Bader & 21 others v Mohammed & another (Environment and Land Petition E002 of 2021) [2025] KEELC 5820 (KLR) (2 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5820 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ENVIRONMENT AND LAND PETITION E002 OF 2021

LL NAIKUNI, J

JULY 2, 2025

BETWEEN

FEISAL ABDALLA BADER & 21 OTHERS & 21 OTHERS & 21 OTHERS & 21 OTHERS ..... PLAINTIFF

AND

MBARUK KHAMIS MOHAMMED & ANOTHER & ANOTHER & ANOTHER & ANOTHER ..... DEFENDANT

RULING

I. Introduction

1. Before the Honourable Court for its determination is the Notice of Motion application dated 10th December 2024. It was filed by Feisal Abdalla Bader & 21 Others, the Plaintiffs/Applicants. It was brought under the provisions of Order 12 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A and 3A of the *Civil Procedure Act*, Cap. 21 and all other enabling provisions of the law.

2. While opposing this application, the Defendants/Respondents filed replies through a replying Affidavit dated 13th January, 2025. The Honourable Court shall be dealing with it in depth at a later stage of this Ruling hereinbelow.

II. The Plaintiffs/Applicants case

3. The Plaintiffs/Applicants sought for the following orders: -

    a. Spent.

    b. That this honourable court be pleased to issue an order staying execution of the decree issued herein pending the hearing and determination of this application.

c. That this honourable court be pleased to set aside the Judgement entered herein against the Applicant, the consequential decree, the ensuing warrants of attachment dated 2nd December 2024 and the proceedings thereto.

d. Spent.

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

4. The application is premised upon the grounds, testimonial facts and the averments made out under the .....Paragraphed supporting affidavit sworn by Feisal Abdalla Bader, the 1st Plaintiff/Applicant herein. The deponent averred as follows that:-

a. The 1st Plaintiff/Applicant was.....

b. The Respondent made an application for issuance of a decree on 2nd December 2024 and was also issued with a decree for money on the same day.

c. The deponent requested for attendance of the process server in court for purposes of being cross examined on the matter of service and to shed light on the issue of service.

d. It was stated that despite Judgement being entered against the Plaintiffs/Applicants they were never served with execution proceedings. The 1st Plaintiff/Applicant had been surprised with the warrants of attachment

e. The 1st Plaintiff/Applicant was surprised by the proclamation by Moran Auctioneers. Further, they were surprised upon the receipt from the said Auctioneers claiming their fees.

f. He stated that being a Member of Parliament, he was on official duty in Saudi Arabia and it would be unfair for the exercise to continue in his absence

g. The deponent maintained that the Plaintiffs/Applicants had a good defense that raised triable issues to the Respondent's claim .

h. No prejudice was to be suffered by the Respondents in the event that the stay of execution and setting aside judgement were to be granted.

i. The court was urged to allow the application to ensure the ends of justice were met.

III. The responses by the Defendants/Respondents

5. As indicated above, the Defendants/Respondents opposed the application through filing of a 16 Paragraphed Replying Affidavit sworn by Mbaruk Hassan Mohammed, the 1st Defendant/ Respondent herein. He averred as follow that:-

a. The 1st Defendant/Respondent was an adult male of sound mind and understanding and one of the Defendants /Respondents herein with full authority to swear this affidavit on behalf of the others.

b. The application by the Plaintiff/Applicant sought to have this court set aside the Judgement entered on the 21st September, 2022, the consequential decree and ensuing warrants of attachments dated 2nd December 2024 and proceedings thereto. Mainly, the Applicant claimed being neither aware about the execution proceedings nor having been served.

c. This application was a sham, scandalous, frivolous, vexatious and classic waste of precious judicial time, as well as resources and should be struck out immediately.

d. The Plaintiff/Applicant was aware that this suit was disposed off by way of a preliminary objection for reason that it was "sub – judice". Subsequently, it was struck out with costs. Costs which were the subject of the execution in this suit and the same could be confirmed on court records and the proceedings.

e. The Plaintiff could not allege to have a meritorious defence when in the first place the case was instituted by the Plaintiff/Applicant vide a Plaint. The issue of a defence never arose.

f. There was a Counsel on record for him as well as the rest of the Plaintiffs. A demand for payment of costs was sent to his advocate on record on the 4th April 2024 and they confirmed receipt of the same on the 17th April 2024.

g. The participation of the Plaintiff/Applicant through their advocate who was in conduct of this matter was properly in this courts record. Further, the Defendants/Respondents herein filed a Party to Party Bill of Costs which the Applicants herein responded and filed submissions.

h. This application had been filed by a stranger who could not be accorded any audience by this court. It was well settled that another advocate could not come on record on post Judgement application without consent from the previous counsel or an application for leave. The court record herein clearly showed Chimera and Company Advocates were on record for the Plaintiff/Applicant.

i. The execution in this matter was a legitimate and lawful process well guided by this court because the Plaintiff/Applicant failed to pay the decretal sum despite being served with a Certificate of Costs and a demand for payment sent to through his advocates on record.

j. This application was just but another tactic employed by the Applicant to deny the Respondents the fruits of their judgement which this court should shun and not entertain even one bit.

k. The Applicant's presence in Kenya or Saudi Arabia should not be held as a reason to defeat a lawful order of this court, which the court had satisfied and pronounced itself on.

IV. The further affidavit by the Plaintiffs/Applicants

6. In response to the averments raised in the Respondents through the Replying Affidavit opposing the application, the Plaintiff/Applicant filed a further affidavit sworn by Counsel John Musyoka Annan. The deponent averred as follows that:- -

a. A notice of appointment had been filed together with the application on 10th December 2024 to stay a warrant of attachment that had been issued on 2nd December 2024

b. The Plaintiff/Applicant were never served with or made aware of the execution proceedings and that they never filed any written submissions.

c. The Plaintiff/Applicant unfettered constitutional rights could not be taken away by undue technicalities as was properly enshrined under the provision of Article 159 of *the Constitution* of Kenya, 2010.

d. The Defendant/Respondent was well aware that the matter was before the court of appeal in Mombasa in Civil Application E027 of 2024 in which an order of stay was still in place.

e. The court was urged to maintain its orders earlier granted on 11th December 2024.

V. Submissions

7. On 30th January 2025 in the presence of Counsels for both parties in this suit, the Court directed to have the Notice of Motion applications dated 10th December 2024 disposed of by way of written submissions. It should be noted that only the Defendants/Respondents complied with the courts directions.

8. Although, a ruling date was reserved for 20th March, 2024 but due to unavoidable circumstances it was eventually delivered on 3rd July, 2025.

VI. The Written Submissions by the Defendants/ Respondents

9. The Defendants/Respondents through the Law firm of OG Makowade Advocates filed the written submissions. Mr. Kowade Advocate commenced his submissions by providing the Court with a brief background of the case. He identified the following three [3] issues for determination in this suit;

10. Firstly, whether the Plaintiff/Applicant had satisfied the conditions for grant of stay of execution set out under the provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010. The Learned Counsel listed the conditions to be met for grant of stay of execution as follows;

    a. Substantial loss may result to him/her unless the order was made.

    b. That the application had been made without unreasonable delay; and

    c. The applicant had given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

11. According to the Counsel, the Plaintiff/Applicant had not demonstrated any loss, let alone substantial irreparable loss that may be suffered if the process of execution was to take place. Just as the holding of the court was clear that the attachment and sale of one's property never amounted to substantial loss as envisioned under the provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010. The Counsel placed reliance in the Court of Appeal holding in the case of:- " Mukuma v Abuoga [1988] KLR 645" which held that:-

> " Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory"

12. The Learned Counsel contended that the Plaintiff/Applicant must establish other factors which show that the execution would create a state of affairs that would irreparably affect the very essential core of the Applicant if he was the successful party in the appeal if there would be an appeal or revision. Therefore the question whether the Applicants had demonstrated that substantial loss would occur unless an order for a stay of execution was issued had been answered in the negative.

13. Secondly, on unreasonable delay. The Learned Counsel submitted that it had taken the Applicant approximately two years nine [3] months between the date of ruling delivered in this court and the time when he filed the instant application. According to the Counsel, Judgment in this suit was delivered on 16th February 2022. Thereafter, the taxation proceedings followed and a ruling delivered on 21st September 2022. A Certificate of Costs was issued and served on the 4th April 2024. That the instant application was dated 10th December 2024. The Plaintiff/Applicant had not offered any reasons for the delay in filing the application this late.

14. Clearly, there was no explanation for the inordinate and inexcusable delay for the 2 year 3 months. The Learned Counsel submitted that the filing of the application was merely an afterthought. It was means employed by the Plaintiff/Applicant to defeat the Defendant's attempt to enjoy the fruits of his judgement.

15. Finally, on security for costs. It was submitted that the Plaintiff/Applicant had not offered any security for the performance of the decree. The Defendant/Applicant averred that the court could only consider the application for stay orders on condition that the Plaintiff/Applicant had offered security for the due performance of the decree.

16. On whether the Judgement in this matter should be set aside. The Learned Counsel asserted that the law demanded, that the Applicant seeking to set aside a Judgment must demonstrate a good reason for the default and present a credible defense to the claim. However, in this case the Plaintiff/Defendant had done neither of these.

17. That this suit was disposed of by way of a preliminary objection for the reason that it was sub - judice as it was filed a few days after ELC E006 OF 2021 over the same parties and determining ownership over the same piece of property and was subsequently struck out with costs. This facts could be clearly confirmed in the court records and the proceedings.

18. The Counsel reiterated that the delay by the Applicant in this case was inexcusable if not unreasonable as deponed above. It had been over 2 years 3 months since the ruling on taxation was delivered. There had been no explanation or justification for the delay especially because till date, the Plaintiff/Applicant remained represented. The Plaintiff/Applicant faulted the service in this suit yet the matter was filed by an advocate that he appointed. It was the same advocate who took part in the taxation proceedings. He was served with the certificate of costs and a demand for payment.

19. The Learned Counsel informed Court that this matter was dismissed by way of a preliminary objection for being sub judice. In other words, this matter could not be reinstated, as it had now become res-judicata following the judgement that was issued in ELC E006 OF 2021. Therefore, no prejudice was likely to be suffered on that front as no defense could be entered in a matter that was sub judice.

20. Whether the Plaintiff/Applicant adhered to the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010 in bringing the suit before the court? As stated above, Judgment in this suit was delivered on 16th February 2022. According to the Plaintiff/Applicant's advocate's in his further affidavit dated 28th January 2025 that they filed a Notice of Appointment on the 10th December 2024. Certainly, that was way post the delivery of Judgement. The position taken by the Defendant was that the Plaintiffs Counsel remained a stranger in this matter with no locus to be given audience before this court. In saying so, he referred Court to the quick reading of Order 9 Rule 9 was the guide for litigators who enter appearance after Judgement had been issued in a matter. That in default of comply with provisions of Order 9 Rule 9, any document filed in such a suit was incompetent. It was also the court's position that any such documents ought to be struck off the record just as the court did in the case of: "Isuzu East Africa Limited [Formerly General Motors East Africa Limited] v RAA [Minor suing through her father and next friend AA] & 2 others [Civil Appeal 450 of 2019] [2023] KEHC 20079 [KLR] [Civ] [4 July 2023] [Judgment]" The Court held as follows:-

> " Once Judgement was entered the provisions of Order 9 Rule 9 had to be complied with if the Plaintiff required to Change the Advocates representing her.....there had to be application filed or a Consent filed by parties.....these provisions were couched in mandatory terms and had to be adhered to by an incoming Counsel after Judgement..... Although the Applicant has a Constitutional Right to be represented, yet where there are clear provisions

of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 above is mandatory and thus cannot be termed as being mere technicality....."

21. The court was urged to find that the applicant had not met the threshold for grant of any of the prayers before this court. Thus, the Learned Counsel pray that this court to dismiss the application dated 10th December 2024 with costs.

VII. Analysis & Determination

22. I have keenly accessed the filed application by the Plaintiff/Applicant, the responses thereto, the written submissions on record, the myriad of cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statures. In order to reach an informed, fair and Equitable decision, the Honouable Court has delineated four [4] salient issues for its determination. These are:-

a. What are the legal parameters for granting of stay of execution.

b. Whether the Notice of Motion application dated 10th December, 2024 by the Plaintiffs/ Applicants has any merit.

c. Whether the Judgement of the court should be set aside.

d. Who will bear the costs of the application.

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

23. Under this Sub–title, the main gist of the matter is on whether or not to grant Stay of Execution from a delivered Ruling or Order of the Court. The law concerning stay of execution pending Appeal is found in the provision of Order 42 Rule 6 [1] and [2] of the Civil Procedure Rules, 2010 which stipulates as follows:

> "No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except in so far as the Court Appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court Appealed from, the Court to which such Appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the Appeal is preferred may apply to the appellate Court to have such order set aside.
>
> [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."

24. The purpose for the stay of execution was well spelt out in the case of "RWW v EKW [2019] eKLR", the Court opined:-

> "...The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is It is trite law that stay of execution pending appeal is a discretionary power bestowed upon this court by the law. In the initial stages of building Jurisprudence around this legal aspect, the Court of Appeal in the case of "Butt v Rent Restriction Tribunal [Supra] gave guidance on how a court should exercise the said discretion and held that:
>
> 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
>
> 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the Judge's discretion.
>
> 3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
>
> 4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
>
> 5. The Court in exercising its powers under Order XLI rule 4 [2] [b] of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

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

26. The provision of Section 1A [2] of the *Civil Procedure Act*, Cap. 21 provides that:-

> " the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under the provision of Section 1B some of the aims of the said objectives are:-
>
> " the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties."

27. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 [2] of the Civil Procedure Rules to which:

    i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;

    ii. The application is brought without undue delay and

    iii. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

28. I find issues for determination arising therein namely:

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

    ii. What orders this Court should make

29. The purpose of stay of execution is to preserve the substratum of the case. In the case of "Consolidated Marine v Nampijja & Another, Civil App.No.93 of 1989 [Nairobi]", the Court held that:-

> " The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory".

30. This principle was enunciated in the decision of Gikonyo J. in the case of:- "Absalom Dova v Tarbo Transporters [2013] eKLR, where he stated:

> " The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court: as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights: the Appellant to his 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..."

a) Substantial loss.

31. The case of "Tropical Commodities Suppliers Ltd& Others v International Credit Bank Ltd [in liquidation] [2004] 2 EA 331" where Ogolla J, stated that:-

> " ...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or smal1, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal..."

32. 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.

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

> "It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay."

34. 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 v Turbo Transporters [2013] [eKLR]"}.

35. As F. Gikonyo J stated in the case of:- "Geoffery Muriungi & another v 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…".

b) Unreasonable delay.

37. That the application has been made without undue delay. The case of "Maitai v Silas [Suing as the personal representative of the Estate of Douglas Muchui - Deceased] [Miscellaneous Civil Application E047 of 2024] [2024] KEHC 5846 [KLR] [23 May 2024] [Ruling] where Edward M. Muriithi J upon finding an application for stay of execution pending appeal meritorious held that:-

> "……..12.The Court has already found above that the delay in the matter was for a period of 5 months which cannot be termed as manifestly unreasonable…"

c) Security for costs.

36. Finally, the applicant has given security or is ready to give security for due performance of the decree. In the case of:- "Samvir Trustee Limited vGuardian Bank Limited [2007] eKLR" in that:-

> "…….the yardstick is for the Court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment…"

ISSUE No. b). Whether the Notice of Motion application dated 10th December, 2024 by the Plaintiffs/Applicants has any merit.

37. Under this Sub heading, the Honourable Court will endeavour to apply the above legal principles to the instant filed application herein. From the pleadings, the Plaintiff/Applicant has in my view not outlined in what way they are bound to suffer loss in the event that the stay of execution orders are not granted. Indeed, the Defendants/Respondents have stated that this suit was struck out on grounds of subjudice. That it was the Plaintiff/Applicant who dragged them to court over the suit property herein but the Defendants/Respondents had already filed a separate suit over the same subject matter in which this court made its decision in favour of the Defendants/Respondents.

38. From the surrounding facts and inferences of this matter, I hold and fully concur with the Defendants/Respondents that the Plaintiff/Applicant has failed to demonstrate any substantial loss to be suffered. Further, the aspect of financial loss has not been successfully demonstrated by the Plaintiff/Applicant. In saying so, I wish to make reference to the holding in the case of:- "Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga [1982-1988] KAR 1018" the Court of Appeal pronounced itself to the effect that:

> "It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay."

39. From the time of the delivery of the Judgement, the instant application was filed on 10th December 2024. This was 3 years after the order of this court striking out the suit. I find that the same has been filed out of time. It is over a period which can be termed as being unreasonable and inordinate delay. The delay has not been explained by the Plaintiffs/Applicants.

40. On the issue of security for costs. The Plaintiff/Applicant has not made any proposal as to what they intend to deposit as security for costs. However, as already demonstrated in the case of:- "James Wangalwa & Another v Agnes Naliaka Cheseto [supra]" the three [3] conditions for granting stay of execution must be met simultaneously. They are conjunctive and not disjunctive. The Plaintiffs have failed to proof grant of orders of stay of execution to the required standard.

41. The court in granting orders of stay of execution must always balance the interests of the parties before it, the party against which the stay is being sought and who is a successful litigant must also be allowed to enjoy the fruits of the judgement granted in their favour. Likewise, the Honourable Court discerns that the Plaintiff/Applicant has failed to fulfil this condition for granting the stay of execution sought. The application must fail.

ISSUE No. c). Whether the Judgement of the court should be set aside.

42. On the prayer of setting aside Judgement delivered in this matter. The provision of Order 12 Rule 7 of the Civil Procedure Rules, 2010 set out the guiding principles for consideration in setting aside Judgement. It provides;

> "Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

43. Further the provision of Order 51 Rule 15 of the Civil Procedure Rules provides that:-

> " The Court may set aside an order made ex-parte".

44. In the case of:- "Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR" the Court of Appeal expressed itself thus:-

> " We agree with the noble principles which go further to establish that the Court's discretion to set aside an ex - parte Judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence, or excusable mistake or error but not to assist a person who deliberately seeks to obstruct the course of justice."

45. Further the court in the case of "Esther Wamaitha Njihia & 2 Others v Safaricom Ltd [2014] eKLR", where the Court held:-

> " The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice [see Shah v Mbogo]. The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a Court. [See Sebei District Administration v Gasyali]. It also goes without saying that the reason for failure to attend should be considered."

46. From the pleadings on record, the suit was struck out with costs as evidenced by the decree dated 16th February 2022. This was after the Respondents successfully prosecuted over a preliminary objection challenging the instant petition for being res judicata. Indeed, was confirmed that the Respondents herein had earlier filed ELC E006 of 2021 over the same subject matter as the petition herein. The plaintiffs after receiving service of the pleadings in ELC E006 of 2021 opted to filed the instant petition instead of responses to the suit earlier filed.

47. According to Black Law Dictionary 9th edition, "Sub – judice" means-

> " before a court for determination....."

48. The provisions of Section 6 of *Civil Procedure Act* defines the above principle or the doctrine as follows:-

> " ..... No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title, where such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed."

49. Mativo J. [as he then was] discussed the concept of sub judice in the case of:- "Republic v Paul Kihara Kariuki, Attorney General & 2 Others Ex - Parte Law Society of Kenya [2020] eKLR where he stated as follows: -

> " .....there exists the concept of sub judice which in Latin means "under judgment." It denotes that a matter is being considered by a court or judge. The concept of sub judice that where

an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage."

50. The court is well aware that a decision was made in favour of the Respondents herein in ELC E006 of 2021. This means that any attempt to set aside the decree in the Petition and reinstate it will automatically lead to breaching of the doctrine of res judicata. The issues over the suit property in both this Petition and ELC E006 of 2021 having been resolved, the court is "functus officio" and cannot make any further orders. The Learned Counsel for the Applicants intimated to court that an appeal had been preferred over this court's decision in ELC E006 of 2021 being Mombasa in Civil Application E027 of 2024 but without providing any further information to that effect. Nonetheless, the Applicants can perhaps pursue the said appeal for justice sake. Therefore, there has been no exceptional circumstance that would cause the execution proceedings in this suit to be halted. Nay, far from it. The court has already given its reasons herein above.

51. Lastly, the Honourable Court will address the issue of the Plaintiff's representation in the instant application. From the very onset, I must admit that the Learned Counsel for the Defendants/ Respondents has elaborately and vigorously submitted on this particular issue. The Court may not need to belabour the point. From the record, the Law firm of Messrs. Musyoka Annan & Co Advocates came on record for the Plaintiff/Applicant at the time of filing the application subject of this ruling. This was on 10th December 2024. It is instructive to note it was after striking out of the suit. The provision of Order 9 Rules 9 and 10 of the Civil Procedure Rules, 2010 provides:

> " Rule 9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
>
> [a] Upon an application with notice to all the parties; or
>
> [b] Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

52. The court in the case of "James Ndonyu Njogu v Muriuki Macharia [2020] eKLR while striking out an application filed by counsel post judgment in contravention of the provisions of Order 9 rule 9 of the Civil Procedure Rules, 2010 held as follows:-

> " Although the Applicant has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 above is mandatory and thus cannot be termed as a mere technicality. Having found that these procedure was not followed by M/S Nyiha, Mukoma & Company Advocates, the said firm is not properly on record, and has no legal standing to move the Court on behalf of the Applicant and therefore all pleadings filed by it ought to be struck out. Consequently, and in the absence of such leave of court as provided by the law, the application by Notice of motion under certificate of urgency dated the December 13, 2019 filed by the firm of M/s. Nyiha, Mukoma & Company Advocates is hereby struck out with costs to the Respondent".

53. The provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010 are couched in mandatory terms. For an Advocate or a party coming on record post judgment, they ought to either first seek leave of court by way of a formal application or obtain consent from the outgoing counsel. The advocate on record

for the applicants did not file either of the documents envisaged in Order 9 Rule 9, in fact counsel only filed a notice of change of advocates to come on record. For this very basic reason, I strongly hold that the circumstances automatically disqualifies the application herein.

ISSUE No. d). Who will bear the costs of the Application

54. 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 v Tarchalan Singh [2014] eKLR" and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, [2014] eKLR".

55. In the case of "Hussein Muhumed Sirat v 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.

56. In this case, based on all the reasoning adduced herein, the Honourable Court holds that the Plaintiff/ Applicant has failed to establish its case. It follows therefore that in all fairness, the Defendants/ Respondents are entitled to be awarded costs.

VIII. Conclusion & findings

57. Consequently, having caused an indepth analysis to the framed issues herein, the Honourable Court guided by the Principles of Preponderance of Probabilities and the balance of convenience, proceeds to make the following orders. These are:-

    a. That the Notice of Motion application dated 10th December 2024 filed by the Plaintiff/ Applicant herein be and is hereby found to lack merit and thus be dismissed with costs to the Defendants/Respondents.

    b. That the Costs to be awarded to the Defendants/Respondents to be borne by the Plaintiffs/ Applicants.

58. It Is Ordered Accordingly.

RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 2ND DAY OF JULY 2025

HON. MR. JUSTICE L.L NAIKUNI,

ENVIRONMENT & LAND COURT

Ruling delivered in the presence of: -

a. Mr. Daniel Disii, the Court Assistant.

b. Mr. Annan Musyoka Advocate for the Plaintiff/Applicant.

c. Mr. Kowade Advocate for the Defendants/Respondents