Mwamdzengo & another v Mwalimu & 10 others (Environment and Land Case E010 of 2022) [2025] KEELC 5850 (KLR) (28 May 2025) (Ruling)

Neutral citation: [2025] KEELC 5850 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ENVIRONMENT AND LAND CASE E010 OF 2022

LL NAIKUNI, J

MAY 28, 2025

BETWEEN

RAMA HAMISI MWAMDZENGO ..... 1ST PLAINTIFF

NAMALI MOHAMED MWAVYOMBO ..... 2ND PLAINTIFF

AND

HAMISI MWALIMU ..... 1ST DEFENDANT

REHEMA KAZI ..... 2ND DEFENDANT

ALI MWALIMU ..... 3RD DEFENDANT

MBARAKA MWASAMULI ..... 4TH DEFENDANT

MWANAKOMBO HAMISI ..... 5TH DEFENDANT

HAMISI MWAKURIA ..... 6TH DEFENDANT

ASHA HAMADI ..... 7TH DEFENDANT

NICOLUS NDULU ..... 8TH DEFENDANT

AKIBA MWAUMBEA ..... 9TH DEFENDANT

SAIDI TERENI ..... 10TH DEFENDANT

FATUMA MWADZONDO ..... 11TH DEFENDANT

RULING

I. Introduction

1. Before the Honourable Court for its determination are two (2) Notice of Application dated 13th and 18th November 2024 respectively. They are brought by the Defendants/Applicants herein through the Law firm of Messrs. M. R Mwadzoyo & Co Advocates.

2. Upon the service, it was only the one dated 13th November, 2024 that elicited responses herein through a Replying Affidavit dated 24th February, 2024 by the 2nd Plaintiff/Applicant herein. The Honourable Court will be dealing which of these applications separately.

II. The Notice of Motions Application dated 13th November, 2024

3. The Defendants/Applicants made this application pursuant to the provisions of Order 51 Rules 1, 3 Order 42 Rule 6 [1] [2] of the Civil Procedure Rules 2010. They sought for the following prayers before court:-

    a. Spent.

    b. That the Honourable Court do grant an order in the nature of status quo on land referenced 5368 and 5367[Orig 4909/5056] on which all the defendants/applicants their families are residing pending the hearing and determination of this application interpartes

    c. That the Honourable Court do grant an order in the nature of status quo on land referenced 5368 and 5367 [Orig 4909/5056] on which all the defendants/applicants their families are residing pending the hearing and determination of the appeal

    d. That costs be in the cause.

4. The application was premised upon the following grounds, testimonial facts and the averments made out under the 15 Paragraphed supporting affidavit of Ali Mwalimu together with three (3) annextures marked as "AM – 1 to 3" annexed hereto. He averred that:-

    a. He was an adult of sound mind and therefore competent to swear this Affidavit on his behalf and of the 1st, 2nd, 4th, 5th, 6th and 7th Defendants/Applicants herein.

    b. He was sued as the 3rd Defendant herein.

    c. The Honourable Court had heard this case and finalised it in favour of the Plaintiffs/ Respondents. Being aggrieved by the said decision, the Applicants who were Defendants had appealed against the decision vide notice of appeal dated 2nd October 2024.

    d. The Honourable Court ordered that the applicants do vacate the land within 180 days from the date of judgement delivered on 19th September 2024 failing which they be evicted forcibly

    e. A perusal of the documents had shown that the case before court was based on the documents produced being Kwale/Ukunda/5368, did not correspond with actual situation on the ground as there was no survey done before the Certificate of Titles were issued.

    f. The same mistake was made by the Chief Kadhi who apportioned the land he verified to be existing on the ground and official records held by Director of Surveys

g. A certified copy of the greencard/white card show that the Chief Kadhi apportioned parcel Kwale/Ukunda 5056 measuring 0.36 acres which was said to have come from CR 4909

h. The Chief Kadhi had no benefit of a map or actual sub – divisions by a Surveyor agreed upon by all parties.

i. The absence of evidence Director of Survey and Land Registrar on the proceedings denied the court vital information and the appeal has sought a retrial to involve the two [2] offices.

j. The history of the Green Card show that the parcel LR. 5056 was sub – division of LR. 4909 and the contested titles being 5367 and 5368 were created from the =later and the former title was closed.

k. It was in the interest of justice that eviction be suspended/stayed pending the hearing and determination of the appeal which was in their view had merit based on the following grounds:-

    i. The trial court was not invited to interrogate the finding of the Chief Kadhi on sub – division of family property leading to the error which had caused hardship on the ground.

    ii. The trial court erred in law affirming the sub – division Kwale/Ukunda/5368 measuring 0.28HA as ordered by the Chief Kadhi without input by the Director of Survey and the Land Registrar.

    iii. The trial court erred in law by reaching a decision relying on the dictum of statute without corresponding facts to establish the Respondent's interest in land hence the error.

    iv. The proceedings before the superior were a mistrial because no evidence was led by the main heirs of the land failure to interrogate the finding of the Chief Kadhi which granted the Respondent's title.

l. The above grounds showed that there was an arguable appeal with probability of success especially the prayer that there be re – trial of the case.

m. The Dependent and the other family members named herein live in this land, it had never been sub – divided or visited by any surveyor for decades and were surprised to learn that the same has been sub – divided and granted to grand children without involvement of all members of the family.

n. The Plaintiffs/Respondents were the maternal relatives to the Defendants/Applicants and had land they had inherited from their fathers, and were driven by greed to want land from their grand – mothers side.

o. Allowing demolition to proceed would cause really hardship to the Defendants/Applicants since the small portion left being the sub – division – Kwale/Ukunda/5367 measuring 0.08HA which would only accommodate one house.

p. Justice leaned in favour of granting the orders since the Applicants will be exposed to untold hardship because their homes would be demolished and required to build them on land that does not exist.

III. The responses by the 2nd Plaintiffs/Respondents.

5. The application was opposed by the 2nd Plaintiff/Respondent through a 14 Paragraph Replying Affidavit sworn by Nimali Mohammed Mwavyombo the 2nd Plaintiff/Respondent. He averred as follows that:-

    a. The 2nd Plaintiff/Respondent was well versed with the issues raised in the application dated 13th November, 2024.

    b. The Notice of Appeal never acted as stay of execution and neither did it operate as an order granting any favourable orders to the Defendants.

    c. Further that the court was devoid of jurisdiction to entertain any further proceedings as an appeal had already been lodged over its Judgement.

    d. The Notice of Appeal was lodged sometimes on 2nd October, 2024, to date no record of appeal had been filed and served. The appeal lodged and these proceedings were aimed solely at delaying the enjoyment of the decree that was in the favour of the Plaintiff/Respondent.

    e. The arguments advanced could not be made at this stage Judgement having been issued and the matter having been concluded.

    f. The Defendants/Applicants seemed to be asking the court to reopen the case after the Judgement which was contra express provisions of the law.

    g. The intended appeal raises no triable issues. The Court determined an application by the Defendants/Applicants based on the finding from the Kadhi, the issue of survey was new as it was never pleaded and could not be raised in these proceedings nor in the appeal. The Defendants/Applicants opted not to participate in the proceedings but opted to call witnesses instead.

    h. Judgement having been delivered and the Defendants/Applicants having been aggrieved rescue was at the Court of Appeal. Whether or not they were related to the Plaintiffs/Respondents and whether or not they were an occupation and the Plaintiffs/Respondents were not arguments to be made at this stage of the proceedings.

        i. The application was termed as being misconceived and bad in law and the court was urged to dismiss the same.

IV. The Notice of Motion application dated 18th November, 2024 by the Defendants/Applicants.

6. The Defendants/Applicants filed a further application dated 18th November, 2024. It was brought under the provision of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21; Order 9 Rules 9 (a) and (b) and Rule 10 and Order 51 Rules 1 and 13 of the Civil Procedure Rules, 2010. They sought the following orders:-

    a. Spent.

    b. That the Law firm of Messrs. M.R Mwadzoyo & Company Advocates be granted leave to come on record for the Defendants in place of Messrs. Barayan & Associates.

    c. That after granting prayers above and in line with the directions given on 13th November, 2024, the Honourable Court do validate the Notice of Appointment dated 1st October, 2024 and the application dated 13th November, 2024 and determine the same.

d. That costs of this application be in the cause.

7. The application was based on the grounds, testimonial facts and the averments made from the 6 Paragraphed Supporting Affidavit of Ali Mwalimu, the 3rd Defendant/Applicant. He averred as follows that:-

a. The Deponent was acting on behalf of the 1st, 2nd, 4th, 5th, 6th and 7th Defendants herein and thus competent to swear this affidavit.

b. The Judgement was delivered on 19th September, 2024 and whereby the Court ordered that the Defendants vacate the land within 180 days from 19th September, 2024 failing to which they be evicted by force.

c. Being dissatisfied with the Judgement, they intended to prefer an appeal. By then, they had been represented by the Law firm of Messrs. Barayan & Associates but now wished to be represented by the Law firm of Messrs. M. R Mwadzoyo & Company Advocates.

d. They had filed an appeal against the Judgement of this Court through a Notice of Appeal dated 2nd October, 2024.

e. They urged Court to have application to be allowed.

V. Submissions

8. On 5th March, 2025, while in the presence of all parties, the Honourable Court directed that the applications be canvassed off by way of written submissions. Pursuant to that, all parties complied. The court reserved 29th May, 2025 as the date to rendering its ruling accordingly.

VI. The Written Submissions by the Defendants/Applicants

9. The Defendants/Applicants through the Law firm of Messrs. M.R Mwadzoyo & Co Advocates filed their written submissions. M/s. Saisi Advocate commenced the submissions by stating that the application was based on the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010. The Learned Counsel submitted that the Applicants had met the threshold of proving substantial loss, that the application had also been made without unreasonable delay. Further that the Applicants were ready and willing to comply by any conditions that would be set by the court.

10. On the status quo orders sought, the court was referred to the holding by Mogeni J in the case of:- "Wangui & Another v Homeplus Realtors Limited & Another (Environment and Land Appeal E079 of 2023) [2024] KEELC 3459 (KLR) (30 April 2024) (Ruling) where the purpose of status quo orders was stated as being for preservation of property. The Applicants maintained that the court was not "functus officio" as was submitted by the Respondents.

11. The Learned Counsel set the justification for the status quo orders by holding that there was substantial loss and that the eviction would not be reversed once it took place. That the Respondents were not bound to suffer any prejudice in the event that the orders sought were granted. Also that the appeal preferred against the decision of this court was an arguable one. The Applicants submitted that the balance of convenience tilted towards the grant of the orders sought. Thus, the Applicants sought that the application be allowed and for the appeal to be heard without them having been evicted.

VII. The Written Submissions by the Plaintiffs/Respondents.

12. While opposing the application, through the by the firm of Messrs. Sharia Nyange Njuguna Advocates, the Plaintiffs/Respondents filed their written submissions. Mr. Nyange Advocates commenced the submissions by raising two issues for determination being:-

13. Firstly, whether the court was "functus officio". The Learned Counsel submitted that the Defendants were evading the requirements to be met in a normal application or stay of execution under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010. To wit, the application before court for determination never met the requirements as stated out under the provisions of Order 42 of the Civil Procedure Rules.

14. The Learned Counsel further averred that the court was being asked to re-open the case after it had already rendered its verdict. That the court was devoid of jurisdiction as it was functus officio. To buttress on this point, reference was made to the case of:- "Menginya Salim Murgani - Versus - Kenya Revenue Authority [2014] eKLR" and in the case of "Raila Odinga & 2 Others - Versus - IEBC [2013] eKLR". That any decision to be made over the matter was by the court of appeal and not this court.

15. Secondly, it was on the issue of jurisdiction of this Court. The Learned Counsel averred that the Applicants had already lodged an appeal at the court of appeal. Therefore, the Applicants were engaging two different for a to resolve the dispute which the law prohibited. The Counsel referred Court to the case of:- "Sheila Kabole Mabwa - Versus - Joshua Angelei & Others ELC No 118 of 2015". The Court was urged to dismiss the application.

VIII. Analysis & Determination

16. The Court has keenly considered the pleadings on record being the two applications, the written submissions and the relevant provisions of law. In order to arrive at an informed, fair and just decision on the matter, the Honourable Court has framed the following three (3) issues for its determination:-

    a. Whether the Notice of Motion applications dated 13th and 18th November, 2024 by the Defendants/Applicants herein have any merit.

    b. Whether the parties herein are entitled to the reliefs sought.

    c. Who bears the costs of the applications.

Issue No. a). Whether the Notice of Motion applications dated 13th and 18th November, 2024 by the Defendants/Applicants herein have any merit.

17. Under this Sub – title, the Honourable Court would be deliberating on a two – fold issues. First, whether the incoming Advocates for the Defendants/Applicants should be granted leave to act for them after a Judgement had been delivered and secondly, whether Defendants/Applicants should be granted stay of execution pending the hearing and termination of the preferred appeal before the Court of Appeal.

18. Before proceeding on with the analysis, it is imperative that the Court extrapolates on brief facts of the matter. From the pleadings on record, the Plaintiffs/Respondents instituted this suit vide a Plaint on 23rd February, 2022. They sought for the following orders:-

    a. A declaration that the Plaintiffs were the registered owners of the suit property.

    b. A Permanent injunction restraining the Defendants from use or occupation of the suit land.

c. An order to the Defendants to give vacant possession.

d. Eviction order against the Defendants if they fail to give vacant possession.

e. An Order on the OCS Diani Police Station to provide security for compliance.

f. Costs and interests.

19. The matter proceeded on accordingly and on 19th September, 2024 this court delivered its Judgement against the Defendants/Applicants herein. The Applicants were asked to vacate the suit property within 180 days' failure to which they were to be evicted from the said land. Aggrieved by the said the decision, the Defendants/Applicants preferred an appeal at the court of appeal. In the meantime, pending the granting of the prayers sought, they have filed the instant application seeking status quo orders. Essentially, the pith and substance of the application by the Defendant/Applicants herein.

20. The Laws governing the granting of leave for an Advocate to come on record after Judgement has been delivered is founded under the provision of Order 9 Rule 9 of the Civil Procedure Rules, 2010 while the one for stay of execution pending the appeal is under Order 42 Rules 1 & 2 of the Civil Procedure 2010. The Honourable Court will examine each of these provisions briefly. The provision of Order 9 of the Civil Procedure Rules, 2010 which is entitled "Recognised Agents and Advocates" - Order 9 Rule 1 and 5 of the Civil Procedure Rules, 2010 provide as follows:-

9 (1). 'Any application to or appearance or act in any Court required or authorized by the law to be made or done by a party in such Court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an Advocate duly appointed to act on his behalf.

9(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 the 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.

9 (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.

21. Essentially, these legal principles of law provide an enabling environment where a party may be represented by an Advocate of his or her choice in a civil proceeding. There are several categories upon which legal representation in a Court of law is recognized. These are:-

a. Appointment of a new Advocate to act in a fresh matter or in the first instance.

b. Appointment of an Advocate after Judgement has been delivered. There are two scenarios here:-

i. when there was an Advocate coming on record in a matter to replace an outgoing Advocate after Judgement had been delivered; and

ii. where there was previously an Advocate and a party now wished to act in person. On these two occasions, there must have been an Advocate on record immediately after Judgement had been rendered.

c. Effecting a change of Advocate from one Advocate to another;

d. A person previously represented by an Advocate but now wishing to act in person.

e. An Advocate wishing to cease acting better still, a litigant may act in person.

21. It is instructive to note that in all these cases, either a formal notice or Consent or leave of Court is required to be filed in Court. The process of representation through engaging with an Advocate, is not a mere formality or to be treated casually. The procedure which is very stringent have to be adhered with to the letter according. This position was has been upheld in a myriad of Court cases. I will only refer to a few of them for ease of reference. These are:- The reasoning behind this provision was well articulated in the case of:- S. K. Tarwadi – Versus - Veronica Muehlmann [2019] eKLR where the Judge observed as follows:

> " .....In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a Judgment is delivered and then sack the advocate and either replace him...."
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> The Learned Counsel submitted that Justice G. V. Odunga in Lalji Bhimji Sanghani Builders & Contractors – Versus - City Council of Nairobi[2012| eKLR it was held as follows:-
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> > " In my view, the Court may when properly moved validate the coming on record by an advocate who was on record depending on the circumstances of the case. However, the Court is not entitled to simply ignore a procedural misstep. That in my view is the alternative that the Court of Appeal had in mind in the latter case. The alternative is not to ignobly disregard the rules of procedure since the said rules are meant to regulate administration of justice and not to assist the indolent. As was held by the Court of Appeal in Hunker Trading Company Limited – Versus - Elf Oil Kenya Limited Civil Application No.Nai.6 of2010:-
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> > > ".....the applicant cannot be allowed to invoke the "O2 principle" and at the same time abuse it at will. If improperly invoked, the "O2 principle" could easily become an unruly horse and therefore while the enactment of the "double O" principle is a reflection of the central importance the court must attach to case management in the administration of justice, in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable factual foundation. The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained".
> > >
> > > The said objective it has been held is a case management tool and therefore before the Court invokes the same the foundation for its application must be properly laid and the benefits thereof judicially ascertained. A party who without any justification decides not to

follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective or assistance and where no explanation has been offered for failure to observe the rules of the procedure the Court may well be entitled to conclude that the failure to comply therewith was deliberate."

22. It is instructive that the instant application was unopposed. Thus, the prayer sought succeeds accordingly.

23. The law concerning stay of execution pending Appeal is found in the provision of Order 42 Rule 6 (1) and (2) 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.
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> (2) No order for stay of execution shall be made under sub rule (1) unless—
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> (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
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> (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.

24. It is trite law that stay of execution pending appeal is a discretionary power bestowed upon this court by the law. In the initial stages of building Jurisprudence around this legal aspect, the Court of Appeal in the case of "Butt –Versus- Rent Restriction Tribunal {1982} KLR 417" gave guidance on how a court should exercise the said discretion and held that:

> " 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.
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> 2. The general principle 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 reverse the Judge's discretion.
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> 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.
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> 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."

24. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in the provision of Sections 1A and 1B of the *Civil Procedure Act*, Cap. 21 the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act*, Cap. 21 or in the interpretation of any of its provisions.

25. The provision of Sections 1A of the *Civil Procedure Act*, Cap. 21 states as follows:-

1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

26. The provision of Section 1A (2) of the *Civil Procedure Act*, Cap. 21 provides that "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" While the provision of Section 1B (1) states that:-

" For the purposes of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purposes of attaining:

a. the just determination of the proceedings;

b. the efficient disposal of the business of the Court;

c. the efficient use of the available judicial and administrative resources; and

d. the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

e. the use of suitable technology.

27. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 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.

28. I find issues for determination arising therein namely:

i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of judgment pending Appeal.

ii. What orders this Court should make

29. The purpose of stay of execution is to preserve the substratum of the case. In the case of "Consolidated Marine – Versus - 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".

30. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.

31. As for the applicant having to suffer substantial loss, in the case of "Kenya Shell Limited – Versus - Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018" the Court of Appeal pronounced itself to the effect that:

> " 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 rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay."

32. The Court of Appeal in the case of "Mukuma – Versus - 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."

33. The Applicant has a burden to show the substantial loss they are likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Applicant to the Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. {See the case of "Absalom Dora –Versus -Turbo Transporters (2013) (eKLR)"}.

34. As F. Gikonyo J stated in the case of:- "Geoffery Muriungi & another – Versus - John Rukunga M'imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (Deceased) [2016] eKLR" and which wisdom I am persuaded with: -

> " .....the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as "reducing the successful appellant into a pious explorer in the judicial process". The said state of affairs is what is referred to as "substantial loss" within the jurisprudence in the High Court, or "rendering the appeal nugatory" within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal...".

35. Having said as much I shall examine whether the Applicant is entitled to the orders sought. The court takes cognizance of the fact that although the instant application is brought before court pursuant to the provisions of Order 42 of the Civil Procedure Rules, 2010 which caters for stay of execution but the Defendants/Applicants has sought the prayers listed on the face of the application being the status quo orders. The purpose of the status quo orders is to prevent their eviction from the suit property which they refer to as their home since time immemorial. Normally, what would allow the applicants to maintain occupation of the suit property would be stay of execution pending appeal.

36. The purpose of stay orders pending appeal is to preserve the subject matter of the appeal so as to not render it nugatory. This position was found by the court in the case of:- "RWW – Versus -EKW [2019] eKLR" where the court stated the purpose of stay of execution order pending appeal, in the following words:

> " The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her Judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent."

37. However, what has been prayed for by the Applicants is not stay of execution but status quo. It is trite law that parties are bound by their pleadings. In the case of "Independent Electoral and Boundaries Commission & another – Versus - Stephen Mutinda Mule & 3 others [2014] eKLR", the Court of Appeal held as follows:-

> " As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The Learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the Petitioners and answered by the Respondents before her and thereby determined the Petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score".
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> ISSUE No. b). Whether the parties herein are entitled to the reliefs sought.

38. Under this sub – heading, the Honourable Court will examine the reliefs sought by the Defendants/ Applicants. It is clear from the above dictum that the principle and based on the provision of Order 2 Rule 6 of the Civil Procedure Rules, 2010, parties are bound by their pleadings apply "mutatis mutandis" even to this court. Nonetheless, in the given circumstances to the instant case and what is clearly at stake, can there be any exceptions to this principle? The East African Court of appeal in the case of:- Odd Jobs – Versus - Mubea (1970) E.A 476", held that a Court may base its decision on an issue that is not in the pleadings as long as the same arises in the course of the proceedings and the same is fully canvassed by the parties. Regarding this issue, the Court of Appeal commented as follows in the case of "Ann Wairimu Wanjohi – Versus - James Wambiru Mukabi [2021] eKLR"

> (33) We take the view that parties should specifically state their claim by properly pleading the facts relied upon and the relief sought, as the pleadings are

> the primary documents that guide the court and the parties concerning the claim and the contesting positions of the parties. In accordance with the Civil Procedure Rules, the parties should also either provide a list of agreed issues, or if there is no agreement, each provide their own list of issues so that the court can settle the issues. Although it is desirable that where necessary the pleadings should be amended to bring in all the issues, Odd Jobs – Versus - Mubia (supra) remains good law, that in limited circumstances where an unpleaded issue is crucial to the matters in issue the court may determine a suit on the unpleaded issue, provided both parties have clearly addressed the unpleaded issue in their evidence or submissions, and left the matter for the determination of the court. However, such determination will not extend to determining or awarding a relief that was not specifically sought in the pleadings."

39. While I fully concur with the Learned Counsel for the Plaintiffs/Respondents and even from the face value, that the Defendants/Applicants though cited the provision of Order 42 Rules 6 (1) and (2) of the Civil Procedure Rules, 2010 they never specifically prayed for orders of stay of execution. To worsen the situation, I have also noted that they have failed to fulfil any of the requirements set out under the said provisions of the law. Nonetheless, as stated above, the issue of preservation of the suit property herein I must admit is crucial in this matter. In the event that the execution is not prevented that the same is bound to adversely affect the Applicants herein. The case of "Odd Jobs – Versus - Mubia" (Supra) exception therefore apply to this instant case. Purely, in the interest of justice, conscience and Equity based on the overriding objective, the court is to not only ensure timely disposal of matters but ensure justice is met through equal protection of rights of the parties before it.

40. Based on the foregoing, it will be imperative of the Honourable Court to exercise its discretion and invoke the overriding objective of the law in civil cases as stipulated in Sections 1A and 1B of the *Civil Procedure Act* by considering what has been sought in the application and allowing the prayers sought.

41. On the significance of the status quo orders, the purpose of an order of status quo has been reiterated in a number of decisions:

42. In the case of: "Republic Vs National Environment Tribunal, Ex-parte Palm Homes Limited & Another [2013] e KLR, Odunga J. stated,

> " When a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve existing state of affairs.....Status quo must therefore be interpreted with respect to existing factual scenario..."

43. In the case of:- "TSS Spinning & Weaving; Company Limited – Versus - Nic Bank Limited & another [2020] e KLR, the unpacked the purpose of a status quo order as follows:

> " In essence therefore, a status quo order is meant to preserve the subject matter as it is/existed, as at the day of making the order. Status quo is about a court of law maintaining the situation or the subject matter of the dispute or the state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention.'

44. In the case of:- "Kenya Airline Pilots Association (KALPA) – Versus - Co-operative Bank of Kenya Limited & another [2020] e KLR, the purpose of a status quo order was explained as follows:-

> " ..... By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision."

45. The Court in the case of:- "High Court of Kenya at Mombasa Civil Appeal 129 of 2020 Classic Building Works Limited - Versus - Pansons Construction Co. Limited [2021] eKLR" granted the Applicant status quo pending appeal and pronounced itself as hereunder:-

> " Having considered all the pleadings and written submissions by the parties, the only issue for determination arising from the application is whether status quo can be maintained pending the hearing and determination of the Appeal against the Ruling of Hon. E. Makori delivered on 10th December, 2020 In the case of "Ujagar Singh – Versus - Runda Coffee Estates Limited [1966] EA 263", the court therein invoked its jurisdiction and ordered for the preservation of the status quo pending the hearing and determination of the appeal.

Issue No. c). Who will bear the cost of the applications

46. The Applicants have further sought for costs of the suit. It is trite law that the issue of costs is at the discretion of the court. Costs is the award that a party is granted at the conclusion of the legal action or proceeding in any litigation. The provision of Section 27 of the *Civil Procedure Act*, Cap. 21 states that:-

> "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or Judge, and the court or Judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order."

47. However, based on the circumstances of the application herein, the court opines that it is proper to have each party bear its own costs.

VI. Conclusion & Findings

48. Consequently, upon causing analysis of the framed issues herein, the Honourable Court proceeds to grant the following orders:-

    a. That the Notice of Motion application dated 13th and 18th November, 2024 be and are hereby found to have merit and thus allowed.

    b. That the Law firm of Messrs. M.R Mwadzoyo & Company Advocates be and are hereby granted leave to come on record for the Defendants in place of Messrs. Barayan & Associates.

c. That in line with the directions given on 13th November, 2024, the Honourable Court do validate the Notice of Appointment dated 1st October, 2024 and the application dated 13th November, 2024 and determine the same.

d. That the an order in the nature of status quo to be maintained meaning the situation remains as it was onto all that parcel of land known as Land Referenced Numbers 5368 and 5367 [Orig 4909/5056] before the Judgement was delivered and that all the Defendants/Applicants and their families to continue residing on the suit land pending the hearing and determination of the appeal be and is hereby granted.

e. That each party to bear its own costs.

It is ordered accordingly.

RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 28TH DAY OF MAY 2025

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HON. MR. JUSTICE L.L NAIKUNI,

ENVIRONMENT & LAND COURT AT KWALE.

Ruling delivered in the presence of: -

a. Mr. Daniel Disii, the Court Assistant.

b. No appearance for the Plaintiff/Respondent.

c. M/s. Saisi Advocate for the Defendants/Applicants.