Kirikoini Investments Limited & another v Ngene (Environment and Land Appeal E021 of 2024) [2024] KEELC 3792 (KLR) (8 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3792 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E021 OF 2024

JO MBOYA, J

MAY 8, 2024

BETWEEN

KIRIKOINI INVESTMENTS LIMITED ..... 1ST APPELLANT

JOSEPH KIBIRU NJUGUNA [SUING ON BEHALF OF THE ESTATE OF PHILIP NJUGUNA WARUTH] ..... 2ND APPELLANT

AND

JANE WANGARI NGENE ..... RESPONDENT

(Being an appeal from the Judgment and Orders of the Chief Magistrate's Court at Nairobi [Milimani) of the Honourable Wendy Micheni (CM) dated the 16th day of February, 2024]InCivil Suit 4955 of 2015)

RULING

Introduction And Backgrund:

1. The Appellants herein had been sued before the Chief Magistrate's Court vide MCELC No. 4955 of 2015 and wherein the current Respondent contended that same [Respondent] was the lawful and legitimate owner of Plot No. 280, Kariobangi [also known as L.R No. 12062/680] which shall herein after be referred to as the suit property.

2. Subsequently, the proceedings before the Chief Magistrate's court were heard and disposed of vide Judgment which was rendered on the 16th February 2024. For coherence, the learned Chief Magistrate found and held that the suit property lawfully belongs to the Respondent herein.

3. Arising from the Judgment and/or decision of the learned Chief Magistrate [details in terms of the preceding paragraph], the Appellants herein felt aggrieved and thus proceeded to and filed a memorandum of appeal dated the 22nd February 2024 and in respect of which same [Appellants] have highlighted a plethora of grounds.

4. Contemporaneous with the filing of the Memorandum of Appeal, the Appellants/Applicants also proceeded to and filed the Notice of Motion Application dated the 22nd February 2024 and in respect of which same [Appellants] have sought for the following reliefs;

   i. .....Spent.

   ii. This Honorable court be pleased to stay execution of the Judgment issued on the 16th February 2024 by Hon. Wendi Micheni [CM] in Civil Suit No. 4955 of 2015 pending the hearing and determination of this Application.

   iii. This Honorable court be pleased to stay execution of the Judgment issued on the 16th February 2024 by Hon. Wendi Micheni [CM] in Civil Suit No. 4955 of 2015 pending the gearing and determination of the Appeal herein.

   iv. This Honorable court do grant any other orders that it deems fitting in the circumstances.

   v. The cost of this Application be provided for

5. Instructively, the instant Application is anchored and premised on various grounds which have been enumerated thereunder. Furthermore, the Application is said to be supported by an affidavit [sic] sworn by P M G Junior.

6. Nevertheless, despite the contention that the application is supported by the affidavit of P M G Junior., it is worthy to underscore that no such supporting affidavit has been annexed to the Application and/or better still, filed before the court.

7. To the contrary, the Appellants have filed two [2] affidavits, namely, the supporting affidavit of Joseph Kibiru sworn on the 22nd February 2024 and the Supplementary affidavit sworn on the 4th March 2024, respectively.

8. Be that as it may, upon being served with the instant Application, the Respondent proceeded to and filed a Replying affidavit sworn on the 11th March 2024 and wherein same [Respondent] has contended inter-alia that the Appellants/Applicants have neither established nor demonstrated the likelihood of substantial loss arising and/or occurring, in the event that the orders sought are not granted.

9. First forward, the instant Application came up for hearing on the 14th March 2024; and whereupon the advocates for the respective Parties covenanted to canvass and dispose of the Application by way of written submissions.

10. Pursuant to and in line with the agreement by the Parties, [details in terms of the preceding paragraph] the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.

11. Notably, the Parties thereafter duly complied and in particular, filed their respective submissions. For good measure, the Appellants' submissions are dated the 4th April 2024, whereas the Respondents submissions are dated 19th April 2024.

12. Suffice it to point out that both sets of written submissions [details in terms of the preceding paragraph] are on record.

Parties' Submissions:

a. Appellants' Submissions:

13. The Appellants/Applicants herein have filed written submissions dated the 4th April 2024; and in respect of which same [Applicants] have reiterated the contents of the grounds alluded to at the foot of the application; as well as the averments contained in the body of the Supporting affidavit and Supplementary affidavit sworn by one Joseph Kibiru.

14. Furthermore, learned counsel for the Applicants has thereafter raised, highlighted and canvassed three [3] salient and pertinent issues for determination by the Honourable court.

15. Firstly, learned counsel for the Applicants has submitted that the Judgment and decision sought to be appealed against was rendered o the 16th February 2024, whereas the current application was filed on the 22nd February 2024.

16. Arising from the foregoing, learned counsel for the Applicants has therefore submitted that the application before hand has been filed timeously and with due promptitude.

17. Consequently and in this regard, learned counsel for the Applicants has thus invited the court to find and hold that the application before the court has been filed [mounted] without undue and inordinate delay.

18. Secondly, learned counsel for the Applicants has submitted that the Applicants herein are the ones who have been and are still in occupation of the suit property. In any event, learned counsel for the Applicants has submitted that it was the occupation of the suit property by the Applicants, which precipitated the filing of the suit before the Chief Magistrate's court.

19. Additionally, learned counsel for the Applicants has submitted that on account of being in occupation of the suit property, the Applicants proceeded to and commenced to develop the suit property. In this regard, learned counsel for the Applicants has submitted that the Applicants incurred substantial amount of money in constructing the development, which is currently sitting on the suit property.

20. Be that as it may, learned counsel for the Applicants has also submitted that by the time Hon Justice B M Eboso, Judge; was issuing the orders of temporary injunction vide ELC Civil Appeal No. 2 of 2018, the Appellants had already undertaken [constructed] the developments on the suit property.

21. Given that the Applicants have been in possession on the suit property, learned counsel for the Applicants has therefore invited the court to find and hold that the Applicants herein shall suffer substantial loss, unless the orders sought are granted.

22. To this end, learned counsel for the Applicants has cited and relied on inter-alia the holding in the case of Halai & Another vs Thornton & Turpin [1963] Ltd [1990]eKLR, Hassan Guyo Wakalo vs Straman [EA] Ltd [2013]eKLR and Kenya Shell Ltd vs Benjamin Kibiru & Another [1986]eKLR, respectively.

23. Lastly, learned counsel for the Applicants has submitted that the grant of an order of stay of execution pending appeal is discretionary and hence, this court should endeavor to balance the rights and interests of the parties beforehand.

24. Further and in addition, learned counsel for the Applicants has submitted that it is incumbent upon the court to ensure that the discretion is exercised in such a manner that shall prevent the appeal which has since been filed from being rendered nugatory.

25. In support of the foregoing submissions, learned counsel for the Applicants has cited and quoted the decision in Butt vs Rent Restriction Tribunal [1979]eKLR.

26. Simply put, learned counsel for the Applicants has invited the court to find and hold that the Applicants have demonstrated and proved the requisite ingredients to warrant the issuance [grant] of the orders of stay of execution pending appeal.

b. Respondents' Submissions:

27. The Respondent herein filed written submissions dated the 19th April 2024; and in respect of which same [Respondent] raised and highlighted two [2] salient issues for due consideration and determination by the court.

28. First and foremost, learned counsel for the Respondent has submitted that the Applicants herein have neither established nor demonstrated the likelihood of substantial loss arising and/or accruing, to warrant the grant of the orders of stay of execution pending appeal or at all.

29. In particular, learned counsel for the Respondent has submitted that the suit before the Chief Magistrate's court [MCELC No 4955 of 2015], was filed by the Respondent with a view to preventing the offensive activities by and on behalf of the Applicants herein.

30. Furthermore, learned counsel for the Respondent has submitted that the Respondent also proceeded to and filed an appeal vide ELC Civil Appeal No. 2 of 2018, together with an application for temporary injunction; which application was heard and an order of temporary injunction was issued to restrain the Applicants herein from undertaking any offensive activities on the suit property.

31. In any event, learned counsel for the Respondent has submitted that upon the issuance of the orders of temporary injunction [details in terms of the preceding paragraphs], the court barred the Applicants herein from remaining on and/or being in possession of the suit property.

32. In a nutshell, learned counsel for the Respondents has thus submitted that it is therefore erroneous and misleading for the Applicants herein to contend that same [Applicants] are the ones who have been in lawful occupation and possession of the suit property.

33. From the foregoing, learned counsel for the Respondent has therefore submitted that the Applicants have neither demonstrated nor proved any scintilla of substantial loss or otherwise.

34. Secondly, learned counsel for the Respondent has also submitted that prior to and or before a court of law can grant an order of stay of execution pending the hearing and determination of an appeal, the claimant is obligated to provide and/or avail security for the due performance of the decree that may ultimately be issued in the matter.

35. However, learned counsel for the Respondent has contended that the Applicants herein have neither met nor satisfied the aspects [perspective] concerning provisions of security.

36. In view of the foregoing, learned counsel for the Respondent has thus implored the court to find and hold that the Applicants herein are not entitled to the grant of the orders of stay of execution pending the hearing of the Appeal, either as sought or at all.

Issues for Determination:

37. Having reviewed the application beforehand; as well as the Replying affidavit filed in opposition thereto and upon taking into consideration the Written submission[s] filed by the Parties, the following issues do emerge [crystalize] and are worthy of determination;

i. Whether the instant Application [which seeks stay of execution pending appeal] is competent or otherwise.

ii. Whether the Applicants herein have established and/or demonstrated the likelihood of substantial loss arising and/or occurring, if the orders sought are not granted.

iii. What reliefs, if ; ought to be granted.

Analysis And Determination:

Issue Number 1. Whether the instant Application [which seeks stay of execution pending appeal] is competent or otherwise.

38. It is common ground that the Application beforehand seeks an order of stay of execution pending the hearing and determination of the instant appeal. Furthermore, there is no gainsaying that such an application is underpinned by the Provisions of Order 42 Rule 6[2] of the Civil Procedure Rules, 2010.

39. By virtue of the reliefs sought at the foot of the current application, it is imperative to state and underscore that such an application is statutorily required to be anchored on and/or supported by a competent affidavit sworn by the Applicant, or such other authorized person on behalf of the Applicant.

40. At any rate, it is important to underscore that whenever an application [like the instant one] is intended to be supported by an affidavit, it behooves the drafter of the application to advert to and/or highlight the details of the supporting affidavit [if any], at the foot of the application.

41. For good measure, it is when the details of the supporting affidavit are adverted to or referenced at the foot of the application, that one, the Court not excepted, would discern the details of the deponent of the affidavit, [if any] that is relied upon and/or, intended to be relied upon.

42. As pertains to the instant application, it is not lost on the court that the Applicants herein have alluded to and/or referenced the affidavit P M G Junior [which is said to be the affidavit anchoring/supporting the instant applicant].

43. Be that as it may it is important to point out that even though the application beforehand adverts to and/or references [sic] the affidavit of P M G Junior, no such affidavit has been annexed and/or otherwise, filed.

44. To my mind, in the absence of the affidavit sworn by P M G Junior, which has been adverted to and/or referenced in the body of the application, the entire Application becomes vitiated and is thus rendered incompetent, for want of the requisite supporting Evidence.

45. Other than the foregoing, it is instructive to note that there are two[2] sets of affidavit[s], namely, the supporting affidavit of Joseph Kibiru sworn on the 22nd February 2024 and the supplementary affidavit sworn on the 4th March 2024, respectively. However, there is no gainsaying that the two [2] affidavits herein, have no nexus to the application dated the 22nd February 2024.

46. Pertinently, the supporting affidavit sworn by Joseph Kibiru on the 22nd February 2024, has neither been adverted to nor referenced in the body of the Application.

47. Quiet clearly, even though the said supporting affidavit bears the date of 22nd February 2024 [which is the same date of the application], there is no affinity and/or nexus between the two [2] documents, namely, the application and the said affidavit.

48. Arising from the foregoing, it is my finding and holding that in the absence of the requisite and apposite supporting affidavit, duly adverted to and referenced in the application; the entire application beforehand is rendered misconceived, invalid and fatally incompetent.

49. Other than the foregoing, it is also important to point out that the purported supporting affidavit would still be incompetent to support the application beforehand and particularly on behalf of the 1st Appellant, insofar as the deponent of the said affidavit [Joseph Kibiru], has neither adverted to or referenced any authority, [if any], donated unto same [deponent] to act and/or depone any legal document on behalf of the 1st Appellant company.

50. For coherence, it is worth recalling that insofar as the 1st Appellant is a limited liability company, same [1st Appellant company], can thus only act through a duly appointed and authorized officer thereof. In any event, such authorization must be vide a resolution of the company made under seal.

51. To this end, it suffices to highlight and reproduce the provisions of Order 9 Rule 2 of the Civil Procedure Rules 2010.

52. Same are reproduced as hereunder;

> 2. Recognized agents [Order 9, rule 2]
>
> The recognized agents of parties by whom such appearances, applications and acts may be made or done are—
>
> (a) subject to approval by the court in any particular suit persons holding powers of attorney or an affidavit sworn by the party authorizing them to make such appearances and applications and do such acts on behalf of parties;
>
> (b) _persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts;
>
> (c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.

53. Furthermore, the legal position that one, the deponent of the affidavits in question not excepted, can only act and/or execute a document on behalf of a limited liability company pursuant to apposite instructions, was also espoused [affirmed] by the Supreme Court [the Apex Court] in the case of Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others (Petition 32 (E036), 35 (E038) & 36 (E039) of 2022 (Consolidated)) [2023] KESC 105 (KLR) (15 December 2023) (Judgment), where the court found and held as hereunder;

> 120. An additional reason as to why the two superior courts below ought to have accorded little weight to the letter from JP Hulme is that it is not clear whether the said JP Hulme had the sanction, competence or authority of Lonrho Agribusiness, a registered limited liability company to bind the company.
>
> In our view, there was insufficient evidence to support the claim that Lonrho Agribusiness intended to surrender the suit properties for the allocation to Sirikwa. This is a serious question that the two superior courts below did not address their minds to. It is elementary principle of company law that a company as a distinct legal entity from its promoters, directors or employees can only act through its organs and make decisions by resolutions. No resolution of the company's board supporting the purported purpose for the surrender was presented in evidence.

54. In view of the foregoing analysis, my answer to and in respect of issue number one [1] is that the instant application is not only premature and misconceived; but same is fatally incompetent.

Issue Number 2. Whether the Applicants herein have established and/or demonstrated the likelihood of substantial loss arising and/or occurring, if the orders sought are not granted.

55. Notwithstanding my finding[s] and holdings [details in terms of the preceding paragraphs] I am still obliged to venture forward and discern whether the Applicants herein have established and/or demonstrated any scintilla of substantial loss arising and/or accruing, if the orders sought are not granted.

56. Notably, substantial loss is the cornerstone upon which an order of stay of execution does issue and hence it is ordinarily incumbent upon every Applicant seeking for such an Order to espouse [demonstrate] the Likelihood of Substantial Loss.

57. Consequently and in the premises, where an Applicant, the current applicant not excepted, failed to demonstrate the existence of substantial loss, then the court is deprived and/or divested of a pertinent ground and/or basis, which would anchor such an order.

58. For coherence, the significance of substantial loss as pertains to an application for stay of execution pending appeal was highlighted and espoused by the Court of Appeal in the case of Kenya Shell Limited v Kariga 1982-88 1 KAR, Court of Appeal held that,

> " if there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay",

59. Additionally, the significance of substantial loss was also underscored and affirmed in the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012]eKLR, where the court stated that:

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

60. Having taken cognizance of the exposition of the law [details in terms of the preceding paragraphs], it is now appropriate to revert back to the subject matter and to discern whether the Applicants herein have indeed demonstrated the likelihood of substantial loss accruing and/or arising, if the orders sought are not granted.

61. To start with, it is important to point out that whoever, desires to procure an order for stay of execution pending appeal, the Applicants herein not excepted, is obligated to implead the requisite conditions envisaged under Order 42 Rule 6[2] of the Civil Procedure Rules, 2010; in the body of the application.

62. Simply put, it was incumbent upon the Applicants herein to implead and highlight the statutory pre-requisite [conditions] in the body of the application. However, there is no gainsaying that the Applicants herein have neither adverted to nor referenced any of the pertinent grounds in the body of the application.

63. Secondly, it is also common ground that once the pre-requisite conditions and/or ingredients envisaged under the law are impleaded and/or highlighted in the body of the application; then the Applicant is called upon to avail and supply the requisite evidence to substantiate the likelihood of substantial loss arising.

64. For good measure, the evidence underpinning the likelihood of substantial loss arising and/or accruing, [if any] is to be contained in the body of the Supporting affidavit.

65. Be that as it may, it is not lost on this court that the application beforehand adverts to and or references a supporting affidavit that is non-existent. Consequently and in this regard, the question as to whether evidence of substantial loss has been tendered or otherwise, is debatable.

66. But even assuming that the affidavits which have been filed by Joseph Kibiru, [which have no nexus with the Application], were to be taken into account in discerning proof of substantial loss; it is worth pointing out that the said affidavits have not highlighted substantial loss as an aspect and/or perspective therein or at all.

67. Insofar as neither the application nor [sic] the affidavits filed, have highlighted substantial loss, it is difficult to find and hold that the Applicants herein have satisfied and/or met the requisite threshold underpinned by existence of substantial loss.

68. Secondly, the Applicants herein have contended that same [Applicants] are the ones who have been in occupation and possession of the suit property and in any event, same [Applicants] had in fact constructed/erected a development thereon.

69. For good measure, the Applicants herein had contended that if the orders of stay of execution are not granted, then the Respondents herein will enter upon and assume possession of the suit property and thereafter destroy the structure [development] which was erected by the Applicants on the suit property.

70. To my mind, the Applicants herein seem to suggest that upon entry onto and taking possession of the suit property by the Respondents, the Respondents herein will damage and/or demolish the Applicants development standing on the suit property.

71. Despite the arguments by and on behalf of the Applicants, it is imperative to underscore that this court [differently constituted] issued an order of temporary injunction vide ELC Civil Appeal No. 2 of 2018, wherein the Applicants herein were prohibited and/or barred from entering upon and/or undertaking any activity on the suit property.

72. Instructively, the orders of temporary injunction, [details in terms of the preceding paragraph] were to subsists until the hearing and determination of Milimani MCELC No 4955 of 2015.

73. My understanding of the import and tenor of the orders of temporary injunction that were issued by the court vide ELC Appeal No. 2 of 2018, is to the effect that the Applicants herein were barred [restrained] from taking possession and/or otherwise remaining in possession of the suit property.

74. On the contrary, the tenor of the orders of temporary injunction issued vide ELC Appeal No. 2 of 2018, meant and indeed denoted that it was the Respondent who was to remain in occupation of the suit property pending the hearing and determination of MCELC No. 4955 of 2015.

75. Arising from the foregoing, if, the Applicants herein contend that same are the ones in possession of the suit property and have by extension undertaken a development thereon, which is now sought to be protected vide an order of stay; then such possession and actions [if any], constitutes contempt of court.

76. Consequently and in the premises, the question that does arise is whether an action by a party, the Applicants not excepted, which has been undertaken in flagrant disregard and in Contempt of lawful court orders, can thus be the basis of attracting [partaking of] discretionary powers of the court.

77. In my humble view, the import and tenor of the orders of temporary injunction which were issued vide ELC Appeal No. 2 of 2018, meant that the Respondent was [is] in possession of the suit property. In this regard, the said position, which is vindicated vide lawful court orders remains the lawful position and/or status.

78. Furthermore, it is worthy to recall that upon the hearing and determination of MCELC No 4955 of 2015, the Learned Chief Magistrate found for and in favor of the Respondent.

79. Pertinently, the decisions that have been in favor of the Respondents have left no breakage in the chain to defeat the Respondents' possession. In this regard, an order of stay cannot thus facilitate the occupation of the suit property by the Applicants herein.

80. Further and at any rate, if the Applicants herein seek to partake of an order of stay merely to protect [sic] the development which was erected on the suit property contrary to lawful court orders, then this court must be reluctant to aid such a party in sustaining what is clearly, an act in breach and violation of the Law/ Lawful Orders of the Court.

81. To this end, it suffices to adopt, reiterate and endorse the holding in the case of *Mbula versus Nzangani (Civil Appeal E150 of 2022*) [2023] KEHC 18249 (KLR) (25 May 2023) (Ruling), where the court held thus;

26.Warsame, J (as he then was) in Samvir Trustee Limited v Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997 where he expressed himself as hereunder:

> " Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But 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 judgement.
>
> It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely

put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention.

It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions."

82. Other than the foregoing, it is also worthy to point out that even if the court were to believe that there was a development erected by the Applicants herein on the suit property, worthy of being preserved, it is not lost on the court that no evidence has been tendered and/or produced to vindicate such an averment.

83. Suffice it to mention that the burden of proving and demonstrating that there was a development of whatsoever nature which was developed on the suit property, fell on the shoulders of the Applicants. [See Sections 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya]. [See also the Holding of the Supreme Court [the Apex Court] in the case of Dr. Samson Gwer and 5 Others versus Kenya Medical Research Institute] [2020] eklr, paragraphs *49*,*50* and *51*, respectively].

84. Sadly, the Applicants herein have neither discharged nor satisfied the requisite standard of proof or at all.

85. In a nutshell, it is my finding and holding that the Applicants herein have neither demonstrated nor established the likelihood of substantial loss accruing and/or arising, if the orders sought are not granted.

Issue Number 3.What reliefs if any, ought to be granted

86. Suffice it to underscore that the Respondent herein currently holds a lawful Judgment and decree in her favor and thus barring any exceptional and peculiar circumstances, same [Respondents] should be allowed to partake of and/or benefit from the fruits of the Judgment.

87. To my mind, the Applicants herein have not placed before me any evidence to underpin an exceptional and peculiar circumstances that should negate [defeat] the rights of the Respondents to enjoy the fruits of the Judgment.

88. Further and in any event, there is no gainsaying that the grant of an order of stay of execution pending appeal or otherwise, constitutes the exercise of Discretion by undertaking a delicate balance between the competing interests of the two [2] parties, namely, the Decree Holder and the Judgment Debtor.

89. However, whilst undertaking the delicate balance in respect of the competing interest, [details in terms of the preceding paragraph] the court must also take into account the conduct of the Parties, Equity and the interests of justice.

90. Nevertheless, having taken into account the ingredients alluded to in the preceding paragraph, I find and hold that the totality of the evidence and circumstances beforehand, do not warrant the grant of the orders sought.

Final Disposition:

91. From the foregoing analysis, it must have become apparent, nay, crystal clear, that the Application dated the 22nd February 2024, is not only premature and misconceived; but same is also devoid [bereft] of merits.

92. Consequently and in the premises, the Application beforehand [dated the 22ND of February 2024], be and is hereby dismissed with costs to the Respondent.

93. Furthermore and to avert any confusion, the interim orders and/or undertaking which was issued on the 14th March 2024; be and is hereby discharged [vacated].

94. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MAY, 2024.

OGUTTU MBOYA,

JUDGE.

In the presence of:

Benson – Court Assistant

Ms. Nyambane h/b for Mr. Ikua for the Applicants

Mr. Nicholas Sumba for the Respondents