



Barnabas East Africa v County Government of Mombasa & 2 others (Environment and Land Constitutional Petition 29 of 2022) [2024] KEELC 1361 (KLR) (5 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1361 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 29 OF 2022

LL NAIKUNI, J

MARCH 5, 2024

IN THE MATTER OF: THE JURISDICTION OF THE SUPERIOR COURT UNDER ARTICLE 23(1), ARTICLE 162(1), (2) (B), ARTICLE 165 (2) (D) (II) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: CONTRAVENTION, BREACH AND VIOLATION OF FUNDAMENTAL RIGHTS

AND FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ARTICLE 2 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

BARNABAS EAST AFRICA PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT

FUNDS 3RD RESPONDENT

RULING

I. Introduction

1. This ruling is in respect to Notice of Motion dated 14th November, 2023 by the 1st Respondent/Applicant herein – the County Government of Mombasa through its offices of the County Attorney.



It was under the provision of Order 42 Rule 6, Order 42 Rule 8, 51 Rule 1 of the Civil Procedure Rules 2010, Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act Cap 21 Laws of Kenya.

2. Upon service of the application to the Respondents, the Petitioner/ 1st Respondent filed a response through a Replying Affidavit dated 21st November, 2023.

II. The 1st Respondent/Applicant's case

3. The 1st Respondent/Applicant herein sought for the following orders:-
 - a. Spent.
 - b. Spent.
 - c. Pending hearing and determination of the intended appeal there be and is hereby issued an order of stay of execution of the judgment and decree made by Justice L. L. Naikuni on 12th October 2023.
 - d. Costs of this application to abide the outcome of the intended appeal.
4. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 17th Paragraphed Supporting Affidavit of –John Wambua Francis, the Planning officer of the Applicant sworn and dated 14th November, 2023 with THREE (3) annexures marked as ‘JWF – 1 to JWF – 4’. The Applicant averred that:
 - a. On 25th July 2022 the Petitioner/Respondent herein filed a Petition against the Applicant in the Environment and Land Court at Mombasa claiming that the Applicant had infringed on his constitutional rights by creating an access road on his private property known as CR: 2283/1 Plot No VIMN/809 a private property. Annexed in the affidavit and marked as “JWF - 1” was a true copy of the Petition.
 - b. The Petition was responded to by the Applicant vide a Replying Affidavit dated 11th November 2022. Annexed herewith and marked as “JWF - 2” was a true copy of the Replying Affidavit.
 - c. By consent of the parties, the superior court directed that the petition be canvassed by way of written submissions and parties filed their respective submissions.
 - d. The only issue for the superior court's determination was whether the Respondent constitutional rights had been infringed and whether they were entitled to reliefs sought.
 - e. Vide a judgment delivered on 12th October 2023 the Environment and Land Court (Naikuni, J.) awarded the Petitioner/Respondent a sum of Kenya Shillings Twenty Seven Million One Hundred and Fifty Thousand (Kshs. 27,150,000/-)
 - f. Being aggrieved by that decision, the Applicant filed a Notice of Appeal against the said Judgment. Annexed in the affidavit and marked as “JWF - 3” was a true copy of the Notice of Appeal.
 - g. The Honourable court be pleased to grant the Applicant stay of Execution without a condition of surety as per the provision of Order 42 Rule 8 of the Civil Procedure Rules 2010 which states as follows:-

“No such security as is mentioned in Rules 6 and 7 shall be required from the Government or where the Government has undertaken the defense of the suit or



from any public officer sued in respect of an act alleged to be done by him in his official capacity.”

- h. If the Petitioner/Respondent executes the Judgment and decree of the Superior Court the Applicant would suffer substantial loss and its appeal rendered nugatory.
- i. Members of the public would have no access road to their property which they had used for more than 26 years.
- j. The Applicant was a government which relied majorly on funding from the National Government and never had an approved budget to pay the award of a sum of Kenya Shillings Twenty Seven Million One Hundred and Fifty Thousand (Kshs. 27,150,000/-) within ninety days (90 days) as ordered from the date of the Judgment.
- k. The Applicant is a government which is funded by the tax payers money and if the said amount of a sum of Kenya Shillings Twenty Seven Million One Hundred and Fifty Thousand (Kshs. 27,150,000/-) was to be paid out and later the Appeal succeeds, the Kenyan tax payers shall have lost money because it would be difficult, if not impossible to recover the money from the Petitioner/Respondent.
- l. If the Applicant restored the suit property known as CR:2283/1 Plot No.VIMN/809 to its original state by covering up and blocking the cabro works road it would still be an access road this time in a more dilapidated state and the tax payers would have lost money used in the construction of the murrum access road which would be difficult if not impossible to recover from the Petitioner/Respondent.
- m. The Applicant had an arguable appeal with a probability of success based on the ground that the Respondent did not deserve the compensation awarded as the said murrum road had always been in existence and the Applicant only upgraded it by putting cabro blocks. Annexed in the affidavit and marked as “JWF - 4” was a Draft Memorandum of Appeal.
- n. The intended appeal would be rendered nugatory and render any subsequent proceeding be moot and mere academic exercise.
- o. It was in the interest of justice that the orders sought herein be granted.

III. The Response by the Petitioner/Respondent

- 5. While opposing the application, the Petitioner/Respondent responded to the Application dated 14th November, 2023 through a 16th Paragraphed Replying Affidavit sworn on 21st November, 2023 by Macmillan Peter Kioko. He averred that:-
 - a. According to the 1st Respondent/Applicant they are asking the court to stay execution of the Judgment made on 12th October 2023.
 - b. Whereas the contents of Paragraphs 1, 2, 3, 4, 5, 6 and 7 of the Supporting Affidavit are admitted, in answer to Paragraph 8 of the Supporting affidavit, the Applicant never fell within the ambit of the provision of Order 42 Rule 8 of the Civil Procedure Rules 2010.
 - c. The contents of Paragraph 10 of the Supporting Affidavit, were contested. The fact that the Court had found that the access road cutting through the Petitioner/Respondent’s property amounted to violation of a constitutional right, attempts to continue with the said violation could not be justified by the number of years of violation.



- d. In answer to the contents of Paragraphs 11 of the Supporting Affidavit, whereas the Applicant alleged that they had no approved budget to pay the award of a sum of Kenya Shillings Twenty Seven Million One Hundred and Fifty Thousand (Kshs. 27,150,000/-) within the period of ninety (90) days that could not be an excuse neither was it a fault of theirs. The short comings of the internal operations of the Applicant could not be an excuse for non-compliance with the Judgment and/or Decree of the Honourable Court.
- e. Opposition to Paragraph 12 of the Supporting Affidavit, he stated that it was not correct for the Applicant to averred that was in a position to refund the awarded sum of Kenya Shillings Twenty Seven Million One Hundred and Fifty Thousand (Kshs. 27,150,000/-). The suit subject matter herein is registered in the names of the Petitioner/Respondent. The value of the suit subject matter would be more than a sum of a sum of Kenya Shillings Twenty Seven Million One Hundred and Fifty Thousand (Kshs. 27,150,000/-) by the time the appeal if any would be heard and determined. In any event the financial ability by the Petitioner/ Respondent to repay was confirmed by the suit property.
- f. The Applicant had not provided any security for this application to be granted.
- g. Further to the contents of Paragraph 8 above. One's financial status could not be a reason for grant of the Orders sought.
- h. In answer to the contents of Paragraph 13 of the Supporting Affidavit the public which stood to lose money as a result of the decisions taken by the Respondents could not be a ground for issuance of the Orders sought. The public was not without recourse including surcharging of the Applicants officers responsible to recover monies lost.
- i. In answer to paragraph 14 of the Supporting Affidavit, the draft Memorandum of Appeal raised no arguable grounds. It had no chance of success whatsoever.
- j. The contents of Paragraph 15 of the Supporting Affidavit were denied. The 1st Respondent/ Applicant had failed to demonstrate how the appeal would be rendered moot.

IV. Submissions

6. On 23rd November, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 11th November, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that, and by the time of penning down this Ruling only the 1st Respondent/Applicant had obliged. Thus, on 18th January, 2024 a ruling date was reserved on 5th March, 2024 by Court on merit accordingly.

A. The Written Submissions by the 1st Respondent/Applicant.

7. The Learned Counsel for the 1st Respondent/Applicant the Office of the County Attorney for the Government of Government of Mombasa filed their written Submissions. M/s. Kuria Advocate commenced the submissions by stating that the Applicant filed an Application dated 14th November 2023 seeking stay of execution of Judgment and Decree made by this Honourable Court on 12th October 2023 pending hearing and determination of the Applicant's Appeal.
8. The Learned Counsel raised the following issues to be considered while making a determination of the said application. These were namely, firstly, whether the Applicant would suffer substantial loss if the order for stay of executing pending the hearing and determination of appeal is not granted?



She responded in affirmative. She averred that the Applicant will suffer substantial loss and its appeal rendered nugatory because:

- a). The members of the public would no longer have an access road to their properties.
 - b). The Applicant was a Government which relied majorly on funding from the National Government and never had an approved budget to pay the award of sum of Kenya Shillings Twenty Seven Million One Hundred and Fifty Thousand (Kshs. 27,150,000/-) within ninety days (90 days) as ordered from the date of the Judgment.
 - c). The Applicant is a Government which was funded by the tax payers money and if the said amount of sum of Kenya Shillings Twenty Seven Million One Hundred and Fifty Thousand (Kshs. 27,150,000/-) is paid out and later the Appeal succeeds, the Kenyan tax payers shall have lost money because it would be difficult, if not impossible to recover the money from the 1st Respondent.
 - d). If the Applicant restores the suit property known as CR: 2283/1 PLOT NO.VIMN/809 to its original state by covering up and blocking the cabro works road it would still be an access road this time in a more dilapidated state and the tax payers would have lost money used in the construction of the murram access road which would be difficult if not impossible to recover from the 1st Respondent.
9. The Learned Counsel submitted that the provision of Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010 gave the court discretionary powers to stay execution. It provided that no application shall be made under sub rule 1 unless the court was satisfied that substantial loss may result to the Applicant unless the order was made and Order 42 Rule 6(2) (b) of the Civil Procedure Rules, 2010 such security as the court orders for the due performance of such decree or order as may ultimately be binding on him had been given by the applicant.
 10. In the present matter the Applicant had stated above four justifiable reasons on why if the stay of execution was not granted the Appeal would be rendered nugatory.
 11. To buttress on this point, the Learned Counsel cited the case of:- “Njiru Micheni Nthiga – Versus - Governor, Tharaka Nithi County Government & 5 others (2021) eKLR the court while reiterating the case of “Geofrey Muriungi & Another – Versus - John Rukunga M’imonyo Suing As Legal Representative of The Estate of Kinoti Simon Rukunga (Deceased) 2016 eKLR stated that the undisputed purpose of stay pending appeal was to prevent a successful Appellant from becoming a holder of a barren result for reason that he could not realize the fruits of his success in the appeal. The Judge stated that he always referred to that eventuality as "reducing the successful Appellant into a pious explorer in the judicial process" . The said state of affairs was what was 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.
 12. The Learned Counsel further referred Court to the case of:- “Century Oil Trading Company Limited – Versus - Kenya Shell Limited Nairobi (2008) eKLR the court stated that where execution of a money decree was sought to be stayed in considering whether the Applicant would suffer substantial loss, the financial position of the Applicant and that of the Respondent became an issue. The court could not shut its eyes where it appeared the possibility was doubtful of the Respondent refunding the decretal sum in the event that the Applicant was successful in his appeal. The court has to balance the interests of the Applicant who was seeking to preserve the status quo pending the hearing of the appeal so that



his appeal was not rendered nugatory and the interest of the Respondent who was seeking to enjoy the fruits of his Judgement.

13. In the present case the Respondent in their Replying Affidavit sworn by Macmillian Peter Kioko only made mere allegations stating that the value of their property was over sum of Kenya Shillings Twenty Seven Million One Hundred and Fifty Thousand (Kshs. 27,150,000/-). It never attached any evidence of a valuation report or even statements from the bank to show that they had that amount and could refund. Further if the Respondent was left to execute the decree, it would only complicate the situation further as the Applicant would have to commence other processes to seek refund of the decretal sum.
14. The Petitioner/Respondent would not suffer any prejudice which cannot be compensated by way of costs. Costs were awarded to the winning party. If at all the Petitioner/Respondent won the appeal the costs awarded to it would be a reasonable panacea to him for the period it would wait so as to enjoy the fruits of its judgment. Moreover interests was also awardable.
15. Secondly, whether the Government should deposit security for costs?. The Learned Counsel while responding in the negative once again referred Court to the case of “Njiru Micheni Nthiga (Supra) and the provision of Order 42 Rule 8 of the Civil Procedure Rules, 2010 which provides that no security to be required from the Government, “inter alia”:

“No security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit of from any public officer sued in respect of an act alleged to be done by him in his official capacity.
16. Thus, she averred that the Applicant being government should not be security for costs.
17. In conclusion, the Learned Counsel urged to allow the present application which had been made without delay and the Applicant has already filed its Record of Appeal at the Court of Appeal awaiting directions. It should grant the prayers sought unconditionally.

V. Analysis & Determination.

18. I have carefully read and considered the pleadings herein by the Appellants and the Respondent, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
19. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
 - a. Whether the Notice of Motion application dated 14th November, 2023 seeking to stay execution of the Judgment and Decree made by Justice L. L. Naikuni on 12th October 2023 pending Appeal is merited?
 - b. Whether the parties herein were entitled to the reliefs sought.
 - c. Who will bear the Costs of Notice of Motion application dated 14th November, 2023.

Issue No. a). Whether the Notice of Motion application dated 14th November, 2023 seeking to stay execution of the Judgment and decree made by Justice L. L. Naikuni on 12th October 2023 pending Appeal is merited

20. Under this Sub – title, the main gist of the matter is on whether or not to grant Stay of Execution from a delivered Judgement or Decree of the Court. The law concerning stay of execution pending Appeal



is found under the provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010 which stipulates as follows:

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

- (2) No order for stay of execution shall be made under sub rule (1) unless—
 - (a) the Court is satisfied that substantial loss may result to the 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.

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

- “ 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
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.”



22. 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 provision of the *Civil Procedure Act* or in the interpretation of any of its provisions.
23. Section 1A (2) of the *Civil Procedure Act* 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.”
24. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 to which:
- i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
 - ii. The application is brought without undue delay and
 - iii. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.
25. 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 decree pending Appeal.
 - ii. What orders this Court should make
26. The purpose of stay of execution is to preserve the substratum of the case. In the case of “Consolidated Marine – Versus - Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)”, the Court held that:-
- “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
27. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.
28. As for the applicant having to suffer substantial loss, in the case of “Kenya Shell Limited – Versus - Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018” the Court of Appeal pronounced itself to the effect that:
- “It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would



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

29. The Court of Appeal in the case of “Mukuma – Versus - Abuoga (1988) KLR 645” where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

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

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

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

Issue No. b). Whether the parties herein were entitled to the reliefs sought

32. Under this sub heading, the Honourable Court now wishes to apply the above legal principles to the instant case. From the proceedings, the Applicant herein filed an application dated 14th November, 2023 seeking orders to stay the Judgment in this matter delivered by this Honourable Court on 12th October, 2023. According to the applicant, the said Judgment issued a permanent injunction against the Applicant on interfering with property known as CR:2283/I Plot No.VIMN/809. The Learned Judge issued a Mandatory injunction compelling the Applicant to restore the suit property known as CR: 2283/1 Plot No. VIMN/809 to its original state by covering by covering up and blocking the cabro road passing through the said property yet the road has always been in existence used by members of the public and the cabro was just an improvement made on the access road. If the Petitioner/Respondent executes the Judgment and Decree of the Superior Court the Applicant will suffer substantial loss and its appeal rendered nugatory because:

- i. Members of the public will have no access road to their property which they have used for more than 26 years.
- ii. The Applicant is a government which relies majorly on funding from the National Government and does not have an approved budget to pay the award of a sum of Kenya Shillings Twenty Seven Million One Hundred and Fifty Thousand (Kshs. 27,150,000/-) within ninety days (90 days) as ordered from the date of the delivery of Judgment.
- iii. The Applicant is a government which is funded by the tax payers money and if the said amount of a sum of Kenya Shillings Twenty Seven Million One Hundred and Fifty Thousand (Kshs.



27,150,000/-) is paid out and later the Appeal succeeds, the Kenyan tax payers shall have lost money because it will be difficult, if not impossible to recover the money from the 1st Respondent.

- iv. If the Applicant restores the suit property known as CR: 2283/1 Plot No.VIMN/809 to its original state by covering up and blocking the cabro works road it will still be an access road this time in a more dilapidated state and the tax payers will have lost money used in the construction of the murrum access road which will be difficult if not impossible to recover from the 1st Respondent.
33. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under the provision of Order 42 Rule 6 of the Rules. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicants unless stay of execution is granted; and thirdly such security as the court orders for the due performance of such decree or order as may ultimately be binding on them has been given by the Applicant.
34. Regarding the pre-requisite conditions evolving from the law is on substantial loss occurring to the Appellants. The court has already deliberated on this aspect and taken into consideration of it from the case of:- “Kenya Shell Limited (Supra)”. From the surrounding facts and inferences of the instant case, I am strongly persuaded that indeed, the 1st Respondent/Applicant has proved that it will suffer substantially if the orders for stay of the execution are not granted as prayed. For that reason, the application should succeed.
35. On the second condition for determination is whether the application for stay of execution was made without inordinate delay. From the record, the Judgment being appealed against was delivered on 12th October, 2023 and the application herein was filed on 14th November, 2023. Further to that, the Applicant also filed a Notice of Appeal on 18th October, 2023. On quick computation, this application was filed after about 1 month and 2 days of the Judgment. Clearly, in this Honourable Court’s assessment, the application was made timeously without any delay. Indeed, the application was filed expeditiously and without undue delay.
36. On the last condition as to provision of security. I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules, 2010 stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. The Applicant has averred that the Honourable court be pleased to grant the Applicant stay of Execution without a condition of surety as per Order 42 Rule 8 of the Civil Procedure Rules 2010 being a Government entity. This provision of the law notwithstanding from the face value, this court is not bound by the type of security offered by an applicant. It can make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.
37. In saying so, I seek refuge from the case of “Aron C. Sharma – Versus - Ashana Raikundalia T/A Rairundalia & Co. Advocates” the court held that:

“ The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the Judgment Debtor ... Civil process is quite different because in civil process the Judgment is like a debt hence the Applicants become and are Judgment Debtors in relation to the Respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately



be binding on the Applicants. I presume the security must be one which can serve that purpose.”

38. Therefore, in the interest of justice and fairness, it behooved the Applicant herein to furnish security as stipulated by the law. This was not done. The Applicant was unwilling to pay any further monies towards this matter as their claim in the appeal was that they have already settled the entire decretal amount. It was their argument that since they were not challenging the decision of the trial court, there was no need to deposit security. They also contended that they were only challenging the legality of the warrants which in any case would absolve them from the parameters of the provision of Order 42, Rule 6 (2b) of the Civil Procedure Rules, 2010. At this point, it appears as though the Applicants want to have their cake and still eat it through hiding under the curtains of the Provision of Order 42 Rule 8 of the Civil procedure Rules, 2010. On the one hand they argue that where stay is not granted, they will suffer substantial loss. On the other hand they are unwilling to comply with the requirements under the provision of Order 42, Rule 6.
39. Stay of execution is exactly what it states. It is an order of the court barring a Decree Holder from enjoying the fruits of his Judgment pending the determination of some issue in contention. It matters not whether the issue in contention is the amount awarded in the Judgment Debt, or liability or legality of the extracted warrants as in this case. Where a party seeks to stay execution, the Court must be guided by the parameters set out in Order 42 Rule 6. While this Court appreciates that the subject of the appeal is whether the decretal amount was paid or not and hence the unwillingness of the Applicant to deposit security for the outstanding judgment debt, at this interim stage, it will only limit itself to the preconditions for granting stay of execution where there exists a Judgment legally entered in favour of one party against the other. Thus, it matters not at this stage whether they had paid the full amount or not, that is a matter for consideration at the appeal stage. It must satisfy the requirement for security.
40. The Court observed in the Case of:- “Gianfranco Manenthi & Another – Versus - Africa Merchant Assurance Company Ltd [2019] eKLR”, thus:-

“..... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 Rule 6 (1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree. (Underlining mine for emphasis)



41. As already demonstrated in the case of:–“James Wangalwa & Another vs. Agnes Naliaka Cheseto (supra)” the three (3) conditions for granting stay of execution pending appeal MUST be met simultaneously. They are conjunctive and not disjunctive. It is my finding that the Applicants herein, though they brought this Application without undue delay and adequately demonstrated the substantial loss that they would suffer and they failed to furnish security as stipulated by sub-rule 2b.
42. In the result, I grant the order for stay of execution on condition that the Applicants shall furnish security being a reasonable sum equivalent to the outstanding amounts in contention being a sum of Kenya Shillings Twenty Seven Million One Hundred and Fifty Thousand (Kshs. 27,150,000/-).

Issue No. b). Who will bear the Costs of Notice of Motion application dated 31st March, 2023.

43. 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 Rule 26 (1) & (2) of *the Constitution* of Kenya (Protection of Rights & Fundamental Freedoms) Practice and Procedure Rules, 2013 hold as follows:-
 - (1) the award of costs is at the discretion of the Court.
 - (1) (2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.
44. The proviso of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).
45. 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. In this case, this Honourable Court has reserved its discretion in not awarding costs.

VI. Conclusion & Disposition

46. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the application, this court arrives at the following decision and makes the orders below:-
 - a. That the Notice of Motion application dated 14th November, 2023 be and is hereby found to have merit and hence allowed subject to the fulfilment of the Pre – Conditions stated herein.
 - b. That this Honourable Court do hereby issue an order to stay the execution of its decree arising from the Judgment of the Honourable Justice L. L. Naikuni delivered on 12th October, 2023 pending the hearing and determination of the intended appeal in the Court of Appeal.
 - c. That an order made that the 1st Respondent/Applicant to deposit a sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs. 5, 500, 000.00/=) as security deposit for the performance of the decree from the Judgement of this Honourable Court in a Joint Escrow bank account of a reputable Commercial bank to be held in the names of Messrs. Benedict Nzamba & Company Advocates and the County Government of Mombasa WITHIN THE NEXT THIRTY (30) days from the delivery of this Ruling pending the hearing and determination of the appeal.



- d. That failure to adhere with the condition under Clause (c) herein above of this Ruling the Notice of Motion application dated 14th November, 2023 shall automatically stand dismissed thereof and execution of the Decree shall ensue procedurally as provided for by law.
- e. That there shall be no orders as to costs.

It is so ordered accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 5TH DAY OF MARCH 2024.

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**HON. 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. No appearance for the Petitioner/Respondent
- c. No appearance for the 1st Respondent/Applicant.
- d. No appearance for the 2nd, 3rd, 4th and 5th Respondents.

