servants and/or agents from alienating, selling or in any other way dealing with the applicants' properties known as LR No Mainland North Section 1/6023 (orig No 1399 & 9474) (CR 32445) Shanzu area Mombasa and plot No Kilifi/Kawala 'A'/Kadzonzonzo/36.
    - d. That costs be provided for.
3. The said application was based on the grounds in the schedule and on the supporting affidavit of Hannah Wambui and on other grounds to be adduced at the hearing hereof.
  - a. That on September 29, 2022 this honorable court delivered a ruling dismissing an application for injunction restraining the respondent from selling the properties known as land reference number Maini and North Section I/6023 and plot No Kilifi/Kawala 'A'/Kadzonzonzo/36 pending the hearing of the suit.
  - b. That the applicants being aggrieved by the said ruling, filed a notice of appeal against the said ruling.
  - c. That the applicants were apprehensive that as a result of the said ruling, the respondent would swiftly advertise the said properties for sale through public auction, a move which would cause the applicants to suffer grave and irreparable loss.
  - d. That the 1<sup>st</sup> applicant, together with her family resided in one of the said properties namely land reference number Mainland North Section I/9475 located in Shanzu area within the County of Mombasa. As such, the 1<sup>st</sup> applicant together with her family risk being rendered homeless and the 1<sup>st</sup> applicant would be left in the streets with her children some of whom were of young age and attending schools here in Mombasa.
  - e. That the applicants honestly believe that the appeal had high chances of success and thus it was important to preserve the subject matter of the said suit lest the same be rendered nugatory in the event the said suit was not allowed.
  - f. That respondent was well secured as the applicant's said other properties were charged in favour of the respondent herein. Besides, there was no allegation whatsoever that the value of the said properties would not be adequate to cover the total loan. As such, the applicants' right of appeal that was constitutionally underpinned should not be compromised through a forcible sale of the said properties while the while the appeal was pending hearing and determination whatsoever.
  - g. That while a matter involving land was still pending in a court of law, no alienation thereof should be made until the dispute was fully resolved as to do so would render the pending matter to become nugatory as the court of law would then make a determination on a matter whose subject matter would have been alienated to a third party who would not be subject to the jurisdiction of the court of law that was seized of the matter.
  - h. That as prevention was always better than cure, the applicants believed that the appeal against the said ruling by this honorable court had high chances of succeeding thus the need to preserve the suit properties.



- i. That the balance of convenience clearly weighed in favour of the applicants in this matter owing to the fact that the matter was still pending full hearing and determination and the fact that the 1st applicant stands to lose her residential home.
    - j. That the balance of convenience clearly weighed in favour of the applicants in this matter owing to the fact that the matter was still pending full hearing and determination and the fact that the 1st applicant stands to lose her residential home.
4. In more details, the application was supported by a 17 paragraphed affidavit with no annexures sworn by Hannah Wambui, dated October 31, 2022. She averred that: -
  - i. On September 29, 2022 the court delivered a ruling whereby the court dismissed an application for injunction by the applicants.
  - ii. The applicants being aggrieved by the said ruling timeously filed a notice of appeal against the said ruling and requested for typed certified copies of the proceedings and the ruling.
  - iii. The upshot of the said ruling was that the respondent was now at liberty to sell off the suit properties despite the fact that the suit was still pending hearing and determination before the Environment and Land Court.
  - iv. There was eminent danger of the respondent selling the suit properties through public auction as the respondent selling the suit properties through public auction as the respondent had, on several occasions, attempted to do so prior to the filing of the suit in the Environment and Land Court.
  - v. The respondents would swiftly cause an advertisement to be placed in the local dailies advertising the sale of the suit properties through public auction as there was no order restraining the respondent from interfering the respondent from interfering with the said properties.
  - vi. She stood to suffer grave and irreparable damage and loss should the respondents not be restrained from selling the said properties since she together with her family resided in one of the suit properties namely land reference numbers Mainland North Section I/9475 located at Shanzu area within Mombasa County.
  - vii. She had made a proposal to have the property known as plot No Kilifi/Kawala 'A'/Kadzongo/36 be sub - divided into smaller portions so that the proceeds realized therefrom could be utilized to offset the loan arrears owed to the respondent. This would result in a win-win situation for all the parties herein.
  - viii. Her said proposal to the respondent was based on the fact that it was economically viable, easy and quick to sell the said land in portions rather than as a whole since most people were able to afford. They were willing to buy a portion rather than the whole property.
  - ix. She had children some of whom were young ones attending school herein the county of Mombasa. Her family risks being rendered homeless and left in the streets if the respondent was not restrained by an order of injunction refraining them from interfering with the said property pending the hearing and determination of the appeal.
  - x. The subject matter of a suit ought to be preserved so as not to render a suit or appeal nugatory.
  - xi. Nonetheless, the respondent was well secured as the applicant's afore said properties were charged in favour of the respondent and there was no allegation whatsoever that the value of the



said properties would not be adequate to cover the total loan. As such, the applicants' right to appeal that was constitutionally underpinned should not be compromised through a forcible sale of the said properties while the appeal was pending.

- xii. She maintained that while a matter involving land spending in a court of law, no alienation thereof should be made until the dispute was fully resolved as to do so would render the pending matter to become nugatory as the court of law would then make a determination on a matter whose subject matter would have been alienated to a third party who would not be subject to the jurisdiction of the court of law that was seized of the matter.
- xiii. The appeal had high chances of success and the same would be rendered nugatory if the respondent was not restrained from interfering with the suit properties which formed the subject matter of the appeal.
- xiv. It was therefore plain, clear and in the interest of justice that unless an injunction order was granted the applicants would suffer irreparable losses not capable of compensation by an award of damages.

### III. The Replying Affidavit by the Defendant/Respondent

5. On November 9, 2022, the learned counsels for the defendant/respondent, the law firm of Messrs Robson Harris Advocates, while opposing the application filed a nine (9) pointer grounds of opposition on the following grounds that:
  - a. The plaintiffs/applicants' notice of motion application dated October 31, 2022 (hereinafter referred to as the application) was frivolous, misconceived and constitutes a blatant abuse of the process of court and waste of the limited judicial time.
  - b. This matter had previously and conclusively been adjudicated upon by the honorable court via rulings delivered on March 21, 2018, September 18, 2019, November 18, 2019 and September 29, 2022.
  - c. The instant application had been improperly and unregularly lodged since this honorable court delivered its ruling on September 29, 2022 and was therefore "*functus officio*".
  - d. The application offended the rules of procedure and the prescriptive provisions of order 42 rule 6 of the *Civil Procedure Rules, 2010* and should be dismissed for want of jurisdiction.
  - e. The intended appeal was frivolous and raised no bona fide issues which deserved consideration by this honorable court.
  - f. The plaintiffs/applicants herein had not satisfied the criteria for the grant of injunctive orders pending the hearing and determination of the appeal as set out in the case of "*Patricia Njeri & 3 others v National Museum of Kenya* [2004] 1 eKLR.
  - g. Further, the instant application never satisfied the criteria for grant of injunctive orders as set out in the well - established case of:- "*Giella v Cassman Brown & Company Limited* (1973) EA 358 and as such, the applicants are not entitled to the favorable exercise of discretion sought.
  - h. The applicants were guilty of proliferated litigation which had resultantly denied the respondent the right to exercise their statutory power of sale.
6. Based on the foregoing, the application herein never warranted the grant of the orders sought by the plaintiffs/applicants and it was in the interests of justice that the said application be dismissed with costs to the respondent.



#### IV. Submissions

7. On November 1, 2022 directions on the matter were taken to have the plaintiff/applicant serve the application and there be an “*inter parte*” hearing. On November 22, 2022 both Mr Gikandi for the plaintiffs/applicants and Mr Okello for the defendant/respondents prosecuted their application by elaborately tendering their submissions orally. Pursuant to that the honorable court reserved the December 9, 2022 as the date for the delivery of its ruling accordingly. The summary of the submissions have been re – produced herein below.

##### A. The Submissions by the Plaintiffs/Applicants

8. Mr Gikandi advocate submitted that he would be relying on the filed pleadings by the plaintiffs/applicants and in particular the averments of the supporting affidavit of Hannah Wambui sworn and dated October 31, 2022 and the annexures. He would also be citing some authorities to buttress his case. He submitted on the following three (3) grounds. Firstly, he strongly contended and based on the provision of order 51 rule 14 of the *Civil Procedure Rules, 2010* taking from the face that the defendant/respondent had only opted to file the grounds of opposition and not either a replying affidavit or raise a preliminary objection or all the three as envisaged by this provision of the law, it follows then the application by the plaintiffs/applicants was unopposed. According to the counsel, from the grounds of opposition, there was nothing tangible that was raised pertaining to the filed application. To support his argument on this point of law, he referred court to the case of “*Timsales Limited v Harun Gichobi Mwangi* (2013)”. Where the other party had not rebutted to the issues raised by the opponent, then there were not granted any audience by court on matters of facts but only strictly issues of facts.
9. Secondly, the counsel argued that the plaintiffs/applicants had already preferred an appeal against the ruling of this court which was delivered on September 29, 2022 in favour of the defendant/respondent. According to him under the provision of article 163 (4) of the *Constitution* of Kenya, 2010. He held that this automatic right of appeal ought to be respected particularly where an injunction had been denied. It was his view that the moment the court noted that there was an appeal filed at a higher court in the instant case at the Court of Appeal, it ought to preserve the suit property so that the said higher court does not embarrass itself or put in an awkward position by ending up granting an order in vain. It is a situation where the appeal becomes nugatory. He emphatically stated that this position was found a while ago in the famous case of “*Butt v Rent Restriction Tribunal* (1982) eKLR” .
10. The counsel argued that the plaintiffs/applicants had fulfilled all the requirements of law under the provision of order 42 rules (1) (2) and (6) of the *Civil Procedure Rules, 2010*. The plaintiffs/applicants had a substance and cause of action and would suffer substantial loss if this orders were not granted. He informed court that while the ruling was delivered on September 29, 2022, the applicant moved court *vide* this application dated October 31, 2022 clearly there was no undue delay in making taking the steps. He argued that this court had not yet become “*functus officio*” as the whole matter pertaining to this suit had not yet been exhausted.
11. He opined with great certainty that the moment the orders were denied by this court, the defendant/respondent would definitely proceed to sale off the suit property. In such a circumstance and where he supposed that the Court of Appeal ends up overturning the ruling by this court, then the whole exercise would turn to be an academic and otiose one defeating the wheels of justice eventually. He submitted that there were evidence that the plaintiffs/applicants were legal owners to numerous other properties which the defendant/respondent was still capable of attaching for the recovery of their outstanding debt owed by the plaintiffs/applicants.



12. The counsel argued that from experience, this was a matter that would be disposed off expeditiously within the next six (6) months by the Court of Appeal. Hence, he urged the court to allow them at least this short period for the plaintiffs/applicants to have had their day in court. This period was not unreasonable nor inordinate delay. to have had. He requested court to be urgently supplied with typed and certified of the proceedings to enable him assemble the records of appeal in two (2) weeks time.
13. Finally, he stated that the plaintiffs/applicants were interested and keen on the appeal and urged court to allow the application as prayed.

#### **B. The Submissions by the Defendant/Respondent**

14. Mr Okello advocate commenced his submission by stating that he would be relying entirely on the nine (9) pointer grounds of opposition dated the November 8, 2022 and filed on the November 9, 2022. He argued that the defendant/respondent emphatically opposed the application and thus the cited case of “*Timsales Limited* (supra) by the counsel for the plaintiffs/applicants was not applicable at all as it was distinguishable. He argued that there had been abuse of the due process and that the application dated October 31, 2022 was frivolous, misconceived and constitutes a blatant abuse of the process of court and waste of the limited judicial time.
15. He argued that the plaintiffs/applicants had been making numerous other attempts to frustrate the defendant/respondent. They were guilty of proliferated litigation which had resultantly denied the respondent the right to exercise their statutory power of sale as provided for by law. The counsel submitted that this matter had been previously and conclusively adjudicated upon by the honorable court via rulings delivered on diverse dates of March 21, 2018, September 18, 2019, November 18, 2019 and September 29, 2022.
16. He averred that the instant application had been improperly and unregularly lodged since this honorable court delivered its ruling on September 29, 2022 and was therefore ‘*functus officio*’. The applicant had come to court over the same issues and prayers which had already been determined through these rulings. Instead, according to him they should have moved court under the provisions of rule 5 (2) (b) of the [Appellate Jurisdiction Rules](#).
17. The counsel argued that the application had not met the statutory ingredients and indeed offended the rules of procedure and the prescriptive provisions of order 42 rule 6 of the [Civil Procedure Rules, 2010](#) and should be dismissed for want of jurisdiction. The counsel argued that the instant application never satisfied the criteria for grant of injunctive orders as set out in the well-established case of:- ”*Giella v Cassman Brown & Company Limited* (1973) EA 358 and as such, the applicants are not entitled to the favorable exercise of discretion sought.
18. His submitted that the intended appeal was frivolous and raised no *bona fide* issues which deserved consideration by this honorable court. Based on the foregoing, the counsel urged court to have the application herein be dismissed with costs to the respondent.

#### **V. Analysis and Determination**

19. The court has considered the said application, the attached annexures thereof and the elaborate oral submissions by the learned counsels, cited authorities in support and opposition of the application and the relevant provisions of the [Constitution](#) of Kenya, 2010 and statutes. The following three (3) issues have been fleshed out for the court’s determination of the matters raised from the application:-
  - a. Whether the plaintiffs/applicants through the filed notice of motion application dated October 31, 2022 have satisfactorily discharged the laid -



down pre – requisite conditions warranting the grant of stay of execution of decree pending appeal as founded under the law.

- b. Whether the parties are entitled to the relief sought?
- c. Who will bear the costs of the application.

**Whether the Plaintiffs/Applicants through the filed Notice of Motion application dated 31<sup>st</sup> October, 2022 have satisfactorily discharged the laid – down pre – requisite conditions warranting the grant of stay of execution of decree pending Appeal as founded under the law.**

20. Briefly, the facts of this matter are that on September 29, 2022 this honorable court delivered a ruling in favour of the defendant/respondent allowing them to exercise their statutory power of sale against the plaintiffs/applicants herein over the suit properties belonging to the plaintiff/applicants. The said properties were charged with the defendant/respondent. The intention was for them to recover their financial proceeds by causing these properties be sold through public auction. Being aggrieved by the said decision, the plaintiffs/applicants filed a notice of intention to file an appeal against the ruling and hence in the meantime approached this court seeking for the orders of stay of execution of the orders of this court.

21. The law concerning stay of execution pending appeal is found in order 42 rule 6 of the *Civil Procedure Rules, 2010* which stipulates as follows:-

“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 sub rule (1) unless—

- (a) The court is satisfied that substantial loss may result to the 1st 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 1<sup>st</sup> applicant.”

22. Courts have delivered a myriad of decisions over this matter and I shall endeavor to sample some these to assist us in attaining a fair ruling thereafter. At the very initial stages of building this Jurisprudence, the Court of Appeal in the case of “*Butt v Rent Restriction Tribunal* [1982] KLR 417 Madan JJA, gave guidance on how discretion should be exercised as follows:

1. “The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.



3. 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.
  4. 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. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
  5. The court in exercising its powers under order xli rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
23. Legally speaking, the purpose of stay of execution is to preserve the substratum of the case. In the case of *Consolidated Marine v Nampijja & another*, Civil App No 93 of 1989 (Nairobi), the court held that:-
- “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
24. There are three conditions for granting of stay order pending appeal under order 42 rule 6 (2) of the *Civil Procedure Rules* to which:
- i. The court is satisfied that substantial loss may result to the applicant unless stay of execution is ordered;
  - ii. The application is brought without undue delay and
  - iii. 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.
25. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma v Abuoga* (1988) KLR 645 where their Lordships stated that:-
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
26. I discern that indeed in the case of *Charles Wabome Gethi v Angela Wairimu Gethi* [2008] eKLR, the Court of Appeal held –
- “..... it is not enough for the applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The applicants must go further and show the substantial loss that the applicants stand to suffer if the respondent execute the decree in this suit against them.”
27. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory. and the interest of the respondent who is seeking to enjoy the fruits of his ruling. In other words, the court should not only consider the



interest of the applicant but has also to consider, in all fairness, the interest of the respondent who has been denied the fruits of his ruling.

28. It was stated by Kuloba, J in the case of:- "*Machira T/A Machira & Co Advocates* (supra):-

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

29. In an application of this nature, the applicant should show the damages he would suffer if the order for stay is not granted since by granting stay would mean that the status quo should remain as it were before the judgment and that would be denying a successful litigant of the fruits of his judgment which should not be done if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay see (see "*Kenya Shell Limited v Kibiru & another* [1986] KLR 410;)

#### **Whether the parties are entitled to the prayers sought**

30. Under this sub heading, the court will proceed to apply the above set out principles to the instant case in order to establish whether the parties are entitled to the relief sought. To begin with, the court wishes to answer the fundamental question - what is the status quo on the suit land? The 1<sup>st</sup> applicant contends that she and her family reside in one of the said properties namely land reference numbers Mainland North Section F9475 located in Shanzu area within the county of Mombasa. As such, the 1<sup>st</sup> applicant together with her family risk being rendered homeless and they would be left destitute in the streets with her children some of whom were of young age and attending schools here in the county of Mombasa.

31. On the second condition, I find that it was not in dispute that the impugned ruling was delivered on September 29, 2022 the honorable court delivered a ruling dismissing an application for injunction to restrain the respondent from selling the properties known as land reference numbers Maini and north section I/6023 and plot No Kilifi/kawala 'A'/Kadzonzonzo/36 pending the hearing of the suit. She indicated that the defendant/respondent were in possession of her other properties which were susceptible for sale and hence recover the outstanding loan owed without much difficulties. She argued that there was need to be slightly patient as she argued her appeal pending before the Court of Appeal within the next six months and await its decision which she was extremely optimistic would be to her favour as she had an arguable appeal. According to the applicant, not to grant the orders sought would declare the appeal nugatory and a mere academic or otiose exercise assuming she was to have it to her favor.

32. Certainly, based on this strong submissions, I am satisfied that the said application was brought without undue or unreasonable delay.



33. On the last condition as to provision of security for costs, I find that order 42 rule 6 (2) (b) of the [Civil Procedure Rules, 2010](#) stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending appeal is that (s)he must furnish security for costs. The applicants have pledged their willingness to deposit the title deed for the suit land with the court as security for due performance of any decree that may be binding on them. in the case of:- ”[Aron C Sharma v Ashana Raikundalia T/A Rairundalia & Co Advocates](#) the court held that “*inter alia*”:

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

34. Indeed, I fully concur that the security should be one that serves that purpose. The grant of stay remains a discretionary order that must also consider the fact that the court ought not to make a practice of denying a successful litigant the fruits of their judgment. This court is not convinced that placing of an additional certificate of title deed would be sufficient security for costs. Ideally, the court has been informed by the plaintiffs/applicants that the defendant/respondent are already holding several title deeds belong to the applicant over other properties and hence to heap another title deed on top of other would not serve the intended purpose. Therefore, the most appropriate security for costs in the given circumstances would be an exact amount of finances to be deposited in a joint escrow bank account to be held by the counsels in this matter pending the hearing and final determination of the intended appeal before the Court of Appeal.

35. I have considered the provisions of order 42 rule 6 of the [Civil Procedure Rules, 2010](#) and the above cited authorities on the conditions to be met by an applicant for grant of orders of stay of execution pending appeal. The court is fully persuaded that the plaintiffs/applicants have well prosecuted their application and are entitled to the prayers sought accordingly.

#### **Who will bear the Costs of this application?**

36. It is now well established that issues of costs is a discretionary of the honorable court. Costs mean the a party is granted at the conclusion of a legal action or process or proceedings in any litigation. The provision of section 27 (1) of the [Civil Procedure Act](#), cap 21 holds that costs follow the events. By events, it means the result or outcome of the process or proceedings or legal action in a litigation.

37. In this case, as the honorable court finds that the notice of motion application dated October 31, 2022 by the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs/applicants has succeeded. However, in the given circumstances whereby the ruling of this court of September 29, 2022 was to their favour and they ought to be enjoying the fruits of it but at the behest of the plaintiffs/applicants that now has been curtailed, I hold that the defendant/respondent are entitled to costs for the application accordingly.

#### **Conclusion And Disposal**

38. In the long run, having conducted the indepth analysis of the framed issues, the facts and the law pertaining to this application I find the notice of motion application dated October 31, 2022 by the plaintiffs/applicants has merit and should be and is hereby allowed with costs to be in the cause and upon the fulfillment of the following pre-conditions:



- a. That the notice of motion application dated October 31, 2022 has merit and thus be and is hereby allowed.
- b. That there be a stay of the execution of the ruling dated September 29, 2022 and any subsequent orders herein is granted pending hearing and determination of the applicants' intended appeal.
- c. That an order be and is hereby made that the 1<sup>st</sup> & 2<sup>nd</sup> plaintiffs/applicants herein be supplied with certified and true copies of the typed proceedings upon payment of the required costs.
- d. That the plaintiffs/applicants directed to deposit security for costs being a sum of Kenya shillings three million five hundred thousand (Kshs 3,500,000/= in an escrow joint bank account of the two law firms of Messrs Gikandi Ngubuini Advocates and Messrs Robson Harris Advocates within the next sixty (60) days from the date of delivery of this ruling.
- e. That in default of any of these orders, the stay of execution orders granted herein shall automatically lapse.
- f. That the costs of the application to be awarded to the defendant/respondent herein.

It is so ordered accordingly.

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

**HON. JUSTICE L. L. NAIKUNI (JUDGE)**  
**ENVIRONMENT AND LAND COURT AT**  
**MOMBASA**

**In the presence of:**

M/s. Yumna, the Court Assistant.

M/s. Murage Advocate holding brief for Mr. Gikandi Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein.

Mr. Mbogo Advocate holding brief for Mr. Akello Advocate for the Defendant/Respondent herein.

