



REPUBLIC OF KENYA



Yakub v Wesonga (Appeal E006 of 2024) [2024] KEELC 6811 (KLR) (8 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6811 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
APPEAL E006 OF 2024
LL NAIKUNI, J
OCTOBER 8, 2024

BETWEEN

SIDIQUE HARRON YAKUB APPELLANT

AND

ALEX MAINDI WESONGA RESPONDENT

RULING

I. Introduction

1. This Honorable Court is tasked to determine the Notice of Motion application dated 23rd May, 2024 by Sidiq Harron Yakub, the Appellant herein, under Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1, Section 79G and 3A of the *Civil Procedure Act*, 20(2) and 47 of the Court of Appeal Rules 2010.
2. Upon service of the application to the Respondent, filed their replies accordingly. The honourable Court shall be dealing with it on its merit at a later stage of this Ruling hereof.

II. The Appellant's case

3. The Appellant sought for the following orders:-
 - a. Spent.
 - b. This Honourable Court be pleased to enlarge time for the Applicant to file and serve a Notice of Appeal and Memorandum of Appeal against the Ruling delivered by the Business Premises Rent Tribunal at Mombasa on 5th April 2024 by the Honourable Patrick Kitur in the BPRT/E214/2022.
 - c. This Honourable court be pleased to issue an order of stay of execution of the ruling delivered on 5th April 2024 in BPRT/E214/2022 pending the hearing and determination of this application inter - parties



- d. This Honourable court be pleased to issue an order of stay of execution of the ruling delivered on 5th April 2024 in BPRT/E214/2022 pending the hearing and determination of this appeal.
 - e. The Memorandum of Appeal annexed hereto be deemed as duly filed.
 - f. Costs of this Application be in the cause
4. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 14th Paragraphed Supporting Affidavit of –Siddique Haroon Yaqub, the Applicant herein sworn and dated 23rd May, 2024 with four (4) annexures marked as ‘SHY-1 to SHY-3’. The Applicant averred that:
- a. The Respondent filed a reference before the Business Premises Rent Tribunal in Mombasa BPRT Case No 214 of 2022 against the appellant and further filed a Notice of Motion dated 24th October, 2022 highlighting the reasons why he intended to terminate the tenancy of the Appellant.
 - b. The parties argued their case and a ruling was scheduled to be delivered on 5th April,2024 by Hon. Patrick Kitur who ordered the following:
 - i. The tenant shall clear the arrears of Kshs. 87,494/- being accrued rent arrears for the months of July, August, September and October 2022 in addition to any rent and incidental costs accrued to date no later than 10th May 2024.
 - ii. That in default, the Landlord is at liberty to proceed to levy for distress of the rent.
 - iii. That the Tenant shall additionally hand over vacant possession of the premises to the Landlord on or before 31st May 2024 failure to which the Landlord shall be at liberty to break in and enter with the assistance of OCS Mombasa Central Police Station or any other Police station close by.
 - iv. This Ruling settles the Complaint dated 24th October 2023.
 - c. The Ruling delivered has greatly prejudiced the Appellant who was forced to pay rent for period he has not even been staying in the Respondent’s premises since the Respondent locked out the Appellant and the Appellant’s tools of trade have since been in the possession of the Respondent’s premises.
 - d. Vide the ruling dated 5th April, 2024 the court had ordered the Appellant to hand over vacant possession and pay for the outstanding amount failure to which execution to issue. The Appellant being aggrieved, intended to institute an Appeal.
 - e. There was imminent threat that the Respondent will proceed any time from the time the application was filed with attachment and execution thereby prejudicing the appellant. (Annexed in the affidavit and marked as “SHY – 1” was a copy of the Respondent’s letter)
 - f. The Appellant had delayed in filling the Memorandum of Appeal since he had been following upon the copy of the ruling which had not been availed to them as of the time of filing of the application despite writing several letters to the registry requesting for a copy of the same. Annexed in the affidavit and marked as “SHY – 2” was a copy of the letter requesting for copy of the ruling.)
 - g. The intended appeal was arguable, raised several weighty and substantial issues of law for determination and is of utmost critical importance to the Appellant’s Business interests.



- h. Due to the lapse of statutory period within which to file a memorandum of Appeal, the Applicant requested this court to show mercy and exercise its discretion to grant it an extension of time, and consider the Memorandum of Appeal on record as duly filed. Annexed in the affidavit and marked as “SHY – 3” was a copy of the Memorandum of Appeal).
- i. The Applicant had an arguable appeal and intended to challenge the Ruling of the Business Premises Rent Tribunal inter alia the following grounds:
 - i. That the Learned trial court erred in fact and Law by failing to consider that the respondents' Notice of Motion dated 24th October, 2022 was in direct conflict with the Business Premises Rent Tribunal Act and was tenable in Law.
 - ii. That the Learned trial court erred in Law and fact by relying on an illegal termination of tenancy notice dated 13th July, 2022 issued by the Respondents to the Appellant contrary to the Law.
 - iii. That the Learned trial court erred in Law and fact by failing to observe that the Application dated 24th October, 2022 was filed during the pendency of the tenancy between the Appellant and the Respondent hence not properly before the court.
- j. No prejudice will be suffered by the Respondent if the leave sought for extension of time is granted and that it is equitable, fair and just that this application be allowed.
- k. The application has been brought without unreasonable delay.
- l. It was in the interest of justice for this application to be allowed.
- m. The failure to file the Memorandum of appeal within the statutory timelines is inadvertent.
- n. The court had unfettered discretion to extend time to file the Appeal.
- o. The appeal raised critical issues that cast serious doubt on the infallibility of the decision of the trial court which made fundamental errors.
- p. The Respondents would not be prejudiced in any way if leave to appeal out of time was granted and if any, no prejudice would be so great that would not be adequately be compensated for by an award of costs.
- q. It was in the interest purely of justice for this Application to be allowed.

III. The Responses by the Respondents

- 5. While opposing the application filed by the Applicant, the Respondents brought a 13 Paragraphed Replying Affidavit sworn by Alex Maindi Wesonga and dated 26th July, 2024. He averred as follows:-
 - a. He was the 1st Respondent in this matter with the knowledge of the facts
 - b. attending to this case and had the express permission of the 2nd Respondent. Hence, he was competent and duly authorized to swear this affidavit.
 - c. He had read and understood the Supporting Affidavit of the Applicant/Tenant and where necessary, the contents thereof had been explained to him by his Advocate Mr. R.M. Tindika.
 - d. The Applicant had never paid rent for the demised premise since July, 2021 up to date, which fact was put to and appreciated by the Business Premises Rent Tribunal.



- e. It was on the basis of the Tenant's non-payment of rent that upon hearing both parties, the Honourable Tribunal ordered that the Tenant to clear the outstanding arrears of a sum of Kenya Shillings Eighty-Seven Thousand Four Ninety Four hundred (Kshs. 87,494.00) being the accrued rent arrears for the Months of July, August, September and October, 2022 in addition to any rent and incidental costs to date, not later than 10th May, 2024, failing which the Landlord was at liberty to proceed and levy Distress for Rent.
- f. The Tribunal also ordered the Tenant to hand over vacant possession of the premises to the Landlord on or before the 31st May, 2024, failure to which, the Respondent was to break in and enter with the assistance of the OCS Mombasa Central Police Station or any other Police Station close.
6. Upon delivery of the said Ruling, by letter dated the 15th April, 2024, which was annexed to the Applicant's Affidavit in support of the Application herein, notified the Applicant/Tenant's Advocates of the said Ruling and Orders and calculated the amount due by 31st May, 2024 which was broken down as follows:-
- (a). Accrued rent arrears for the Months of July, August, September and October, 2022 Kshs. 87,494.00
 - (b). Rent for November to December, 2022 Kshs. 43,747.00
 - (c). January to December, 2023 Kshs. 262,482.00
 - (d). January to May, 2024 Kshs. 109,367.50
 - (e). Court filing fees Kshs. 2,000.00
 - (f). Party & party costs Kshs. 40,100.00
 - (g). Attendances before the Tribunal on 13/12/2022;
3/2/2023; 7/3/2023; 12/5/2023; 11/10/2023; 9/11/2023
and 5/2/2023 Kshs. 14,700.00
Total Kshs. 559,890.50
7. The Tenant/Applicant had never complied with any of the Orders of the Tribunal. He had never paid a single cent to date nor granted the Respondent vacant possession of the premises, despite the fact that the Orders of the Tribunal were made on the 6th April, 2024.
8. It was absolutely not true that the Respondent closed the premises demised to the Applicant. To the contrary, he closed the premises and left all his furniture and fittings therein thus denying the Respondent both access to and income therefrom.
9. It was very unfortunate that the Applicant was misusing judicial process to both deny the Respondent his property and income from the same and thus he urged this Honourable Court to put this to a stop.
10. He was aware that an Appeal like the one purported by the Appellant to file herein ought to have been filed within Thirty (30) Days from the date of the Decision. The Applicant/Tenant had not given any reasons why there was no compliance with the mandatory requirements of the law.



11. Further to the above contents of this Application herein was dated the 23rd May, 2024, but the Applicant only filed the same in Court on the 6th June, 2024, FOURTEEN (14) DAYS thereafter. This clearly showed that the Applicant had not come before this Honourable Court with clean hands. Thus his Application herein for extension of time within which he ought to have filed the Appeal should outrightly be rejected.
12. Consequently, he prayed that this application dated the 23rd May, 2024 to be dismissed with costs to the Respondents.
13. In the alternative, if this Honourable Court, for any reason, was persuaded that the Application herein could be allowed, then let the same be on strict condition that the Applicant does deposit the entire sum of Kshs. 559,890.50 either in Court or in a Bank Account in the joint names of the Advocates herein and within a period of FOURTEEN (14) DAYS, and failure to comply therewith, the stay orders stand vacated.

IV. Submissions

14. On 10th July, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 23rd May, 2024 be disposed of by way of written submissions and all the parties complied. Pursuant to that a ruling date was reserved on 7th October, 2024, 2024 by Court accordingly.

A. The Written Submissions by the Appellant

15. The Learned Counsel for the the Appellant herein, the Law firm of Messrs. Wangila & Wangila Advocates filed their written submissions dated 2nd October, 2024. M/s. Saif Advocate holding brief for Mr. Wangila Advocate commenced her submission by provision Court with a brief back – ground to the matter. She stated that the Appellant filed an application dated 23rd May, 2024 which was certified urgent on 6th June, 2024. The orders were placed on the E-filing Case Tracking system as follows:-
 - a) That the Notice of Motion application dated 23rd May, 2024 be and is hereby certified as urgent.
 - b) That the Appellant/Applicant is directed to serve the Respondent with the said application and all the pleadings and file proof of service under the provision of Order 5 Rule 15 of the Civil Procedure Rules, 2010.
 - c) That upon effecting service, the Respondent be granted 14 days leave to file and serve their Replies accordingly.
 - d) That there shall be "Inter Parte" hearing on 10th July, 2024 before ELC No.3
 - e) That an order of stay of execution of the ruling delivered on 5th April, 2024 in BPRT E214/2022 pending the hearing and determination of this appeal subject for its review on 10th July, 2024 depending on the emerging circumstances then.
16. The Learned Counsel informed Court that the said orders were not accessible in the E-filing Case Tracking System (court decisions) as they were only placed on the E-filing portal on the case activities sector. That the Appellant/Applicant through its advocates on record herein tried requesting for the said orders that were placed on the E-filing portal through a letter dated 20th June, 2024 but there was no response to the same. The Appellant/Applicant through its advocates on record further emailed the Environment and Land Court Registry requesting and following up on the said orders but there was



- still no response to the same. The Appellant's advocates further wrote a letter to the Deputy Registrar, Environment and Land Court dated 8th July, 2024 explaining that we had not yet received the court order in respect to their application that was brought under certificate of urgency on 6th June, 2024 and that their frequent and several requests have not yielded any results.
17. After several attempts through letters and emails requesting to have the orders extracted, they were able to have the orders signed and stamped by the Deputy Registrar on 8th July, 2024. They then immediately effected service upon the Respondent with a copy of the Application dated 23rd May, 2024 and the Order dated 8th July, 2024. Upon serving the Respondents with Application dated 23rd May, 2024 and the Order dated 8th July, 2024, the Respondent was required to reply with 14 days. The Respondent served us with their Grounds of Opposition via email without an attachment which necessitated us to reply to their email and request for the document of the Grounds of Opposition, however they never responded and they had to retrieve the same through the E-filing portal.
 18. Further, the Learned Counsel held that this Application arose from the Ruling of the Business Premises Tribunal delivered by the Honorable Patrick Kitur on the 5th April, 2024 in B.P.R.T E No. 214 of 2022 where the Respondent filed a reference before the Business Premises Rent Tribunal in Mombasa B.P.R.T Case number E No. 214 of 2022 against the Appellant and further filed a Notice of Motion application dated 24th October, 2022 highlighting the reasons why he intended to terminate the tenancy of the Appellant. The ruling delivered in B.P.R.T ENo. 214 of 2022 – “Alex Maindi Wesonga – Versus - Sidique Haroon Yakub” greatly prejudiced the Appellant who was forced to pay rent for a period he had not been staying in the Respondent's premises since the Respondent locked out the Appellant and the Appellant's tools of trade had since been in the possession of the Respondent's premises. In the Ruling delivered by the Honorable Patrick Kitur on the 5th April, 2024 in “Civil case B.P.R.T E No. 214 of 2022-Alex Maindi Wesonga – Versus - Sidique Haroon Yakub”, the court ordered the Appellant to hand over vacant possession and pay for the outstanding amount failure to which execution to issue.
 19. The Appellant had delayed in filling the Memorandum of Appeal since he had been following upon the copy of the Ruling delivered by the Honorable Patrick Kitur on the 5th April, 2024 in the “B.P.R.T E214 of 2022 - Alex Maindi Wesonga (Supra). She informed Court that this was an application for enlargement of time to file an appeal and for stay pending appeal thereafter. The Learned Counsel stated that the Appellant framed three (3) issues for the court determination. Firstly, whether the Appellant/Applicant should be granted leave for enlargement to file the Appeal out time. The Learned Counsel averred that the legal provision on enlargement of time was mainly based on the following provisions with clear time bound framework. The provision of Section 79G of the Civil Procedure Act Cap.21 states that:

“ Every Appeal from the sub-ordinate court to the High court shall be filed within a period of thirty (30) days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for preparation and delivery to the Appellant of a copy of the decree or order.”
 20. Under the provision of Order 50 Rule 6 of the Civil Procedure Rule a party was accorded time to seek leave to enlarge this time but with sufficient reasons. There were many decisions citing out the fundamental requirements for the enlargement of time. In the case:- "Attorney General Versus-Sylvanus Otieno Odiaga (2017) eKLR Otieno Vitalis Omondi Othuon-Versus-Nairobi Conservation & Pipeline Corporation; Nicholas Kiptoo Arap Salat Versus- IEBC & 7 Others, SC Appl. No 15 of 2014.



21. The Appellant was no longer required to present sufficient reason for the extension of time, but the extension of time should be liberally granted. In general terms, the court normally took into account the following aspects:-
- a) The length of the delay.
 - b) The reason for the delay.
 - c) The chances of the appeal succeeding if the Application was granted.
 - d) The degree of prejudice to the Appellant if the application was not granted.
22. The above-mentioned terms were clearly mentioned in the case of “Leo Sila Mutiso – Versus - Rose Hellen Wangeri Mwangi Civil Appeal 255/1997”, the court in considering the exercise of discretion to extend time held as follows:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay. Secondly, the reason for the delay; Thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent if the application is granted.”

Further, in the case of: “Jiwa t/a Jiwa Properties & another – Versus - Jiwa & 2 others [Environment & Land Miscellaneous] Application E038 of 2023 [2024] KEELC 861 (KLR) the Honorable Judge cited the principles laid down by the Supreme Court in “Nicholas Kiptoo Korir Arap Salat - Versus- IEBC & 7Others [2014] eKLR” which stated as follows:-

“(T)he underlying principles a court should consider in exercise of such discretion include:1.Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;2.A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;3.Whether the court should exercise the discretion to extend time, is a consideration to be made a case to case basis;4.Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;5.whether there will be any prejudice suffered by the Respondent if the extension is granted;6.Whether the application has been brought without undue delay.7.....”

23. From the time that the Ruling delivered by Honorable Patrick Kitur on the 5th April, 2024 in the case of “B.P.R.T E214 of 2022 - Alex Maindi Wesonga (Supra)” and the time that the Application dated 23rd May, 2024 was filed within the timeline. The reason for the delay has been clearly stated in the Appellant’s Application dated 23rd May, 2024 and Replying Affidavit dated 29th July, 2024 with annexures attached thereto to prove its case. The delay is unavoidable given that the several requests made to the B.P.R.T Registry requesting for a copy of the Ruling have fallen into deaf ears prompting the Appellant to request for an extension of time to file his Appeal.
24. The chances of the Appeal succeeding was high given that the appeal was arguable, raises several weighty and substantial issues of Law for determination and is of utmost critical importance to the Appellant’s business interests.
25. Secondly, whether the Applicant was entitled to orders for stay. The Appellant submitted that he had that they were satisfied all the pre requisite conditions to enable this Honourable Court grant him stay



of execution of the orders issued by Hon. Patrick Kitur. The Supreme Court in case of: “Gitirau Peter Munya – Versus - Dickson Mwenda Kithinji and 2 Other (2014)eKLR held thus:-

“.....The concept of“ stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.”

26. Further, the court in the case of: “Intel corporation v Via Technologies Inc. 2002 3 HKC 650” stated that:-

“in stay of proceedings the court must consider what would serve the ends of justice between the parties to the litigation and the administration of justice generally a stay should cause an injustice to the Plaintiff. The Applicant for stay must satisfy the court that continuing the proceedings would be unjust to him. Where the plaintiff continues proceedings as of right he should not be deprived of the right to continue those proceedings in the absence of very good reasons. In considering the interest of justice, plainly one must consider the claims of both parties (See Bertel Limited – Versus - Balt Brassiere Co. Limited 1970 RPC 469).”

The Court in “Exon Investments Limited – Versus - Consolidated Bank Limited & another [2020] eKLR” faced with the same issue of determination gave stay orders and stated as follows:-

“To the contrary, if the creditor is not restrained and the assets are sold, as long as they have an economic value, the borrower can adequately be compensated in monetary terms or damages. Further, it suffices to note that, an injunction is an equitable remedy granted in cases where the grant of damages is not adequate. Further, an analysis of the documents relied on by both parties reveal that the parties indeed entered into credit Agreements and loans advanced. The Plaintiff and the Defendant have both produced statements and/or evidence of repayment of the can as well as statements reflecting the arrears which either side think is legally due. In that use, it is in the interest of justice to hear and determine the main matter on a priority basis. I further note that, the Respondent is apprehensive that any further delay in hearing the matter will render the subject matter, being, the motor vehicles out valued by the accruing interest.”

27. The ruling delivered ordered the Applicant to hand over vacant possession and pay for outstanding amount. The appellant is aggrieved by the orders given that he had to pay rent for period he had not even been staying in the Respondent’s premises since the Respondent had locked out the Appellant and the Appellant’s tools of trade had since been locked in the Respondent’s premises. It was accurate to state that the Appellant would be prejudiced if the application was not granted.

28. The Appellant places reliance on the case of “Caltex Oil (Kenya) Limited – Versus - Rono Limited (2016) eKLR” on the issue that courts had no jurisdiction to grant a prayer that was not pleaded, the Court of Appeal held as follows:-

“In the Plaint, we have noted that the Respondent never claimed to have suffered any damages as a result of the appellant’s breach. In the circumstances, having not made a claim for general damages, there cannot be a basis for awarding the same. The court has no inherent jurisdiction to award damages whether separate or in addition to specific performance where no such plea was made in its pleadings. Damages must be pleaded so that the other party can reply through the defence. That is not what happened in this matter. It was not right for the trial court to purport to engage in an exercise in futility. No matter how many times it is canvassed before court, the respondent is not entitled to damages and the court has no



basis to grant the same. To find otherwise would amount to the court exercising a power it does not have and rendering decisions without any parameters or borders which would lead or a total disorder and abuse of the judicial process."

29. The Learned Counsel asserted that it was very clear from the pleadings and the ruling of the tribunal. Further that court granted orders that were not sought by the applicant in his application dated 24th October, 2022. From the analysis given herein, it was clear that the Appellant under the provision of Order 50 Rule 6 of the Civil Procedure Rule, the Appellant could be accorded time to seek leave to enlarge time but with sufficient reasons as slated in his application dated 23rd May, 2024 and Replying Affidavit dated 29th July, 2024.
30. In conclusion, the Learned Counsel submitted that the ruling delivered had greatly prejudiced the Appellant who was forced to pay for rent for a period he had not even been staying in the Respondent's premises since the Respondent locked out the Appellant and the Appellant's tools of trade have since in the possession of the Respondent's premises. The Appellant has delayed in filing the Memorandum of Appeal since he had been following up on the copy of the ruling which had not been availed to date despite writing several letters to the registry requesting for a copy of the same. It would be convenient that the Memorandum of Appeal annexed to the application dated 23rd May, 2024 be deemed as duly filed, the execution of the ruling delivered on 5th April, 2024 in "B.P.R.T Case Number E0 No. 214 of 2022 - Alex Maindi Wesonga (Supra) be stayed pending the hearing and determination of the Appeal and the Application dated 23rd May, 2024 be found to have merit.

B. The Written Submissions by the Respondents

31. While opposing the application filed by the Appellant, the Learned Counsel for the Respondent the Law firm of Messrs. Tindika & Company Advocates filed their written submissions dated 26th September, 2024. Mr. Tindika Advocate commenced by stating that the said application which was brought under the provisions of Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 79G and 3A of the *Civil Procedure Act*, Rule 20(2) and 47 of the Court of Appeal Rules, 2010 sought for the above stated orders. Subsequently, upon being served, the Respondent opposed the said application and filed Grounds of Opposition dated the 9th July, 2024 as well as the Replying Affidavit.
32. According to the Counsel, the gist of the Applicant's Application herein was that the Respondent had filed a Reference before the Business Premises Tribunal, Mombasa in BPRT Case No. E214 of 222 against the Appellant and Notice of Motion dated the 24th October, 2023 seeking to terminate the Tenancy between the parties herein. Having heard both parties through Written Submissions, the Honourable Patrick Kitur, by Ruling delivered on the 5th April, 2024, made the following Orders:-
 - (a). The Tenant shall clear the arrears of Kshs. 87,494.00 being the accrued rent arrears for the months of July, August, September and October, 2022 in addition to any rent and incidental costs accrued to date not later than 10th May, 2024.
 - (b). In default, the Landlord is at liberty to levy distress of the rent.
 - (c). The Tenant shall additionally hand over vacant possession of the premises to the Landlord on or before 31st May, 2024 failure the Landlord shall be at liberty to break in and enter with the assistance of OCS Mombasa Central Police Station or any other Police Station close by.
 - (d). This Ruling settles the Complaint dated 24th October, 2023.



33. The Applicant, in his Supporting Affidavit, annexed letter dated the 15th April, 2024, which was received by his Advocate on 19th April, 2024 clearly gave a breakdown of the amount payable by the Applicant, being a total a sum of Kenya Shillings Five Fifty-Nine Thousand Eight Ninety Hundred (Kshs. 559,890.50/=), demanded for full of the said amount within the time ordered as well as vacant possession by 31st May, 2024, all of which were not complied with. Though the Applicant alleges that several letters were written to the BPRT for a copy of the Ruling, it is clear that only one letter was written 5th May, 2024, a few days before the due date for the payment and the Order was only paid for on the 9th May, 2024, which was the day the Applicant was required to pay the amount of a sum of Kenya Shillings Five Fifty Nine Thousand Eight Ninety Hundred (Kshs. 559,890.50/=). Thus, it was utterly deceptive and misleading for the Respondent's Advocates to allege that they had written several letters, which they have not demonstrated leaving only one conclusion, no such letters were written.
34. On his part, the Respondent averred that the Applicant was misusing this Honourable Court to advance his malicious desire to frustrate him in that though the Application herein was dated the 23rd May, 2024, it was only placed before this Honourable Court on the 10th June, 2024, and even after the Honourable Court granted the Orders on the 10th June, 2024, the Appellant/Applicant did not serve the Respondent and/or his Advocates with the said Application and Order until the 9th July, 2024, on the eve of the said hearing of the said Application and Thirty (30) Days after the granting thereof.
35. Secondly, that Applicant had not paid the rent for the demised premises since July, 2022 up to date; he has thus deliberately kept the Respondent from his property and frustrated him from enjoying the income therefrom and thus if any unfounded stay is to issue, then the same ought to be on condition that the Applicant deposits the sum of a sum of Kenya Shillings Five Fifty Nine Thousand Eight Ninety Hundred (Kshs. 559,890.50/=) in Court within SEVEN (7) DAYS, plus accrued rent from June, 2024 at a sum of Kenya Shillings Twenty One Thousand Eight Seventy Three Thousand and Fifty Cents (Kshs. 21,873.50/=) per month.
36. Thirdly, that the Applicant locked the demised premises, and thus as a further condition for the grand of Stay of Execution, he should be ordered to hand over vacant possession thereof or in the alternative pay rent as and when it falls due failing which the Respondent be at liberty to take vacant possession thereof. The Applicant was all along aware of the details of the Ruling delivered by the Honourable Tribunal and no explanation has been offered why the purported Appeal was not filed within the mandatory period.
37. The Learned Counsel averred that there was no doubt that the granting of an Order of Stay pending Appeal is the discretion of this Honourable Court. However, there are major considerations/ conditions which the Applicant must comply with in order for the orders sought to be granted. These conditions were clearly outlined under Order 42 Rule 6 of the Civil Procedure Rules, 2010.
38. From the foregoing, four major pre-requisites could be deduced as being:-
- (a). The Applicant had filed an appeal.
 - (b). The court was satisfied that substantial loss may result to the Applicant unless the order is made; and
 - (c). That the application had been made without unreasonable delay; and
 - (d). 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.



39. Thus, while applying this test, the Learned Counsel submitted as follows. Firstly, whether the Applicant had filed an Appeal. According to the Counsel. The provision of Section 79G of the Civil Procedure Act, which made provisions with regard to filing of an Appeal from the decision of a Sub-ordinate Court, including Tribunal(s) states:-

“79G. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

40. He held that the Applicant did not file any Appeal within the mandatory period of Thirty (30) Days nor had any been filed to date. Instead, he had filed an Application for extension of time within which he ought to have filed the same. No plausible reasons whatsoever had been advanced why the purported Appeal was not filed within the mandatory period, following the Ruling delivered on the 5th April, 2023. Hence, the Learned Counsel averred that the Applicant had not fulfilled this mandatory requirement.

41. Secondly, whether substantial loss would occur to the Applicant if the Order for stay of execution was not made. Substantial loss was the paramount basis upon which a grant of Stay of Execution was usually premised and this had been restated in numerous cases as the deciding factor in Applications for Stay of Execution. To buttress on this point, the Counsel cited Justice Gikonyo, F. in the case of “Antoine Ndiaye – Versus - African Virtual University [2015] eKLR” while describing the essence of substantial loss quoted the work of Ogola J. in “Tropical Commodity Suppliers Limited” that:-

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

42. The Learned Counsel contended that the record shows that the Applicant had never paid rent for the premises which he has all along been in possession of, and it was for the said reason that the Learned Counsel sought an order of stay of execution from July, 2022 until 31st May, 2024, by which date he was required to hand over vacant possession of the demised premises. This was a litigant who was not paying for the premises he was occupying but at the same time retaining the same. In the Application before the Court, no loss had been alluded to nor proved. This issue was very foundational to granting an order of stay of execution, without which this the Orders sought could not issue. He relied on the case of:- “Chege – Versus - Gachora (Civil Appeal 265 of 2023) [2024] KEHC 1994(KLR)

16. Substantial loss was clearly explained in the case of James Wangalwa & Another – Versus - Agnes Naliaka Cheseto [2012] eKLR:-

“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.

17. The applicant contends that he stands to suffer irreparably if the respondent levies execution against him. The respondent argues that the applicant has not demonstrated the substantial loss he stands to suffer. On perusal of the applicant's affidavit, I have noted that the applicant has not demonstrated how he stands to suffer substantial loss if the orders sought are not granted. The Applicant merely states that he is exposed to execution of the decree unless a stay is granted and further that the intended appeal shall be rendered nugatory if stay is not granted. Only in his submissions does the Applicant state that he stands to suffer irreparable damage as the Respondent will not be financially able to repay back the decretal sum.
43. The Counsel opined that the Applicant never demonstrated that he would suffer and loss, more so substantial one. Balanced with the Respondent's position, it was the latter who had and continues to suffer loss and thus granting the orders in the Application herein would be grossly detrimental to the Respondent.
44. Thirdly, whether this Application had been brought without undue delay. The Learned Counsel held that despite of the Ruling which was the subject of the Application herein having been delivered on the 5th April, 2024, the application was filed after the 4th June, 2024. This was long after the period within which even the Appeal ought to have been filed. Thus, he submitted that there was gross inordinate delay in filing the Application herein, which should not be condoned by the Honourable Court.
45. Finally, whether the Applicant had provided due security. The Learned Counsel averred that an Applicant for orders of stay was also required to place a security equivalent to the amount in decree as may ultimately be binding on him. It was now evident, the Applicant had not provided any security for the issuance of the orders of stay of execution.
46. In the long run, the Counsel held that having failed to meet all the mandatory conditions imposed by the law, and indeed none of the said conditions, the Application herein ought to be dismissed with costs to the Respondent. However, in the event this Honourable Court was convinced otherwise, he submitted that the Applicant must be ordered to deposit a sum of Kenya Shillings Five Fifty Nine Thousand Eight Ninety Hundred (Kshs. 559,890.50/=) plus the accrued rent from the month of June to September being a Sum of Kenya Shillings Eighty Seven Thousand Four Ninety Four Hundred (Kshs. 87,494.00) totaling to a sum of Kenya Shillings Six Fourty Seven Thousand Three Eighty Four Hundred and Fifty cents (Kshs.647,384.50/=) either in Court or in an interest earning Account in the names of the Advocates for the parties herein. He should also be ordered to hand vacant possession of the premises herein to the Respondent. Lastly, costs of the Application herein should be awarded to the Respondent.

V. Analysis & Determination.

47. I have carefully read and considered the pleadings herein by the Plaintiff/Applicant, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
48. 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 23rd May, 2024 seeking to stay execution of the Ruling delivered by the Business Premises Rent Tribunal at Mombasa on 5th April 2024 by the Honourable Patrick Kitur in the BPRT/E214/2022 pending the hearing and determination of the Appeal is merited?



- b. Whether leave can be granted to appeal out of time.
- c. Who will bear the Costs of Notice of Motion application dated 23rd May, 2024.

ISSUE No. a). Whether the Notice of Motion application dated 23rd May, 2024 seeking to stay execution of the Ruling delivered by the Business Premises Rent Tribunal at Mombasa on 5th April 2024 by the Honourable Patrick Kitur in the BPRT/E214/2022 pending the hearing and determination of the Appeal is merited

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

“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.

47. Stay of execution pending appeal is a discretionary power bestowed upon this court by the law. 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.”
47. 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*, 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* or in the interpretation of any of its provisions.
48. The provision of 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 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.”
49. 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.
50. 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
51. 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”.
47. 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.



48. 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.”

47. 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.”

47. 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)”}.

48. 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...”

47. While applying these principles to the instant case, the Applicant herein filed an application dated 23rd May, 2024 seeking stay of execution of the Ruling delivered by the Business Premises Rent Tribunal at Mombasa on 5th April 2024 by the Honourable Patrick Kitur in the BPRT/E214/2022 pending the hearing and determination of the present appeal. Annexed is a copy of memorandum of appeal dated 23rd May, 2024 marked as “SHY-3”. The 30 days period granted by the trial court on 5th April, 2024 during the delivery of the aforesaid ruling is set to lapse on 5th May, 2024. Unless this application seeking stay of execution pending appeal is heard urgently and stay granted, the appeal herein shall be rendered nugatory thereby occasioning substantial loss and prejudice to the Appellant.

48. He is apprehensive that unless this court urgently gives an order of stay of execution, the Respondent will proceed and execute the ruling and he will be evicted from the suit property anytime thereby occasioning substantial loss. The Intended execution exercise would render the appeal filed herein totally nugatory and he would thereby suffer irreparable and substantial losses as the Appellant’s tools of trade have since been in the possession of the Respondent’s premises.



49. The Respondent filed a reference before the Business Premises Rent Tribunal in Mombasa BPRT Case No 214 of 2022 against the appellant and further filed a Notice of Motion dated 24th October, 2022 highlighting the reasons why he intended to terminate the tenancy of the Appellant. Vide the ruling dated 5th April, 2024 the court had ordered the Appellant to hand over vacant possession and pay for the outstanding amount failure to which execution to issue. The Appellant being aggrieved, intended to institute an Appeal.
50. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under Order 42 Rule 6. 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. I find the reasons advanced by the Applicant to be sufficient for the grant of stay of execution pending appeal.
51. Regarding the pre-requisite in Order 42 Rule 6, that is substantial loss occurring to the Applicant, the court has already referred the consideration to be made in the case of “Kenya Shell Limited –Versus - Benjamin Karuga Kigibu & Ruth Wairimu (Supra)”. I find that the Applicant has proved that he will suffer substantially if the orders for stay of the execution are not granted as prayed.
52. The second issue to determine is where the application for stay of execution was made without inordinate delay. From the record, the ruling being appealed against was delivered on 5th April, 2024 and the application herein was filed on 23rd May, 2024, the draft memorandum of appeal on 23rd May, 2024. This application was filed after about one month and 18 days after the ruling. In this Honourable Court’s opinion, the application was made timeously without any delay. The application was therefore made and filed expeditiously and without undue delay.
53. On the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules 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. Has made no provisions for security in his application.
54. However, this court can make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.
55. In 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.”
47. 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. This Court observes that the appeal is based on the issue of non-compliance of the Court orders of vacating the suit premises, which is agree with the Appellant/ Applicant does not call for the security of cost.

48. The Court observed in “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 degree in order to enjoy the fruits of his judgment in case the appeal fails.

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

47. Be that as it may, I find it reasonable that the Appellant while being granted the orders as sought it be on fulfilment of a Pre – Condition that he deposits the decretal sum into an interest earning joint bank account held by the Advocates of both the Appellant and Respondent awaiting the outcome of the impugned appeal.
48. By and large, and as already demonstrated in “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 Applicant herein, though they brought this Application without undue delay and adequately demonstrated the substantial loss that they would suffer as stipulated by sub-rule 2b.
49. The end result is that I grant the order for stay of execution of the ruling delivered by Hon. Patrick Kitur on 5th April, 2024.

ISSUE No. b). Whether leave can be granted to appeal out of time

47. Under this sub title, the Court shall determine the merits of the application with regards to extension to file an appeal out of time. Section 79G of the *Civil Procedure Act* provides that appeals originating from the subordinate court should be filed within thirty (30) days from the date of the decree or order appealed against. Section 95 of the said Act gives the court discretion to extend the time as it deems fit even if the time originally fixed has expired.



48. The provision of Section 79G of the *Civil Procedure Act* provides as follows:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

47. The provision of Section 95 of the *Civil Procedure Act*, Cap. 21 provides thus: -

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

47. The principles to be considered in exercising the court’s discretion on whether or not to enlarge time to file appeal were set out in the case of “Leo Sila Mutiso – Versus - Rose Hellen Wangeri Mwangi Civil Appeal 255/ 1997”, the court, in considering the exercise of discretion to extend time, held as follows: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay. Secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent if the application is granted.”

47. These principles were also reiterated in “First American Bank of Kenya Limited – Versus - Gulab P. Shah & Others HCC 2255/2000 [2002] IEA 65” as follows: -

- 1) The explanation if any, for the delay;
- 2) The merits of the contemplated action, whether the appeal is arguable;
- 3) Whether or not the Respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.

47. This Court will therefore proceed to address each limb of the principles outlined in the cases above and establish whether the Applicant has satisfactorily met each of the said principles. On the length of the delay and the explanation if any. The Appellant/ Applicant filed this present application on 23rd May, 2024 after the trial court delivered its ruling of the Notice of Motion application dated 24th October, 2022 on 5th April, 2024. The Applicant gave his reason for the delay of 18 days stating that he had been following upon the copy of the ruling which had not been availed to them as of the time of filing of the application despite writing several letters to the registry requesting for a copy of the same. Annexed in the affidavit and marked SHY-2 a copy of the letter requesting for copy of the ruling.)

48. Even though there is no maximum or minimum period of delay set by the law, anyone seeking this relief must satisfactorily explain the cause of the delay. From the delivery of the ruling to the filing of the instant Application is about 18 days. This in my view does not amount to inordinate delay further, the explanation given by the Applicant is sufficient and I therefore find that the Application was filed without undue delay.



49. On the issue of the chances of the success of the intended appeal. I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case at this stage. Having that in mind, I wish to state that from the Draft Memorandum of Appeal, one of the issues the Applicant intends to raise is on the utmost critical importance to the Appellant's Business interests.
50. The third limb is whether the Respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the Applicant. The answer is in the affirmative, I find that no prejudice will be caused to the Respondent that cannot be compensated by an award of costs if the Application is allowed.
51. The principles laid down by the Supreme Court in "Nicholas Kiptoo Korir Arap Salat – Versus - IEBC & 7 Others [2014] eKLR" are pertinent in this case; namely:
- “(T)he underlying principles a court should consider in exercise of such discretion include:
1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 5. whether there will be any prejudice suffered by the Respondent if the extension is granted;
 6. Whether the application has been brought without undue delay.
 7.”
47. Guided by the above principles, the upshot of the foregoing is that the orders sought by the Applicant; for leave to file the Appeal out of time is merited and for that reason Prayer no. (b) in the Notice of Motion dated 23rd May, 2024 is allowed.

ISSUE No. c). Who will bear the Costs of Notice of Motion application dated 23rd May, 2024.

47. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court "Jasbir Rai Singh – Versus - Tarchalan Singh" eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).
48. 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.
49. In this case, this Honourable Court has reserved its discretion in not awarding costs.



V. Conclusion & Disposition

47. 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 omnibus application, this court arrives at the following decision and makes the orders below:-

- a. That the Notice of Motion application dated 23rd May, 2024 be and is hereby found to have merit hence hereby allowed in its entirety upon fulfillment of the Pre – Conditions set out herein.
- b. That an order is hereby made that the Appellant to deposit the total decretal sum being a sum of Kenya Shillings Six Forty Seven Thousand Three Eighty Four Hundred and fifty Cents (Kshs. 647, 384.50/=) in an Interest earning Escrow bank account at a reputable Commercial Institution to be held in the names of the Law Firms of Messrs. Tindika & Company Advocates and Wangila & Wangila Company Advocates WITHIN THE NEXT THIRTY (30) DAYS from the date of the delivery of this Ruling.
- c. That the Memorandum of Appeal herein attached dated 23rd May, 2024 be and is herein admitted after payment of the requisite filing fees and the appeal be filed within (15) fifteen days from the date of this ruling.
- d. That this Honourable Court do hereby issue an order to stay the execution of the ruling delivered on 5th April 2024 in BPRT/E214/2022 pending the hearing and determination of this appeal herein.
- e. That the Applicant to file and serve a Record of Appeal within 45 days from the date of this Ruling and there be a mention of the matter on 11th December, 2024 for taking direction on the admission and disposal of the appeal under the provision of Section 79B of the Civil Procedure Act, Cap. 21; Order 42 Rules 11, 13 and 16 of the Civil Procedure Rules, 2010.
- f. That subsequently, all facts remaining constant reserves to deliver the Judgement on 19th February, 2025.
- g. That failure to comply with any these Pre – Conditions set out herein the Notice of Motion application dated 23rd may, 2024 shall automatically stand dismissed without further recourse to this Honourable Court herein.
- h. That each party shall their own costs.

It is so ordered accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, MEANS SIGNED AND DATED AT MOMBASA THIS 8TH DAY OF OCTOBER 2024.

.....

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

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.



- b. M/s. Saif Advocate holding brief for Mr. Wangila Advocate for the Appellant/Applicant.
- c. Mr. Tindika Advocate for the Respondent.

