



**Wambui v Frann Investment Limited (Environment & Land Case
207 of 2019) [2025] KEELC 159 (KLR) (24 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 159 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 207 OF 2019
LL NAIKUNI, J
JANUARY 24, 2025**

BETWEEN

JAMES MWANGI WAMBUI PLAINTIFF

AND

FRANN INVESTMENT LIMITED DEFENDANT

RULING

I. Introduction

1. This Honorable Court is tasked to determine the Notice of Motion application dated 8th July, 2024 by Frann Investment Limited, the Defendant/Applicant herein, under Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Cap. 21, Laws of Kenya, Order 42 Rule 6 of the Civil Procedure Rules, 2010.
2. Upon service of the application, and while opposing it, the Plaintiff/Respondent, filed Grounds of opposition dated 14th January, 2025 and a Replying Affidavit. The Honourable Court shall be dealing with it later on in this Ruling.

II. The Defendant/Applicant's case

3. The Defendant/Applicant's sought for the following orders:-
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of the appeals, Mombasa Court of Appeal Civil Appeal No. E106 of 2024 Frann Investments Limited – Versus - James Mwangi Wambui, Mombasa Court of Appeal Civil Appeal No. E107 of 2024 Frann Investments Limited – Versus - James Mwangi Wambui and Mombasa Court of Appeal Civil Appeal No. E109 of 2024 Frann Investments Limited – Versus - James Mwangi Wambui an order of stay of



execution be issued to restrain the Plaintiff/Respondent from executing the Judgement dated 28th November 2023, the ruling dated 18th March 2024 and the Amended Judgement dated 18th March, 2024 by Hon. Naikuni in Mombasa Environment and Land Court No.207 of 2019 James Mwangi Wambui vs Frann Investments Limited.

- d. That the costs of this Application be provided for.
4. The application by the Defendant/Applicant herein was premised on the grounds, testimonial facts and averments made out under the 19 Paragraphed Supporting Affidavit of –EDWARD KAGUME, the Applicant herein sworn and dated on the same day with three (3) annexures marked as ‘EK-1 to 3’. The Applicant averred that:
- a. By Judgment delivered on 28th November 2023 by this Honourable Court, the Plaintiff/Respondent was awarded general damages in the sum of Kenya Shillings Two Million (Kshs. 2,000,000/-). Attached and reference was made to the Judgement which was part of the record of the suit herein.
 - b. The Plaintiff/Respondent filed an application dated 30th November, 2023 for review of the said Judgement. Subsequently, the court delivered its ruling on 18th March, 2024. He referred to the said ruling which was also a part of the said proceedings of this suit.
 - c. The aforesaid Judgement dated 28th November 2023 was amended causing the Plaintiff/Respondent to be awarded general damages in the sum of Kenya Shillings Sixty-Two Million, Forty-Seven Thousand, Three Hundred and Fifty (Kshs. 62,047,350/-). He referred to the said Amended Judgement which was also a part of the said proceedings of this suit. He annexed in the affidavit a copy of the decree issued herein dated 28th April, 2024 which was marked as annexure ‘EK - 1’.
 - d. Being aggrieved by the said decisions, the Defendant/Applicant filed a Notice of Appeal. It also filed Memorandum of Appeal and Records of Appeal in the Court of Appeal against the said decisions. The same were “Mombasa Court of Appeal Civil Appeal No. E106 of 2024 Frann Investment Limited – Versus - James Mwangi Wambui, Mombasa Court of Appeal Civil Appeal No. E107 of 2024; Frann Investment Limited – Versus - James Mwangi Wambui and Mombasa Court of Appeal Civil Appeal No.E109 of 2024 Frann Investment Limited – Versus - James Mwangi Wambui”. He annexed copies of the Notices of Appeal and Memorandums of Appeal marked as annexure ‘EK - 2’ thereof.
 - e. The said appeals raised substantial questions of law which were contained in the Memorandums of Appeal filed therein.
 - f. Despite the pending appeals, the Plaintiff/Respondent filed an application dated 26th April, 2024 to execute the said Judgement through a sale by public auction. The said application was an indication of the Plaintiff/Respondent’s intention to execute. He annexed a copy of the said application which was marked as annexure ‘EK - 3’.
 - g. Although the Plaintiff/Respondent withdrew the said application, the Defendant/Applicant was apprehensive that unless an order for stay of execution was granted, the Defendant/Applicant would proceed with the process of execution of the said Judgements and ruling before the appeals were heard and determined. He annexed a copy of the said notice of withdrawal which was marked as annexure ‘EK - 4’.



- h. Unless an order for stay was granted the Defendant/Applicant stood to suffer irreparable loss and that was also if the Plaintiff/Respondent proceeded to execute, considering the decretal sum was manifestly high.
- i. If execution proceeded, the Defendant/Applicant would suffer substantial loss as the Defendant was not aware whether the Plaintiff/Respondent had any assets that would be used to recover the decretal sum in the event of a successful appeal. It was therefore very doubtful whether the Plaintiff/Respondent would be able to immediately refund the Judgement sum if it was paid out of him.
- j. Such an action would be prejudicial to the Defendant/Applicant as the appeals would be rendered nugatory, if successful.
- k. The Plaintiff/Respondent shall not be prejudiced by the stay of execution pending appeal as the decretal sum continued to accrue interest through cushioning the Plaintiff/Respondent from any diminution in the award.
- l. The Defendant/Applicant was a reputable company with ability to pay the decretal sum should the appeal fail.
- m. The Defendant/Applicant had already filed the records of appeal, all that was pending was the hearing of the appeals which was beyond the control of any of the parties.
- n. The Defendant/Applicant was ready to deposit with the court the original Certificate of title deed for all that parcel of land known as Land Reference No. MN/III/1700 as security. The said land had been valued at a sum of Kenya Shillings One Hundred and Twenty-Five Million (Kshs.125,000,000/-). He annexed a copy of the Valuation report of the said land which was marked as annexure 'EK - 5'.
- o. There was no overwhelming reason to deny the stay of execution as sought.
- p. The Defendant/Applicant's constitutional right to lodge an appeal should not be prejudiced nor should the Defendant be made to suffer any harassment on account of attachment of the suit property for the execution of the general damages when in the fullness of time, the impugned decisions may be set aside through the success of the said appeals.
- q. It was in the interest of justice and fairness that the application be heard expeditiously and the orders sought be granted so as to preserve the Defendant/Applicant's constitutional right to a fair hearing, which includes the right of appeal.

III. The Replies by the Plaintiff/Respondent

- 5. While opposing the Notice of Motion application dated 8th July, 2024, the Plaintiff/Applicant filed a 14 Paragraphed Replying Affidavit sworn by JAMES MWANGI WAMBUI together with two (2) annexures marked as "JWW – 1 and 2" annexed thereto. He averred as follows: -
 - a. He was the Plaintiff/Respondent herein and hence competent to swear this Affidavit.
 - b. He had read the Application by way of a Notice of Motion application dated 8th July, 2024 and where necessary, the same had been explained to him by his Advocates on record and he wished to register his strong opposition to the Application and respond thereto as hereunder;



- c. This Honourable Court on the 28th November, 2023, delivered a Judgment in his favour, as prayed against the Defendant/Applicant herein in its entirety save for Prayer No. 1 of the Plaint. Attached and marked as “JMW - 1” was a copy of the Judgement.
- d. The Judgement was silent on the value amount awarded under prayer (c) of the Plaint and he sought for review of the Judgment and a Ruling was delivered in his favour amending the Judgment to capture the values under prayer c of the Plaint. Attached and marked as “JMW - 2’ was a copy of the Decree dated 18th March, 2024.
- e. He was advised by his Advocates on record which advice he verily believed to be true and accurate that the ordinary principle was that a successful party was entitled to the fruits of his/her Judgement and this Application aimed to deny and/or deter him from enjoying the fruits of the Judgement entered in his favour by this Honourable Court.
- f. The Applicant herein had not demonstrated by way of evidence the substantial loss it stood to suffer and a mere statement that substantial loss would result or that the Appeal would be rendered nugatory could not suffice as they ought to provide empirical or documentary evidence to support such contention.
- g. In light with the aforementioned circumstances and to protect his rights as a Decree - Holder, if this Honourable Court did deem it fit to grant the Applicant the Orders sought in the Application, he proposed that the Applicant herein do deposit the full Decretal Sum of Kenya Shillings Sixty-Two Million, Forty-Seven Thousand, Three Hundred and Fifty (Kshs. 62,047,350/-) to a Joint Interest Account as security.
- h. He was advised by his Advocates on record which advice he verily believe to be true and accurate that the purpose of the security needed under the provision of Order 42 of the Civil Procedure Rules, 2010 was to guarantee the due performance of such Decree or Order as may ultimately be binding on the Applicant and the security must be one which could serve that purpose and in view of the same he proposed the Applicant did deposit the full Decretal amount in a Joint Interest Account.
- i. In the event this court deemed it fit to issue the Orders sought in the Application, his proposal that the Applicant does deposit the full Decretal Amount would not be prejudicial to them as the Applicant in Paragraph 12 of their Supporting Affidavit dated 8th July, 2024 had deponed that the Applicant was a reputable company with the ability to pay the decretal sum if the Appeal failed.
- j. The Application was unmerited as the Applicant would not suffer any substantial loss in the event he proceeded to execute the Judgment and Decree of this Honourable Court and they had not adduced any evidence to support their claim of substantial loss as required under the provision of Order 42 of the Civil Procedure Rules, 2010.
- k. From the face of the Memorandum of Appeal annexed to the Applicant’s Application, it was clear that the Appellant/Applicant did not have an arguable Appeal before the Court of Appeal.
- l. If the Orders sought were granted, he would be highly prejudiced as he would be prevented from enjoying the fruits of the Judgment delivered in his favour.



- m. As such, he prayed the Application herein be dismissed and/or struck out with costs as it was a delaying tactic aimed at preventing the him from enjoying the fruits of the Judgement, and a waste of this Court's precious time.

IV. Submissions

6. On 9th December, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 8th July, 2024 be disposed of by way of written submissions. Pursuant to that, at the time of penning down this Ruling, it had only been able to access the submissions by the Plaintiff/Respondent and not that by the Defendant/Applicant. Nonetheless, a ruling date was reserved for 31st January, 2025 on its own merit by Honourable Court accordingly.

A. The Written Submissions by the Plaintiff/Respondent.

7. While opposing the Notice of Motion application dated 8th July, 2024, the Respondent through the Law firm of Messrs. Gachie Mwanza & Company Advocates filed their written submissions dated 24th September, 2024. Mr. Gachie Advocate commenced the said submissions by providing Court with a brief background of the matter. He stated that the application sought the above stated reliefs. Further, that on the 28th November, 2023, this Honourable Court delivered a Judgment in the favour of the Plaintiff/ Respondent, as prayed against the Defendant/Applicant herein in its entirety save for Prayer No. 1 of the Plaint.
8. To buttress on his legal point, the Learned Counsel raised the issue on whether the Applicant had demonstrated that the orders of stay of execution pending the hearing and determination of the Application for Review was merited. According to him, the principles guiding the grant of a stay of execution was well settled as provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010. Therefore, an Applicant for stay of execution of an order was obliged to satisfy the conditions set out in Order 42 Rule 6 (2), aforementioned namely:-
- (a) that substantial loss may result to the applicant unless the order is made,
 - (b) that the application has been made without unreasonable delay, and
 - (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
9. The Learned Counsel submitted that the corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules was that substantial loss would result to the applicant unless a stay of execution is granted. What constituted substantial loss was broadly discussed by Gikonyo J in the case of "James Wangalwa & Another – Versus - Agnes Naliaka Cheseto [2012] eKLR" where it was held inter alia that:-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein – Versus - Chesoni, [12]the issue of



substantial loss is the cornerstone of both jurisdiction of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”

10. The contention by the Counsel was that in the instant case, the Applicants averred that they stood to suffer substantial loss in the event the Plaintiff/Respondent executed the Judgment and Decree issued by this Honourable Court without providing this Honourable court with any pecuniary or tangible loss to warrant the issuance of the said Orders for Stay. Additionally, on the same issue the Learned Counsel placed reliance in the matter of “, the Court held as follows: - “Machira t/a Machira & Company Advocates – Versus - East African Standard (no 2) 2002 eKLR” where the Court held that:-

“If the Applicant cites as a ground substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given Where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay Indeed, remote contingencies would not warrant the Court’s interference with the ordinary course of justice and the process of the law.”

11. He further cited the case of “Kenya Shell Limited – Versus - Benjamin Kibiru & Another 1986” eKLR 410” , where Gachuhi AG JA (as he then was) stated as follows:-

“It is not sufficient by merely stating that the sum of Kshs. 20,380/= is a lot of money and the applicant would suffer loss if the money is paid In an application of this nature, the Applicant should show the damages it would suffer if the order for stay is not granted.”

12. The Counsel argued that the Applicants in this matter had not adduced any evidence of substantial loss that they may suffer in the event the Plaintiff/Respondent proceeded with the execution of the Decretal Amount. In fact, in Paragraph 12 of their Replying Affidavit, they acknowledged that they were in a position to pay the decretal amount as they were a reputable company with the financial muscle to settle the same. Thus, in light of the above facts, provisions and case law, it behooved the Applicant to prove that substantial loss would occasion it if stay orders were not granted, and the Applicant herein had not fulfilled this condition as required by the law.

13. On the issue of security, it was trite that the Applicant seeking stay of execution ought to offer security. The purpose of the security was also aptly explained in the case of “Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd [2019] eKLR”, where the Court stated:

“..... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails. Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the Appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to



fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals.”

14. The Counsel averred that, although the Applicant had intimated to produce a title deed as security, it was the Respondent’s proposal that the Applicant do deposit the full Decretal Sum of Kenya Shillings Sixty-Two Million, Forty-Seven Thousand, Three Hundred and Fifty (Kshs. 62,047,350/-) to a Joint Interest Account as security in the event this Honourable Court did deem it fit to issue an Order for Stay as this would protect the Plaintiff/Respondent’s rights as the Decree-Holder. The Counsel held that the deposit of the decretal amount would protect his rights as the Decree/Holder as it would act as sufficient security in this matter. Further, the proposal for the Applicant to deposit the Decretal Amount was in line with their averment under Paragraph 12 of their Supporting Affidavit dated 8th July, 2024 where the Applicant deponed that the Applicant was a reputable company with the ability to pay the decretal sum if the Appeal failed. Thus it was only proper and in the interest of justice that the Applicant be ordered to deposit the full decretal amount in the event this Honourable Court did issue an Order for Stay. In the event this Honourable Court deemed it fit to issue an Order for Stay, the deposit of the full Decretal Sum of Kenya Shillings Sixty-Two Million, Forty Seven Thousand, Three Hundred and Fifty (Kshs. 62,047,350/-) to a Joint Interest Account was the only security that could serve purpose in the interest of justice. He further relied on the case of “Arun C. Sharma – Versus - Ashana Raikundalia T/A Rairundalia & Co. Advocates & 2 others [2014] eKLR”, where the court stated as follows: -

“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.”

15. The Counsel contended that in light of the aforementioned case law, it was the Plaintiff/Respondent’s submission that the Applicant ought to provide this Court with security that is binding upon the parties. 17. He argued that the Plaintiff/Respondent was in a position to refund the Defendant the decretal sum in the event the Appeals before the Court of Appeal are successful; which was unlikely. According to the Counsel, it was clear that the Applicant had not provided sufficient security to warrant the Orders prayed in the Application. On this point, he further cited the case of “Machira T/ A Machira & Co Advocates (supra)” where Kuloba, J stated as follows:-

“To be obsessed with the protection of an appellant or intending appellant in total disregard of flitting of the so far successful party is to flirt with one party as crocodile tears are shed for the other contrary to sound principle for exercise of a judicial discretion. The ordinary principle is that a successful party is intitled to the fruits of his judgement or of any decision of the Court giving 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 or 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”



16. In light of the aforementioned case law it was the Plaintiff/ Respondent's submission that this application aimed to frustrate or prevent him from enjoying the fruits of the judgment of this Honourable Court. The Counsel argued that the Applicant never had an arguable appeal before the Appellate Court and this application aims to frustrate the Decree - Holder herein from enjoying the fruits of the Judgement delivered by this Honourable Court as it was clear that the Application herein was a back door attempt to stall the inevitable and cause the Plaintiff/Respondent further stress and frustration and to prevent him from enjoying the fruits of his ruling. Furthermore, the Applicant had not placed any material before the court as provided by the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules to support its application.

V. Analysis & Determination.

17. I have carefully read and considered the pleadings herein by the Defendant/Applicant, the responses by the Plaintiff/Applicant, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
18. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
- a. What are the legal parameters for granting stay of execution.
 - b. Whether the Notice of Motion application dated 8th July, 2024 seeking to stay execution of the Judgment dated 28th November 2023, the ruling dated 18th March, 2024 and the Amended Judgement dated 18th March, 2024 by Hon. Justice Naikuni in Mombasa Environment and Land Court No. 207 of 2019 James Mwangi Wambui – Versus - Frann Investments Ltd pending the hearing and determination of the Appeal is merited?
 - c. Who will bear the Costs of Notice of Motion application dated 8th July, 2024.

Issue No. a). What are the legal parameters for granting stay of execution.

19. Under this Sub – heading, the Honourable Court will decipher on the substratum of the matter herein being whether the grant stay of execution pending the hearing of the appeal or not. It is at the discretion of the Court. Legally speaking, the law governing stay of execution pending Appeal is found in the provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010 which stipulates as follows:

- “(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 sub rule (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.
- (3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
 - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
 - (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
 - (6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms.”
20. There are three conditions for granting of stay order pending Appeal under the provision of 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.
21. I find issues for determination arising therein to be 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
22. The purpose of stay of execution is to preserve the substratum of the case. I say so based on the legal ratio 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”.
23. 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.



24. As for the applicant having to suffer substantial loss, in the case of “Kenya Shell Limited (Supra) 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.”

25. 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.”

26. 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)”}.

27. As F. Gikonyo J stated in “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...”

28. In order to grant the order for stay of execution the court must be satisfied that the above three conditions have been met. The first condition is that the Applicant must demonstrate that if the stay is not granted, he shall suffer substantial loss. As to what amounts to substantial loss the court in the case of:- “James Wangalwa & Another – Versus - Agnes Naliaka Cheseto [Supra] observed as follows:-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

29. In the instant case the Applicant has not demonstrated what loss it stands to suffer if the order for stay is not granted. All that is stated in his Supporting affidavit is that he has an arguable appeal with



high chances of success. I must point out that at this stage it is required and neither the Court has the Jurisdiction to examine the merits of the appeal. In the case of “Butt – Versus - Rent Restriction Tribunal [1982] KLR 417” the Court of Appeal while dealing with an Application for stay of execution pending Appeal held that a stay must be granted so that an Appeal may not be rendered nugatory.

30. While in the case of:- “James Wangalwa & Another – Versus - Agnes Naliaka Cheseto (Supra)” the Court of Appeal held that:-

“An Applicant must establish factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as a successful party.”

Issue No. b). Whether the Notice of Motion application dated 8th July, 2024 seeking to stay execution of the Judgment dated 28th November 2023, the ruling dated 18th March, 2024 and the Amended Judgement dated 18th March, 2024 by Hon. Justice Naikuni in Mombasa Environment and Land Court No. 207 of 2019 James Mwangi Wambui – Versus - Frann Investments Ltd pending the hearing and determination of the Appeal is merited?

31. Under this sub – title, the Honourable Court will proceed to apply the above stated elaborate legal principles to the instant case. From the record, the Applicant herein avers that a Judgement dated 18th March 2024, the aforesaid Judgement dated 28th November 2023 was amended causing the Plaintiff/ Respondent to be awarded general damages in the sum of Kenya Shillings Sixty-Two Million, Forty-Seven Thousand, Three Hundred and Fifty (Kshs. 62,047,350/-). The Defendant, aggrieved by the said decisions, filed the Memorandums of Appeal and Records of Appeal in the Court of Appeal against the said decisions. According to the records, the said appeals were:- “Mombasa Court of Appeal Civil Appeal No. E106 of 2024 Frann Investment Limited – Versus - James Mwangi Wambui, Mombasa Court of Appeal Civil Appeal No. E107 of 2024 Frann Investments Limited -Versus - James Mwangi Wambui and Mombasa Court of Appeal Civil Appeal No. E109 of 2024 Frann Investments Limited – Versus - James Mwangi Wambui”. Despite of the pending appeals, the Plaintiff/Respondent filed an application dated 26th April, 2024 to execute the said Judgement through a sale by public auction. The said application is an indication of the Plaintiff/Respondent's intention to execute the Decree. The Defendant/Applicant averred that it stood to suffer irreparable loss considering the decretal sum is manifestly high.
32. Based on the facts before me, and while associating myself on the legal principles from the decisions cited above in this Ruling, I find that the Defendant/Applicant has demonstrated he stands to suffer substantial loss if the order of stay pending Appeal is declined. Particularly so, since the decretal amount is substantially high though based on the value of the suit land.
33. With regard to the issue of whether there was undue delay in moving this Court. While applying the principles of Order 42 Rule 6, the instant application is dated 8th July, 2024, seeking to stay the execution of Judgement dated 28th November 2023, the ruling dated 18th March, 2024 and the Amended Judgement dated 18th March, 2024 and annexed in the affidavit in support of the application is the Notices of Appeal and Memorandum of Appeal marked as “EK – 2”. The Notices of Appeal are dated 6th December, 2023, 20th March, 2024 and 15th April, 2024 respectively which puts the time line procedural. Clearly, from this information, the application was made timeously without any delay. The application was therefore made and filed expeditiously and without undue delay.



34. On the last condition as to provision of security for the due performance of the Decree. I find that the provision of Order 42 Rule 6 (2) (b) of the Civil Procedure Rules, 2010 stipulate in mandatory terms that the third condition, a party needs to fulfil so as to be granted the stay order pending Appeal. That is to say, (s)he must furnish security. Nonetheless, this court can make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal. I have noted that the Defendant/Applicant, has offered to deposit an Original Certificate of Title Deed of a parcel of land known as Land Reference No. MN/III/1700 and valued at a sum of Kenya Shillings One Twenty Five Million (Kshs. 125, 000, 000/=) in accordance with the filed Valuation Report marked as “EK – 5” as a provisions for the due performance of such decree in this application. Unfortunately, apart from the valuation report there was no empirical evidence adduced to demonstrate due diligence processes for instance an affidavit sworn by the legal proprietor of the parcel of land; a latest Certificate of official search from the Land Registry where the land is situated, having been undertaken by the Defendant/Applicant existence of any encumbrances registered against it whatsoever. For this stand alone reason, I discern that the title deed may not be credible nor adequate security as envisaged under the law.
35. In the case of “Aron C. Sharma – Versus - Ashana Raikundalia T/A Rairundalia & Co. Advocates (Supra)” the court held that:
- “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.”
36. Stay of execution is exactly what it states; it is an order of the court barring a Decree - Holder from enjoying the fruits of his judgment pending the determination of some issue in contention. It matters not whether the issue in contention is the amount awarded in the judgment debt, or liability or legality of the extracted warrants as in this case. Where a party seeks to stay execution, the Court must be guided by the parameters set out in Order 42 Rule 6.
37. I have carefully considered the draft Memorandum of Appeal. The grounds, some of which, the issues of service of the Application impugned and the validity of the judgment sought to be enforced as demonstrated of the same especially as stated about overwhelming evidence in favour of the Appellant, are weighty matters which raise arguable points on appeal. Failing to grant the orders herein would render the appeal nugatory.
38. In the case of:- “Focin Motorcycle Co. Limited – Versus - Ann Wambui Wangui & Another (2018) eKLR” the court stated that:-
- “Where the applicant proposes to provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The applicant has offered to provide security and has therefore satisfied this ground.”



39. The upshot is that the Applicant has shown that it has an arguable appeal, that it will suffer substantial loss in case the stay is not granted, the application was filed in good time, and that it is willing to perform the decree. Thus, the application dated 8th July, 2024 is granted with no orders as to costs.

Issue No. c). Who will bear the Costs of Notice of Motion application dated 8th July, 2024.

40. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action 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 event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).
41. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
42. In this case, this Honourable Court has reserved its discretion in not awarding costs.

VI. Conclusion & Disposition

43. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards the Preponderance of Probabilities and the balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the application, this court arrives at the following decision and makes the orders below:-
- a. That the Notice of Motion application dated 8th July, 2024 be and is hereby found to have merit hence hereby allowed in its entirety upon fulfillment of the Pre – Conditions set out herein.
 - b. That an order made that the Appellant to deposit a total of Kenya Shillings Twenty Million, Six Hundred and Eighty Two Thousand, Four Hundred and Fifty (Kshs. 20,682,450/-) being a third of the decretal amount in an Interest earning Escrow bank account at a reputable Commercial institution to be held in the names of the Law Firms of Messrs. Gikandi & Company Advocates and Gachie Mwanza & Co Advocates Within The Next Forty Five (45) Days from the date of the delivery of this Ruling.
 - c. That this Honourable Court do hereby issue pending the hearing and determination of the appeals,

“Mombasa Court of Appeal Civil Appeal No. E106 of 2024 Frann Investments Limited – Versus - James Mwangi Wambui, Mombasa Court of Appeal Civil Appeal No. E107 of 2024 Frann Investments Limited – Versus - James Mwangi Wambui and Mombasa Court of Appeal Civil Appeal No. E109 of 2024 Frann Investments Limited – Versus - James Mwangi Wambui an order of stay of execution be issued to restrain the Plaintiff/Respondent from executing the Judgement dated 28th November 2023, the Ruling dated 18th March 2024 and the Amended Judgement dated 18th March, 2024 by Hon. Naikuni in “Mombasa Environment and Land Court No. 207 of 2019 James Mwangi Wambui – Versus - Frann Investments Limited”.



- d. That failure to comply with any these Pre – Conditions set out herein the Notice of Motion application dated 8th July, 2024 shall automatically stand dismissed without further recourse to this Honourable Court.
- e. That there are no orders as to costs.

It is so ordered accordingly.

RULING DELIEVERED THROUGH THE MICROSOFT TEAM VIRTUAL, MEANS SIGNED AND DATED AT MOMBASA THIS 24TH DAY OF JANUAR 2025.

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**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Gikandi & Kabebe Advocates for the Defendant/Applicant.
- c. Mr. Mburu Advocate holding brief for Mr. Gachie Mwanza Advocate for the Plaintiff/ Respondent.

