**Mwangi (Suing as Administrator of the Estate of Mark Mwaura Mwangi) v Kosambo & another (Environment & Land Case 114 of 2012) [2025] KEELC 1127 (KLR) (7 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1127 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ENVIRONMENT & LAND CASE 114 OF 2012**

**LL NAIKUNI, J**

**MARCH 7, 2025**

**BETWEEN**

**JOHN WAWERU MWANGI ..... PLAINTIFF**

**SUING AS ADMINISTRATOR OF THE ESTATE OF MARK MWAURA MWANGI**

**AND**

**LINUS MOSES KOSAMBO ..... 1ST DEFENDANT**

**KANMARK LIMITED ..... 2ND DEFENDANT**

**RULING**

## I. Introduction

1. This Honourable Court was called upon to determine the Notice of Motion application dated 10th September, 2024. It was filed by Linus Moses Kosambo, the 1st Defendant/Applicant herein brought under the provision s of Sections 3, 3A & 63 (e) of the *Civil Procedure Act*, Cap. 21 , Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 82 & 83 of the Court of Appeal Rules and all other enabling provisions of the law.

2. Upon service of the Notice of Motion application, and while opposing it, the 3rd Party filed a Replying Affidavit dated 14th October, 2024.

## II. The 1st Defendant/Applicant's case

3. The 1st Defendant/ Applicant sought for the following orders:-

    a. Spent.

    b. That the Notice of Appeal dated 22nd February, 2023 be deemed as withdrawn.

c. That this Honourable Court be pleased to set aside the orders of stay issued on 19th February 2024.

d. That this Honourable Court be pleased to issue warrants of arrest as against the 3rd Party for committal to serve six (6) months imprisonment pursuant to the judgment dated 21st February 2023.

e. That this Honourable Court be pleased to grant any orders necessary to meet the ends of justice.

f. That costs of this Application be provided for.

4. The application was premised on the grounds, facts and testimony on the face of the application and the averments made out under the 12 paragraphed annexed affidavit of PAUL W. MAGOLO, an Advocate of the High Court of Kenya practicing in Mombasa and having the conduct of this matter on behalf of the 1st Defendant herein. The Applicant averred That:-

a. The court records show That on the 21st February 2023, this court pronounced itself on this matter and delivered Judgment to the effect That the 3rd Party be committed to serve six (6) months imprisonment term or in the alternative, he refunded of Kenya Shillings Eleven Million Nine Hundred Thousand (Kshs 11,900,000/-), which sum continues to accrue interest.

b. The 3rd Party filed a notice of appeal dated 22nd February, 2023.

c. On the 19th February, 2024, on application be the 3rd Party, this Honourable Court delivered a ruling granting stay of the Judgment pending the intended appeal.

d. No appeal had ever been filed to date since the Judgment was delivered on the 21st February, 2023 which is over 19 months ago.

e. The law required That an appeal be lodged in the Court of Appeal within 60 days of filing the Notice of Appeal.

f. The law further required That if a party failed to institute an appeal within the appointed time he should be deemed to have withdrawn his notice of appeal.

g. The 3rd Party had no intention at all to appeal and his intention of obtaining stay was simply to defeat justice.

h. The Justice delayed is Justice denied.

i. It was therefore within the interest of justice and equity for the proceedings and orders of 31st July, 2023 be set aside.

**III. The 3rd Party's response**

5. The 3rd Party responded to the Application through a 14 Paragraphed Replying Affidavit sworn by STEPHEN NDEDA on 14th October, 2024 where he averred That:-

a. Being aggrieved by the judgment delivered by Hon. Justice Naikuni on 21st February, 2023, he filed a Notice of Appeal dated 22nd February, 2023 with the intention of pursuing an appeal against the said judgment.

b. However, he was unable to file the said appeal within sixty (60) days of delivery of the Judgment, as he had not been supplied with certified copies of the proceedings and Judgment.

c. Vide a letter dated 22nd February, 2023, his then Advocates, Messrs. Wandai Matheka & Co. Advocates wrote to the Deputy Registrar requesting to be supplied with certified copies of the typed proceedings and Judgment delivered by Hon. Justice Naikuni on 21st February, 2023. He annexed in the affidavit a copy of the said letter dated 22nd February, 2023 requesting to be supplied with certified copies of the said proceedings which he marked as Annexture ''SN – 1".

d. Upon appointing his current Advocates, Messrs. Gikandi & Co. Advocates, they had been diligently following upon with the court registry for the supply of the said proceedings and Judgment.

e. In addition to following up with the court registry, his current advocates on record wrote to the Deputy Registrar of the Environment and Land Court on 30th September, 2024 to remind the court to supply us with certified copies of proceedings and Judgement to enable them file their appeal. He annexed in the affidavit a copy of the said Letter dated 30th September, 2024 requesting to be supplied with certified copies of the said proceedings which he marked as annexure "SN – 2".

f. While the record of appeal was required to be filed within sixty (60) days from the date of the filing of the notice of appeal, Rule 84 of the Court of Appeal Rules, 2022 provides for exclusion of the time taken by the registry for preparation and supply of certified copies of the proceedings and the judgement from the computation of the sixty days for filing of the record of appeal.

g. The delay in filing the Record of Appeal was not due to any fault of his own but rather due to the court's delay in typing the proceedings.

h. He should not be penalized for the delay as the same was beyond his control.

i. He was ready to file the record of appeal immediately he was supplied with certified copies of the proceedings and the judgment.

j. The Respondent's claim That he had not pursued his appeal was unfounded as he had been proactive in requesting to be supplied with certified copies of the proceedings and the Judgment to enable him file the Record of Appeal.

k. In the circumstances he urged this Honourable court to dismiss the Respondent's application dated 10th September as the same was not merited.

**IV. Submissions**

6. On 29th October, 2024 while the Parties were present in Court, they were directed to have the Notice of Motion application dated 10th September, 2024 be disposed of by way of written submissions and all the parties complied. Pursuant to That all the parties obliged and on 18th November, 2024 a ruling date was reserved on 5th January, 2025 by Court accordingly. But due to unavoidable reasons it was eventually delivered on 7th March, 2025.

**A. The Written Submissions by the 1st Defendant**

7. The 1st Defendant through the Law firm of Messrs. J.O. Magolo & Company Advocate filed their written submissions dated 5th November, 2024. Mr. Paul Magolo Advocate Counsel submitted That

the 1st Defendant/Applicant's Notice of Motion application dated 10th September 2024 sought the following orders:-

SUBPARA a.

That this Application be certified as urgent and service be dispensed with in the first instance.

b. That the Notice of Appeal dated 22nd February 2023 be deemed as withdrawn.

c. That this Honourable Court be pleased to set aside the orders of stay issued on 19th February 2024.

d. That this Honourable Court be pleased to issue warrants of arrest as against the 3rd Party for committal to serve six (6) months imprisonment pursuant to the judgment dated 21st February 2023.

e. That this Honourable Court be pleased to grant any orders necessary to meet the ends of justice.

f. That costs of this Application be provided for.

8. The Application was opposed by way of a Replying Affidavit sworn by the Respondent and dated 14th October 2024. On the background, the Learned Counsel submitted That on the 13th October, 2016 over this Honourable Court issued an order for That Third Party. The 3rd Party to deposit the sum of Kenya Shillings Eleven Million One Hundred and Nineteen Thousand Five Hundred (Kshs. 11,119,500/-) (which was the purchase price being claimed by the Applicant) to Court within 45 days of this date. The order has never been complied with. On the 21st February, 2023, this Court pronounced itself on this matter and delivered judgment to the effect That the 3rd Party be committed too serve six (6) moths imprisonment term or in the alternative he refunded Kenya Shillings Eleven Million Nine Hundred Thousand (Kshs 11,900,000/-), which sum continues to accrue interest. From the court records That the 3rd Party filed a Notice of Appeal dated 22nd February, 2023.

9. From the court records on the 19th February 2024, on application be the 3rd Party, this Honourable Court delivered a ruling granting stay of the judgment pending the intended appeal. Unfortunately no appeal has ever been filed to date since the judgment was delivered on the 21st February 2023 which is over 19 months ago. The law required That an appeal be lodged in the Court of Appeal within 60 days of filing the Notice of Appeal. The law further required That if a party failed to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal. The 3rd Party has no intention at all to appeal and his intention of obtaining stay was simply to defeat justice. Justice delayed was Justice denied.

10. On the Notice of Appeal, the Learned Counsel submitted That from the court records That the 3rd Party filed a notice of appeal dated 22nd February 2023. From the court records on the 19th February 2024, on application be the 3rd Party, this Honourable Court delivered a ruling granting stay of the judgment pending the intended appeal. Unfortunately no appeal has ever been filed to date since the judgment was delivered on the 21st February 2023 which is over 19 months ago. In his Defence, the 3rd Party has attached two letters addressed to the Deputy Registrar seeking certified copies of proceedings, 1st one dated 22nd February 2023 and the other dated 30th September 2024.The one dated 22nd February 2023, was duly stamped and That shows That it was duly received by the court.

11. However, the letter dated 30th September 2024 was drawn after they had been served with this application dated 10th September 2024. The same was also not stamped by the court and there was therefore no evidence That the letter was even received.

12. It was the Learned Counsel's submission That the letter dated 30th September 2024 was drawn to hoodwink this court to believing That the Third Party was making efforts on following up for supply of proceedings while the true position was That no steps have been taken since 22nd February 2023. Rule 83 of the Court of Appeal rules states as follows;

> " (1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-
>
> (a) a memorandum of appeal, in quadruplicate;
>
> (b) the record of appeal, in quadruplicate;
>
> (c) the prescribed fee; and
>
> (d) security for the costs of the appeal.
>
> If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. Theparty in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served."

13. The Learned Counsel asked the Court to be guided by the decision of the Court of Appeal in Nyeri in "Civil Application Number 9 of 2016, Charles Wanjohi Wathuku – Versus - Githinji Ngure and Another" (attached herewith) where the court stated as follows:-

> " But any party is at liberty to invoke Rule 83.
>
> The Rule states as follows:- "If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the Court may on its own motion or on application by any party, make such order. The party in default shall be liable to pay the costs arising therefrom on any persons on whom the notice of appeal was served" (Emphasis added.)
>
> 11. In the case of John Mutai Mwangi & 26 others (supra), this Court had this to say on the rationale behind the rule:
>
> > 'This deeming provision appears to us to be inbuilt case-management system loaded into the Rules. It enables the Court, ideally, to clean up its records by striking out all the notices of appeals That have not been followed up, within 60 days, by records of appeal. It is a rule That telegraphs That notices of appeal should not be lodged in jest or frivolously, with no real or serious intention to actually institute appeals.
>
> The rationale of this is self-evident but made the more compelling by a recognition That mischievous or crafty litigants may be content to merely park the bus at appeal gate and not move thereafter- especially should they obtain some kind of stay or injunctive orders protective of their interests pending appeal. To That category of appellants, a delayed, snail speed or never-happen institution of the appeal means a perpetual enjoyment of interim relief. The rule was designed to give to such no succour. Under the rule, the Court deems and orders That a notice unbacked by institution of an appeal

has been withdrawn. It essentially concludes That the intended appellant has abandoned his intention to appeal notwithstanding That he has not formally withdrawn the notice of appeal under Rule 81.

The Court makes the order upon being moved by any party or, significantly, on its own motion. It is a clean-up exercise born by the need for rationality in appellate litigation and practice".

12. We are in no doubt That the respondents were intent on challenging the order for payment of over Sh. 8 million and there was a notice of appeal to show for it. This court indeed agreed with them That the appeal was not frivolous when it granted a stay of execution. But the stay was only a stop gap measure to facilitate the appeal process as allowed by the rules. The rules require That the appeal be lodged within 60 days of the filing of the notice of appeal by dint of Rule 82 of CAR. As this court stated in the same authority(supra): "That timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring That the Court processes dispense justice in a timely, just, efficient and cost-effective manner. The rule recognizes,however, That there could be delays in the typing and availing of the proceedings at the High Court necessary for the preparation of the record of appeal. The proviso to the rule accordingly provides That where an appellant has bespoken the proceedings within thirty days and served the letter upon the respondent, then the time taken to prepare the copy of proceedings, duly certified by the registrar of the High Court, shall be excluded in the computation of the 60-day period. A certificate of delay therefore suffices to exclude any delay beyond the prescribed 60 days".

13. The Respondents concede That they have not filed the intended appeal since the notice of appeal was filed and served about six years ago. They have not filed any application for extension of time and we do not know the reasons they would have raised in such application.

> "It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform as principal and does not perform it, surely such principal should bear the consequences".

14. The Learned Counsel urged That as the Court of Appeal in the decision herein deed, you do order That the Notice of Appeal filed be deemed as withdrawn..

15. On the law regarding stay, the Learned Counsel submitted That the provisions of Order 42 (6) of the Civil Procedure Rules, 2010 are pertinent herein. The law states as follows;

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

16. To buttress on this point, the Learned Counsel relied on the case of "James Wangalwa & Another – Versus – Agnes Naliaka Cheseto [2012] eKLR", Learned Justice Gikonyo noted That for orders of stay are grantable at the discretion of the court on sufficient cause being established by the applicant. He goes further to state as follows:-

> 'Sufficient cause being a technical as well as legal requirement will depend entirely on the Applicant satisfying the court That:
>
> a) Substantial loss may result to the applicant unless the order is made,
>
> b) The application has been made without unreasonable delay, and
>
> c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.'

17. The Learned Counsel submitted That since the stay was granted did not require the Intended Appellant to deposit the decretal sum in interest earning account of advocates to the parties herein as security, the Intended Appellant is just being mischievous or crafty and is content to merely park the bus at appeal gate and not move thereafter simply because he has obtained stay orders. The Respondent had no serious intention to institute an appeal and we can see That since is no certificate of delay and further the letter dated 30th September 2024 purported to have been addressed to the Deputy Registrar was not even received, and came after filing of this application.

18. The Learned Counsel further asked That the Court be guided by the decision of the judges of the Court of Appeal of Nakuru in the case of "John Mutai Mwangi and 26 Others – Versus - Mwenja Ngure & 4 Others" (attached herewith) where the judges of appeal stated as follows:-

> " This deeming provision appears to us to be inbuilt case-management system loaded into the Rules. It enables the Court, ideally, to clean up its records by striking out all the notices of appeals That have not been followed up, within 60 days, by records of appeal. It is a rule That telegraphs That notices of appeal should not be lodged in jest or frivolously, with no real or serious intention to actually institute appeals.
>
> The rationale of this is self-evident but made the more compelling by a recognition That mischievous or crafty litigants may be content to merely park the bus at appeal gate and not move thereafter-especially should they obtain some kind of stay or injunctive orders protective of their interests pending appeal. To That category of appellants, a delayed, snail speed or never-happen institution of the appeal means a perpetual enjoyment of interim relief. The rule was designed to give to such no succour. Under the rule, the Court deems and orders That a notice unbacked by institution of an appeal has been withdrawn. It essentially concludes That the intended appellant has abandoned his intention to appeal notwithstanding That he has not formally withdrawn the notice of appeal under Rule 81. The Court makes the order upon being moved by any party or, significantly, on its own

motion. It is a clean-up exercise born by the need for rationality in appellate litigation and practice....."

19. The Learned Counsel averred That on the 13th October 2016, over 8 years ago, this Honourable court issued order for That Third Party to deposit the sum of Kenya Shillings Eleven Million One Nineteen Thousand Five Hundred (Kshs. 11,119,500/-) (which was the purchase price being claimed by the Applicant) to Court within 45 days. The order has never been complied with. They therefore urged this Court to set aside the orders of stay issued on 19th February, 2024 as there was no appeal against this Court's judgment of 21st February 2023.

20. In conclusion, the Learned Counsel submitted That justice delayed is justice denied. They therefore urged this court to allow our application dated 10th September 2024 and enable the Applicant enjoy the fruits of his judgment. On 13th October, 2016, over 8 years ago, this Honourable court issued order for That Third Party to deposit the sum of Kenya Shillings Eleven Million One Nineteen Thousand Five Hundred (Kshs. 11,119,500/-) (which was the purchase price being claimed by the Applicant) to Court within 45 days. The order has never been complied with.

21. In the Judgment delivered on the 21st February 2023, this court stated as follows at paragraph 97:-

> " Undoubtedly, the 1st Defendant was duped by fraudsters. Juxtapose, in order to balance the scale of Justice herein, who evidently used and paid up his clean and hard cash in form of purchase price directly to the 3rd Party is entitled to it in form of a refund together with interests as the monies were never remitted to the Plaintiff as the Vendor.
>
> Perhaps, acting out of and/or abundance of benevolence, and based on the negotiations the Plaintiff and the 1st Defendant herein had initiated pursuant to the provision of Article 159(2) of *the Constitution* of Kenya, the Honorable Court strongly discern That the Plaintiff should consider selling the 1st Defendant herein.
>
> Be That as it may, arising from the acts of omission and commission by the 3rd Party,this Court wishes now to address our noble legal profession here. The entry point to the issue is through the words of Paul in his letter to the Galatians 3;1-2 holds thus;-"O foolish Galatians! Who has bewitched you, before whose eyes Jesus Crist was publicly portrayed as crucified let ask you only this. Did you receive the spirit by works of law of by hearing with faith? Are you foolish? Having begun with the Spirit are you now ending with the flesh? Did you experience so many things in vain? If it really is in vain?"
>
> The conduct by the 3rd Party an Advocate of the High Court of Kenya has added to the long list of persons who have continued to put the noble and good name, reputation and fame of the legal profession to high ridicule, shame and respect by the public.....
>
> 101. Finally this court finds it intriguing That after the application for him to make deposit of the Purchase Price in court and ruling delivered on the 13th October 2016, it took him for the Court on the 5th October, 2021 close to over five (5) years upon issuing took him for the Court on the 5th October 2021 close notice to show cause That the 3rd Party comes guns blazing.....
>
> Instead of obeying it or moving Court to vary or set aside, he wilfully and deliberately refused to obey and comply with it.

DEFINITELY, THEREFORE HE IS IN CONTEMPT. Court orders are to be guarded jealously and obeyed. It is now well established That disobedience of Court orders have a severe consequence bordering on criminality....."

22. The Learned Counsel submitted That this Honourable Court in the Judgment held That the 3rd Party is in contempt of the court orders of 13th October 2016. The court could not and should not exercise its discretion in favour of such a party. The Learned Counsel urged this Court to allow their application dated 10th September, 2024 and issue warrants of arrest against the 3rd P arty.

**B. The Written Submissions by the 3rd Party**

23. The 3rd Party through the Law firm of Messrs. Gikandi & Company Advocates filed their written submissions dated 28th October, 2024. Mr. Kabebe Advocate commenced their submissions by stating That they stated That the Third Party being aggrieved by the Judgement of this court dated 21st February, 2023 delivered by Hon. Justice L. L. Naikuni filed a Notice of Appeal dated 22nd February, 2023 against the said judgement. Concurrently, the Third Party made a formal request to the Deputy Registrar vide a letter dated 22nd February, 2023 seeking certified copies of both the judgment and proceedings to enable him file an appeal in compliance with the sixty (60) day statutory deadline for lodging an appeal provided under Rule 84 of the Court of Appeal Rules, 2022.

24. However, despite the Third Party's advocates diligently following up with the court registry for the supply of the said copies of proceedings and judgement, the said documents were never availed to the Third Party. Hence, the Third Party was unable to file the said appeal within the statutory sixty (60) day period.

25. This prompted the Third Party's Advocates, Messrs. Gikandi & Company Advocates, to write another letter to the Deputy Registrar of the Environment and Land Court, Mombasa dated 30th September to remind the said court to supply them with the said documents. The same have still not yet been supplied to date even despite the Third Party's advocates severally physically visiting the court registry to follow up on the release of the said copy of the proceedings. Without certified copies of the proceedings and the judgement, it is impossible to file a record of appeal. In fact, Rule 84 of the Court of Appeal Rules, 2022, one of the primary documents That must be incorporated in any competent record of appeal is a certified copy of the proceedings and the judgment without which such an appeal would be rendered incurably defective, hence liable to be struck out as such. With due respect, it is only the court That has the mandate to issue the certified copy of the proceedings and the judgement and the ThirdParty herein is obliged to wait until the court notifies him That the said certified copy or proceedings and the judgement were ready.

26. The Learned Counsel contended That it was correct That Rule 84 of the Court of Appeal Rules, 2022 stipulated That a record of appeal ought to be filed within sixty (60) days from the date of lodging a notice of appeal in the appropriate registry. However, sub-rule 1 of the said Rule 84 of the Court of Appeal Rules, 2022 provides for exclusion of the time taken by the registry for the preparation and supply of certified copies of the proceedings and the judgement from the computation of the said sixty (60) days for filing of the record of appeal.

27. Therefore, as the delay for the filing of the appeal was not of the Third Party's doing but solely lay on the Registry's end, the Learned Counsel submitted That it would not be fair and just for the Third Party to be penalized of a mistake That was beyond his control. The Learned Counsel relied on the

Supreme Court decision in "Nicholas Kiptoo Arap Korir Salat – Versus - Independent Electoral and Boundaries Commission & 7 others [2014]eKLR" where the court stated thus:-

> " A party may however, encounter some delay and the time within which he was to perform an act lapses. At Common Law, equity developed in the courts of Chancery Division to check the excess of common law. If one showed That he had a bona fide cause of action and time had lapsed, but was constrained to pursue within time That cause, because of some compelling reasons, the courts of the Chancery Division could intervene and indulge such a person if established That he was not at fault. It is on this equitable under-pinning That courts in Common Law jurisdictions in exercise of their discretion now grant orders extending time. Presently, extension of time has now been given statutory backing with various legislations providing courts with the power to extend time...The applicant urged this Court to exercise its discretion under Rule 53 of the Supreme Court Rules and extend time within which to file the appeal. He submitted That the delay in filing the appeal was occasioned by facts beyond his control and pointed blame to his advocate for going to the wrong forum first, and delay in obtaining the proceedings from the Court of Appeal and the settling of the terms of the decree by the Court of Appeal...The time limited for filing of a Petition of appeal by the applicant is hereby extended. The applicant is granted leave to file an appeal within 14 days from today's date."

28. Additionally, the Learned Counsel relied on the decision in "S W O – Versus – A B M [2015] eKLR", where the High Court stated thus;

> " 8. I note That the applicant annexed a Draft Memorandum of Appeal to the application, and therefore it is clear on what grounds he seeks to challenge the ruling. The matter is not frivolous. This is a case where the minor in question has a putative father whereas the court found That the applicant has parental responsibility over it. Secondly, it is clear That the applicant applied for certified copy of ruling and proceedings and That by the time he was given by the registry the time for appeal had passed. The correspondence bears him out. There was no need for a certificate of delay in the matter. Thirdly, the applicant seeks to exercise his right of appeal. This is statutory and constitutional right. Fourthly, the respondent has not indicated how she will suffer, or be prejudiced, by the applicant being allowed extension of time to appeal. If there is any inconvenience or prejudice, costs should be able to deal with the situation.
>
> 9. I am satisfied That the delay in this case was not inordinate and the applicant hassatisfactorily explained what led to the delay. He was not the guilty party as far as the delay was concerned. I find That the justice of the matter requires That the application be allowed. I extend time by 14 days to get the applicant to file appeal against the ruling of the lower court..."

29. The Learned Counsel averred That the delay occasioned in filing the said appeal, in so far as it could not be attributed to the Third Party, was not so unreasonable and/or inordinate as to prejudice the Applicant and such delay can always be compensated by an award of damages and/or costs. However, if the Third Party's appeal was dismissed, he stood to be committed to civil jail for six (6) months at Shimo La Tewa Prison for lacking the wherewithal to effect payment of the decretal sum of Kenya Shillings Eleven Million Nine Hundred Thousand (Kshs. 11,900,000/-) together with 14% interest per annum. Such an outcome would not only deprive him of his liberty but would also inflict irreparable

damage to his professional standing as an advocate, severely impacting his career and reputation in the legal field.

30. The Learned Counsel relied on the decision in "Njoroge & another – Versus - Monyo (Civil Appeal 96 of 2021[2024] KEHC 3164(KLR)(26th March, 2024)(Ruling)", where the High Court held as follows;

> " The Applicants submit That, they have not obtained the requisite documents in order to file their Record of Appeal and have attached evidence of follow up. On the other hand, the gist of the matter is That the Applicants stand to suffer prejudice in the event That the appeal is not heard on merit since they would have lost their Right to Appeal...In view of the above, it is the Applicants submissions That the hardship and prejudice likely to be occasioned to them in this matter is greater than the hardship to be occasioned to the Respondent since the Applicants will lose their opportunity to prosecute their Appeal and have the same determined on its merits. Further, Article 159 of *the Constitution* of Kenya 2010 requires the Court to be more concerned with substance justice where possible instead of giving undue regard to technicalities and if this Appeal is not heard on merit, the Applicants would have been denied the benefit of substantive justice.
>
> 14. In-view of all the foregoing, it is the Applicants submissions That the Appeal herein should be reinstated and time granted to file their Record of Appeal...The delay in filing the Record of Appeal was inadvertent and beyond the Appellants' control. The justification of the delay has adequately been explained in response...The Appeal Nakuru HCCA No. 96 of 2021 is hereby reinstated. ii. The Appellants shall set down the Appeal for Directions/ Hearing within sixty (60) days from the date hereof."

31. The Learned Counsel further relied on the case of "Allan Otieno Osula – Versus - Gurdev Engineering & Construction Ltd [2015] eKLR", where the Court held as follows;-

> " It is therefore on the above grounds That I decline to strike out the appeal as prayed. I employ the principle That the right of appeal is a constitutional right and in as much as there has been delay which has not been satisfactorily explained by the appellant, this Court has to weigh the cost and prejudice That is likely to be occasioned to the appellant as well as the respondent, if the appeal is struck out at this stage without appellant an opportunity to be heard on the merits of the appeal....In the circumstances shall invoke the overriding objective principle in order to obviate the hardship expense, delay and focus on substantive justice. I find albeit there was delay That it is in the interest of justice That the appeal should not be struck out as the Respondent compensated by an award of costs."

32. The Learned Counsel concluded by stating That the intended appeal has merits and in the event That the appeal is dismissed, the Third Party stood to lose his constitutional right to appeal and the right to have his case heard and determined on its merits. The Third Party was ready to file his record of appeal immediately upon being supplied with the said certified copies of the proceedings and judgement. Thus, they prayed That the 1st Defendant's Notice of Motion dated 10th September, 2024 be dismissed.

**V. Analysis and Determination**

33. I have carefully read and considered the pleadings and the submissions herein and the relevant provisions made by the by the Learned Counsels. In order to arrive at an informed decision, the Honorable Court has framed the following three (3) issues for its determination: -

a. Whether this Honourable Court could be pleased to issue warrants of arrest as against the 3rd Party for committal to serve six (6) months imprisonment pursuant to the judgment dated 21st February 2023?

b. Whether this Honourable Court can set aside the orders of stay issued on 19th February, 2024 and the withdrawal of the Notice of Appeal?

c. Who bears the Costs of the Notice of Motion application dated 10th September, 2024.

**ISSUE No. a). Whether this Honourable Court could be pleased to issue warrants of arrest as against the 3rd Party for committal to serve six (6) months imprisonment pursuant to the Judgment dated 21st February 2023.**

34. Under this Sub – heading, the Honourable Court will decipher on the substratum of the matter is whether the 3rd Party should be committed to civil jail for failing to satisfy the Judgment dated 21st February, 2023. The provision of Section 38 of the *Civil Procedure Act* provides as follows:-

Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree—

(a) by delivery of any property specifically decreed;

(b) by attachment and sale, or by sale without attachment, of any property;

(c) by attachment of debts;

(d) by arrest and detention in prison of any person;

(e) by appointing a receiver; or

(f) in such other manner as the nature of the relief granted may require:

Provided That where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the Judgment-debtor an opportunity of showing cause why he should not be committed to prison, the court, for reasons to be recorded in writing, is satisfied—

(a) That the Judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree-

(i) is likely to abscond or leave the local limits of the jurisdiction of the court; or

(ii) has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; or

(b) That the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree, or some substantial part thereof, and refuses or neglects, or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which, by or under any law, or custom having the force of law, for the time being in force, is exempt from attachment in execution of the decree; or

(c) That the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

35. What comes out clearly from the foregoing is That a person who fails to satisfy a monetary decree may, if the conditions stipulated in the provision of Section 38 of the *Civil Procedure Act*, Cap. 21 are satisfied be committed to jail. Committal to jail in such circumstances in my view is exceptional in the sense That a person's liberty is curtailed not at the instance of the State but at the instance of a private individual though the person detained, in our circumstances, is placed in the custody of the state. Under our Constitution the right to liberty is enshrined in Article 39(1) which codifies the right to freedom movement. That right however is not one of the non-derogable rights which under Article 25 of *the Constitution*. Accordingly, pursuant to Article 26 of *the Constitution* the right to freedom of movement can be limited pursuant to Article 24 of *the Constitution*.

36. The Constitutionality of the remedy of committal to civil jail has been jurisprudentially analyzed in this country. In "Beatrice Wanjiku & Another – Versus - The Attorney General Petition 190 of 2011" it was held That:-

> " Before the promulgation of *the Constitution*, Kenya took a dualist approach to the application of international law. A treaty or international convention which Kenya had ratified would only apply nationally if Parliament domesticated the particular treaty or convention by passing the relevant legislation. *The Constitution* and in particular Article 2(5) and 2(6) gave new colour to the relationship between international law and international instruments and national law. Article 2(5) provides, ?The general rules of international law shall form part of the law of Kenya and Article 2(6) provides That ?Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

37. The Learned Judge went ahead and stated in "Beatrice Wanjiku Case (supra)" That:-

> " The *Civil Procedure Act* and the Rules provide a legal regime for arrest and committal as a means of enforcement of a judgment debt. Article 11 of the Convention states That, "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation."[Emphasis mine]I read the merely as used above to mean That one cannot be imprisoned for the sole reason of inability to fulfil a contractual obligation. It means That additional reasons other than inability to pay should exist for one to be imprisoned. Article 11 recognises That in fact there may be instances where imprisonment for inability to fulfil a contractual obligation may be permitted. As there is no inconsistency between Article 11of the Convention and the general tenor of the committal regime under *Civil Procedure Act* and the Rule, the provisions of Article 11 of the Convention are at best an interpretative aid.

38. In a persuasive jurisprudence from South Africa – in the case of "Coetzee – Versus - Government of South Africa {1995} 4 SA 631" the Constitutional Court observed on the provisions of Section 30 which has similar language with Section 38 (1) (f) of our *Civil Procedure Act* That:-

> " The Law seems to contemplate That imprisonment should be ordered only where the debtor has the means to pay the debt, but is unwilling to do so."

39. My reading of the aforesaid provisions of Section 38 does make adequate distinctions of the category of debtors to be committed to Civil Jail. For the Court to rule otherwise would be tantamount to an act of deprivation of the right to liberty and freedom clearly guaranteed by *the Constitution*. One key fundamental factors in execution proceedings, the executing Court has to ascertain the assets and income of the Judgment debtor to determine the quantum, whether the Judgment debtor has the means to satisfy the money-decree. The growth in, incarceration of individual debtors for failure to

satisfy a money-decree without first satisfying the test/enquiry in the aforesaid Section is a threat to the fundamental rights and freedom under the Bill of Rights.

40. In the case of_ "Jayne Wangui Gachoka – Versus - Kenya Commercial Bank Petition Number 51 of 2010" it was held:-

> " The deprivation of liberty sanctioned by sections 38 and 40 of the *Civil Procedure Act* is permissible and is not in violation of either *the Constitution* or the ICCPR. The caveat, however, which has been emphasized in all the cases set out above, is That before a person can be committed to civil jail for non-payment of a debt, there must be strict adherence to the procedures laid down in the *Civil Procedure Act* and Rules, which provide the due process safeguards essential to making the limitation of the right to liberty permitted in this case acceptable in a free and democratic society."

41. Similarly, in the case of:- "Kenya Bus Services Limited & Others – Versus - Attorney General and Others [2005] 1 EA 111; [2005] 1 KLR 743" it was held:-

> " Fundamental rights cannot be enjoyed in isolation and by selected few while they trample on others or tread upon their rights since the enjoyment of fundamental rights and freedoms contemplates mutuality and an atmosphere of respect for law and order including the rights of others and the upholding of the public interest...The function of the Court when faced with the task of establishing or determining the rights on the one hand and determining the limitation and restrictions on the other hand is to do a balancing act and in this balancing act are principle values, objectives to be attained, a sense of proportionality and public interest and public policy considerations...There cannot be a cause of action based on a lawful exercise of the right of execution by interested parties since it is a serious contradiction to suggest That creditors who are enforcing their rights under the private law should be stopped from so doing because there are allegations of violations of *the Constitution* by the state or Government."

42. What comes out from the foregoing is That committal to civil jail is not objectionable subject to the due process being adhered to. However, it is my view That committal to civil jail is not a means of satisfaction of a decree. Whereas it is a means by which compliance is sought to be enforced, it does not in itself amount to a satisfaction of a decree. In other words, it is a means to an end rather than an end itself. That there is a distinction between the satisfaction of a decree and the committal to civil jail for failure to satisfy a decree is clearly discernible from Section 42 of the *Civil Procedure Act*, Cap. 21 which provides as hereunder:-

(1) Every person detained in prison in execution of a decree shall be so detained—

(a) where the decree is for the payment of a sum of money exceeding one hundred shillings, for a period not exceeding six months; and

(b) in any other case, for a period not exceeding six weeks:

Provided That he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be—

(i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the prison; or

(ii) on the decree against him being otherwise fully satisfied, if the court so orders; or

(iii) on the request of the person on whose application he has been so detained, if the court so orders; or

(iv) on the omission of the person, on whose application he has been so detained, to pay subsistence allowance.

(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be rearrested under the decree in execution of which he was detained in prison. [Emphasis mine].

43. It therefore follows That the course of committal to civil jail will only be resorted to in appropriate cases and the guidelines for determining whether a particular case is appropriate for such course must necessarily depend on whether the conditions stipulated under the provision of Section 38 of the Act have been fulfilled. There is no prescribed punishment for contempt of Court, save That judicial discretion is donated to the High Court by dint of Section 5 of the *Judicature Act*.The right to liberty is enshrined in the provision of Articles 29 (1) (a) and 39(1) of *the Constitution*. These rights together with the right to freedom of expression under Article 33 of *the Constitution*, the latter which the Contemnor has espoused in his material, are not absolute and must be exercised in a manner That does not prejudice the rights and fundamental freedoms of other citizens. See Article 24(1) (d) of *the Constitution*. Moreover, the question revolving around the nature and purpose of punishment by committal to civil jail of contemnors has been the subject of litigation in our courts.

44. What emerges clearly from the foregoing is That a person who fails to satisfy a monetary decree may, if the conditions stipulated in Section 38 of the *Civil Procedure Act*, are satisfied be committed to jail. Committal to civil jail in such circumstances is exceptional in the sense That a person's liberty is curtailed not at the instance of the State but at the instance of a private individual though the person detained, in our circumstances, is placed in the custody of the state.

45. On 13th October, 2016 over this Honourable Court issued an order for That Third Party. The 3rd Party to deposit the sum of Kenya Shillings Eleven Million One Nineteen Thousand Five Hundred (Kshs. 11,119,500/- ) (which was the purchase price being claimed by the Applicant) to Court within 45 days of this date. The order has never been complied with. On the 21st February, 2023, this Court pronounced itself on this matter and delivered Judgment to the effect That the 3rd Party be committed to serve six (6) moths imprisonment term or in the alternative he refunded Kenya Shillings Eleven Million Nine Hundred Thousand (Kshs 11,900,000/-), which sum continues to accrue interest. From the court records That the 3rd Party filed a Notice of Appeal dated 22nd February, 2023.

46. From the court records on the 19th February 2024, on application be the 3rd Party, this Honourable Court delivered a ruling granting stay of the judgment pending the intended appeal. Unfortunately no appeal has ever been filed to date since the judgment was delivered on the 21st February 2023 which is over 19 months ago. The law required That an appeal be lodged in the Court of Appeal within 60 days of filing the Notice of Appeal. The law further required That if a party failed to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal. The 3rd Party has no intention at all to appeal and his intention of obtaining stay was simply to defeat justice. Justice delayed was Justice denied.

47. On the Notice of Appeal, the Learned Counsel for the 1st Defendant/Applicant informed Court That from the court records That the 3rd Party filed a notice of appeal dated 22nd February 2023. From the court records on the 19th February 2024, on application be the 3rd Party, this Honourable Court delivered a ruling granting stay of the judgment pending the intended appeal. Unfortunately no appeal has ever been filed to date since the judgment was delivered on the 21st February 2023 which is over 19

months ago. In his Defence, the 3rd Party has attached two letters addressed to the Deputy Registrar seeking certified copies of proceedings, 1st one dated 22nd February 2023 and the other dated 30th September 2024. The one dated 22nd February 2023, was duly stamped and That shows That it was duly received by the court. However, the letter dated 30th September 2024 was drawn after they had been served with this application dated 10th September 2024. The same was also not stamped by the court and there was therefore no evidence That the letter was even received.

48. The 1st Defendant submited That this Honourable Court in the Judgment held That the 3rd Party is in contempt of the court orders of 13th October 2016 and urged this Court to allow their application dated 10th September, 2024 and issue warrants of arrest against the 3rd Party.

49. The 3rd Party on the other side argued That the Third Party being aggrieved by the judgement of this court dated 21st February, 2023 delivered by Hon. Justice L. L. Naikuni filed a Notice of Appeal dated 22nd February, 2023 against the said judgement. Concurrently, the Third Party made a formal request to the Deputy Registrar vide a letter dated 22nd February, 2023 seeking certified copies of both the judgment and proceedings to enable him file an appeal in compliance with the sixty (60) day statutory deadline for lodging an appeal provided under Rule 84 of the Court of Appeal Rules, 2022.

50. However, despite the Third Party's advocates diligently following up with the court registry for the supply of the said copies of proceedings and judgement, the said documents were never availed to the Third Party. Hence, the Third Party was unable to file the said appeal within the statutory sixty (60) day period.

51. This prompted the Third Party's Advocates, Gikandi & Company Advocates, to write another letter to the Deputy Registrar of the Environment and Land Court, Mombasa dated 30th September to remind the said court to supply them with the said documents. The same have still not yet been supplied to date even despite the Third Party's advocates severally physically visiting the court registry to follow up on the release of the said copy of the proceedings. Without certified copies of the proceedings and the judgement, it is impossible to file a record of appeal. In fact, Rule 84 of the Court of Appeal Rules, 2022, one of the primary documents That must be incorporated in any competent record of appeal is a certified copy of the proceedings and the judgment without which such an appeal would be rendered incurably defective, hence liable to be struck out as such. With due respect, it is only the court That has the mandate to issue the certified copy of the proceedings and the judgement and the Third Party herein is obliged to wait until the court notifies him That the said certified copy or proceedings and the judgement were ready.

52. The law is crystal clear That although the release of the Judgment Debtor from prison does not absolve him from satisfying the decree, he shall not be liable to be re - arrested in execution under the same decree of which he was detained in prison. The Applicant is at liberty to pursue other modes of execution as enlisted under the provision of Section 38 of the *Civil Procedure Act*, Cap. 21 save for the mode herein preferred. For these reasons therefore, this Court finds merit in granting prayer 4.

**ISSUE No. b). Whether this Honourable Court can set aside the orders of stay issued on 19th February, 2024 and the withdrawal of the Notice of Appeal.**

53. Under this Sub title the Court shall examine whether the this Honourable Court can set aside the orders of stay issued on 19th February, 2024 and the withdrawal of the Notice of Appeal. It is not disputable That, under the provision of Rule 84 of the Court of Appeal Rules, an appeal is instituted at the Court of Appeal by lodging a Memorandum of Appeal and Record of Appeal in the appropriate registry within sixty (60) days of the date when the Notice of Appeal was lodged. The proviso to sub-rule 1 of the said rule excludes such time as may be certified by the Registrar of the trial court as having

been required for the preparation and delivery to the appellant of a copy of the proceedings where an application for such proceedings is made within thirty (30) days of the date of the decision intended to be appealed from. In addition, rule 84(2) provides That an appellant shall not be entitled to rely on the proviso unless the application for a copy of the proceedings is in writing and a copy thereof served on the respondent.

54. This Court has power and discretion, either on application or on its own motion, as was held in the case of "Mae Properties Ltd – Versus - Joseph Kibe and Another [2017] eKLR", to deem the Notice of Appeal as having been withdrawn under Rule 85 of the Court of Appeal Rules, which is in the following terms:-

    a. If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, That party shall be deemed to have withdrawn the notice of appeal and the Court may, on its own motion or on application by any other party, make such order.

    b. The party in default under sub-rule (1) shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.

55. The provisions of Rule 85 of the Court of Appeal Rules are predicated on the existence of circumstances from which the Court can deem a Notice of Appeal as having been withdrawn. Firstly, the steps That are required to be taken in instituting an appeal are those required by this Court's Rules. Secondly, there is no evidence That such steps namely, those of seeking typed proceedings, issuance of a certificate of delay, and filing of the record of appeal have been demonstrated by the Respondent and the reasons for the delay have not been proffered. Since the relevant facts in this application demonstrate That the 3rd Party had not fulfilled the steps prescribed by the Rule 84 of the Court of Appeal Act; the same may be deemed as withdrawn.

56. I need to emphasise in this respect, as has been done many times before by this Court, That the timelines for the taking of certain steps are indispensable to the proper adjudication of the appeals That come before us, and That the Rules are expressed in clear and unambiguous terms and command obedience. This Court in the case of:- "Salama Beach Hotel Limited & 4 Others – Versus - Kenyariri & Associates Advocates & 4 Others [2016] eKLR" expressed itself as follows:-

> "We think That the true meaning and import of the rule is more often than not scarcely appreciated. The rule as framed prescribes the legal consequence for non-institution of an appeal within the 60 days appointed by the Rules of Court. Moreover, the said consequence is couched in mandatory, peremptory terms: the offending party shall be deemed to have withdrawn the appeal. It seems to us That the deeming sets in the moment the appointed time lapses. Essentially this is a practical rule That is intended to rid our registry of merely speculative notices of appeal filed either in knee-jerk reaction to the decision of the court below, or filed in holding mode while the party considers whether or not to lodge a substantive appeal. Indeed, it is not uncommon and we take judicial notice of it, for such notices to be lodged ex abundanti cautella by counsel upon the pronouncement of decisions but to await instructions on whether or not to proceed full throttle with the appeal proper - with the attendant risks, prospects and consequences."

57. Similarly, in the case of:- "Quicklubes E. A. Limited – Versus - Kenya Railways Corporation [2014] eKLR", this Court expressed itself, in reference to Rule 83 (currently rule 85) of the Court of Appeal Rules as follows:-

> " Rule 83 gives this court unfettered discretion to deem an appeal as withdrawn if a party files a notice of appeal and then goes to slumber, by failing to initiate the other necessary processes to ensure That the appeal is filed and served. That usually happens in some cases where a party gets favourable interim orders as the hearing and determination of an intended appeal is awaited, and particularly when such orders are open ended. An appellant may also lack interest in the appeal, or the parties may even settle the matter out of court but fail to inform the court with a view to having the matter struck off the register of pending appeals. The Rule is meant to stem abuse of the court process and also promote efficiency in terms of case management. That is why the Court of Appeal Rules allow the court to invoke Rule 83 suo moto if the respondent in the intended appeal does not move the court."

58. More recently in the case of:- "Mombasa Water Products Limited – Versus - NIC Bank Limited & 2 others, Civil Application No. E051 of 2021 [2022] KECA 523 (KLR)", the Court stated That it possesses discretion to strike out a Notice of Appeal by using the deeming provisions of Rule 83 (now Rule 85(1) of 2022 Rules). In this circumstance, I see the need to withdraw the Notice of Appeal for not following procedure.

59. On the issue of setting aside the orders for stay of execution, 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. In determining whether this Honourable Court has inherent jurisdiction to set aside its own orders, the Court of Appeal in the case of "Provincial Insurance Company E.A. Ltd – Versus - Mordekai Mwanza Nandwa C.A. 179/95"(attached hereto and marked 'A') quoted with approval the case of "Craig – Versus - Kanseen(1943)" held:-

> " Those cases appear to me to establish That an order which can properly be described as a nullity is something which the person affected by it is entitled ex debito justitiae to have set aside. So far as the procedure for having it set aside is concerned, it seems to me That the court in its inherent jurisdiction can set aside its own order, and That an appeal from the order is not necessary. I say nothing on the question whether an appeal from the order, assuming That the appeal is made in proper time, would not be competent."

60. Additionally, in the in "Kenya Bus Service Limited and Others -Versus - Attorney General and The Minister for Transport and Others NRB Hc Misc. 413 of 2005" (marked as 'C') where the Court held That:-

> " Where there is no specific provision to set aside, the courts power or jurisdiction would spring from inherent powers of the court. Whereas ordinary jurisdiction stems from Acts of Parliament or statutes, the inherent powers stem from the character and the nature of the court itself-it is regarded as sufficiently empowered to do justice in all situations."

61. Principally, this Honourable Court has unfettered powers as founded under the provision of Sections 1, 1A, 3 and 3A of the *Civil Procedure Act*, 2010; Sections 3 and 13 of the *Environment and Land Court Act*, No. 19 of 2011. Further, the provision of Order 51 Rule 1 of the Civil Procedure Rules, 2010 is about the form of the application while the provision of Sections 1, 1A, 3 and 3A of the *Civil Procedure Act*, Cap. 21 are all about the inherent powers of the Court to make such order as to meet the

ends of justice or prevent the abuse of its process. The phrase "all other enabling provisions of the law" is meaningless in so far as there is no enabling provision of law which is cited to clarify what it refers to. At this juncture I am inclined to granting the prayer to set aside the stay orders. Litigation must come to an end. The Decree – Holder should not be prevented from enjoying the fruits of the Judgment.

**ISSUE No. c). Who bears the Costs of the Notice of Motion application dated 10th September, 2024.**

62. It is now well established That the issue of Costs is at the discretion of the Court. Costs meant the award That is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds That Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR" and "Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR", the court reaffirmed That the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. 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.

63. In the present case, the 1st Defendant shall have the costs of the Notice of Motion application dated 10th September, 2024.

**VI. Conclusion and Disposition.**

64. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, the Court arrives at the following decision and make below orders:-

    a. That the Notice of Motion application dated 10th September, 2024 be and is found to have merit and the same is hereby allowed in its entirety.

    b. That the Notice of Appeal dated 22nd February, 2023 be and is hereby deemed as withdrawn.

    c. That this Honourable Court be and is hereby pleased to set aside the orders of stay issued on 19th February 2024.

    d. That this Honourable Court be and is hereby pleased to issue warrants of arrest as against the 3rd Party for committal to serve six (6) months imprisonment pursuant to the judgment dated 21st February 2023.

    e. That the 1st Defendant shall have the costs.

    It is so ordered accordingly.

**RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS.....7TH .....DAY OF .....MARCH.....2025.**

**.....**

**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. Nyachiro Advocate for the Plaintiff.

c. Mr. Paul W. Magolo Advocate for the 1st Defendant; and

d. Mr. Kabebe Advocates for 3rd Party.