Bayusuf v Mbesa Investments Limited & another (Environment and Land Appeal 17 of 2022) [2024] KEELC 13615 (KLR) (4 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13615 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 17 OF 2022

LL NAIKUNI, J

DECEMBER 4, 2024

BETWEEN

FAHAD IQBAL AHMED BAYUSUF ..... APPELLANT

AND

MBESA INVESTMENTS LIMITED ..... 1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2ND RESPONDENT

(Being an Appeal from the decision and Judgment of the National Environment Tribunal (NET) (Waithaka Ngaruya, Ag. Chairperson Bahati Mwamuye and Kariuki Muigua, Members) delivered on 21st April, 2022 in National Environment Tribunal Appeal No. 30 of 2020)

RULING

I. Introduction

1. This Honourable Court is tasked on making a determination of the Notice of Motion application dated 12th July, 2022. The Court was moved under Certificate of urgency by Fahad Iqbal Ahmed Bayusuf, the Appellant/Applicant herein. The application was brought under the provisions of Section 130 (2) of the Environment Management & Co - ordination Act, Cap. 387, the Laws of Kenya (Hereinafter referred to as "EMCA").

2. Upon service of the said application, the 1st Respondent filed their responses through a Replying Affidavit sworn on 26th July, 2022 accordingly. Thus, the Honourable Court will be dealing with it on its own merit thereof.

II. The Appellant's case

3. The Appellant/Applicant sought for the following orders:-

a. Spent.

b. Spent.

c. The Orders of the National Environment Tribunal (NET) in NET 30 of 2020 made on the 21st day of April 2022 be stayed and remain unenforced until the Appeal lodged herein being civil appeal number 17 of 2022 is heard and determined, as required by Section 130 (2) of the Environment Management & Co - ordination Act, cap 387 Laws of Kenya.

d. The costs of this application be provided for.

4. The application by is premised on the grounds, testimonial facts and averments made out under the 8 Paragraphed annexed affidavit of FAHAD IQBAL AHMED BAYUSUF the Appellant/Applicant herein. The Deponent averred that:

a. The 1st Respondent, Mbesa Investments Limited, filed in the National Environment Tribunal (Hereinafter referred to as "The NET") Tribunal Appeal No. 30 of 2020, on the 30th July 2020. Exhibited at pages 1 to 12 copies of the said case for ease of reference.

b. On the 21st day of April 2022, the Tribunal Appeal rendered its decision. This was the decision referred to at paragraph *2* of this Notice of Motion. Exhibited at paragraphs *13* to *31* copies of the said Judgment for its full terms and effect.

c. At the conclusion of that Judgment, the Honourable members of the Tribunal drew the attention of the Appellant/Applicant to the provisions of Section 130 of the EMCA, Cap. 387.

d. A perusal of the provisions of Section 130 (1) & (2) which the Tribunal drew the attention of the Appellant/Applicant.

e. The Appellant/Applicant timeously commenced this appeal on the 6th day of May 2022, which was within the thirty (30) days period decreed by the Act.

f. Notwithstanding the commencement and service of the appeal upon the 1st Respondent, it had continued with construction works on the subject properties, in complete and total violation of the provisions of law cited at paragraph *4* above.

g. In the circumstances, the bringing of this application had been rendered a necessity.

III. The Response by the 1st Respondent

5. The 1st Respondent responded to the Notice of Motion application dated 12th July, 2022 through a 7 Paragraphed Replying Affidavit sworn by HASSAN SHARRIFE ALWY, a director Mbesa Investment Limited, the 1st Respondent herein on the same day as the application. He averred that:-

a. The subject matters before the tribunal forming the subject of this appeal were the letters by the 2nd Respondent addressed to the 1st Respondent dated 24th July, 2021 and 28th July, 2010 that sought:

b. That the order of 24th July, 2020 directing projects works to stop immediately was hereby underscored and reiterated.

c. That one immediately commence the process of submitting a fresh Environmental Impact Assessment Study Report NOTING to engage and obtain the views of all stakeholders including the immediate neighbors. This should be submitted within the next 45 days.

d. That in keeping with the provision of Section 64 (3) of Environmental Management and Coordination Act (EMCA), show cause within the next 14 days, why EIA License Number NEMA /EIA/PSL/9181 dated 14th April, 2020 should not be cancelled or revoked by the Authority.

e. The Judgment subject of this appeal simply set aside the 2nd Respondent's letters of 24th July, 2020 and 28th July, 2020. There was therefore no positive order to be enforced by the Tribunal or this Honourable Court.

f. The 1st Respondent's Environment Impact Assessment (EIA) License Number NEMA/EIA/TSL/918I issued on 14th April, 2020 and a variation granted on 14th May, 2020 remained valid and had never been challenged. The statutory period challenging the license lapsed 60 days after issuance.

IV. Submissions

6. On 29th July, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 12th July, 2024 be disposed of by way of written submissions and all the parties complied. The Honourable Court on 17th October, 2024 proceeded to reserve a ruling date on 2nd December, 2024 on its own merit accordingly.

A. The Written Submissions by the Appellant/Applicant

7. The Appellant/Applicant through the Law firm of Messrs. Paul O. Buti Advocates filed their written submissions dated 12th February, 2024. Mr. Buti Advocate commenced his submissions by providing some brief facts of the matter. He stated that the application before Court for determination was dated and filed in Court on 12th July 2022. It was filed under Certificate of urgency of the same date. Although filed in this manner, the same was not heard because on the 26th July 2022, the 1st Respondent, Mbesa Investments Limited, filed a Notice of Preliminary Objection, in which it raised questions on the jurisdiction of this Court to hear and determine the Appellant's Notice of Motion dated and filed in Court on the 12th July 2022. Being a jurisdictional question, it had to be canvassed and determined before any further proceedings or steps in the matter could be taken if at all.

8. The Learned Counsel submitted that the Preliminary Objection on jurisdiction was canvassed. Finally, on the 6th November 2023 the Honourable Court rendered a determination thereon. The Court found that the "Notice of Preliminary Objection dated 26th July 2022 by the 1st Respondent to be lacking merit and hence it was dismissed in its entirety with costs. This paved the way for the hearing of the Appellant's Notice of Motion dated 12th July, 2022 in respect of which these submissions were now written.

9. Further the Learned Counsel averred that the prayers that were alive for determination in the subject Notice of Motion are three, framed as follows:-

a. An Interim Order be given to stay or cause to remain unenforceable the Orders of the National Environment Tribunal (NET) issued in NET 30 of 2020 on 21st April 2022 in accordance with the provisions of Section 130 (2) of the Environment Management Co - ordination Act, pending the hearing and determination of this application.

b. The Orders of the National Environment Tribunal (NET) in NET 30 of 2020 made on the 21st day of April 2022 be stayed and remain unenforced until the Appeal lodged herein being

civil appeal number 17 of 2022 is heard and determined, as required by Section 130 (2) of the Environment Management & Coordination Act, Cap. 387 Laws of Kenya.

c. The costs of this application be provided for.

10. These prayers were a derivative of the provisions of Section 130 (1) & (2) of the Environment Management & Coordination Act, Cap. 387 Laws of Kenya. For ease of reference, the germane sub - Sections of that Section provide as follows:

130 (1) Any person aggrieved by a decision or Order of the Tribunal may, within thirty days of such decision or Order, appeal against such Order or decision to the High Court.

11. Then there is sub - section (2) which provides that:

130 (2) No decision or Order of the Tribunal shall be enforced until the time for lodging an appeal has expired or, where the appeal has been commenced, until the appeal has been determined.

12. These provisions of law simply mean what they say. They did not need any extra-terrestrial skills of interpretation in order for them to be understood what they are saying, and what they direct.

13. The Learned Counsel relied on the case of "Duport Steels Limited – Versus - Sirs & others (1980) 1 AII ER 529", which clearly sets out the Golden Rule of interpretation of statutes. In this respect, the Counsel cited the words of Lord Edmund Davies, at page 547 as follows:-

> " My Lords, a Judge's sworn duty to 'do right by all manner of people after the laws and usages of this realm' sometimes puts him in difficulty, for certain of those laws and usages may be repugnant to him. When that situation arises, he may meet it in one of two ways. First, where the law appears clear, he can shrug his shoulders, bow to what he regards as the inevitable, and apply it. If he has moral, intellectual, social or other twinges in doing so, he can always invoke Viscount Simonds LC, who once said (in Scruton's – Versus - Midland Silicones Limited)
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> For to me heterodoxy or, as some might say, heresy, is not the more attractive because it is dignified by the name of reform. Nor will I easily be led by an undiscerning zeal for some abstract kind to ignore our first duty, which is to administer justice according to law, the law which is established for us by Act of Parliament or the binding authority of precedence.
>
> For, as Holt CJ said in 1701,....an Act of Parliament can do no wrong, though it may do several things that look pretty odd.....'

14. Since 'an Act of Parliament can do no wrong', and its words were clear and unambiguous, it was his submission that the directive given in the provision of Section 130 (2) of the Environment Management & Co - ordination Act, be followed by this Court to the letter.

15. According to the Learned Counsel it was not in dispute that the present appeal was filed within the time prescribed by law. That had been clearly set out in the Grounds in support of the Notice of Motion which was now for consideration. In addition to the Grounds referred to at Paragraph *7* above, there was a Replying Affidavit of the Appellant together with annextures running to a total of 38 pages. All these documents are in support of the present Notice of Motion application. He needed not reproduce them here in these submissions. The very elaborate documents clearly speak for themselves.

16. In conclusion, the Learned Counsel opined that the Respondents made no effort at all to either file any grounds of opposition to the Notice of Motion application or any Replying Affidavit to that sworn by

the Appellant/Applicant. In the circumstances, he submitted that this Application was unopposed. The orders sought should therefore be granted.

B. The Written Submissions by the 1st Respondent

17. The 1st Respondent herein filed their written submissions through the Law firm of Messrs. Sagana, Biriq & Muganda Advocates dated 12th April, 2024. Mr. Sagana Advocate submitted that the written submissions were filed on behalf of the 1st Respondent in opposition to the Appellant's Notice of Motion application dated 12th July, 2022. The 1st Respondent would persuade the Court why the prayers sought in this application could not be granted. The court was invited have regard to the content of the 1st Respondent's Replying Affidavit dated 26th July, 2022 sworn by HASSAN SHARRIFF ALWY together with the annextures.

18. Further it was contended that the background was that the 1st Respondent was a proponent of a residential development called "Naurus" in Nyali, Mombasa. The development straddles three (3) parcels of land known as Land Reference Numbers MN/1/5503, MN/1/5504 and MN/1/3412. The project proponent (1st Respondent herein) applied to the 2nd Respondent (NEMA) for an EIA license for the project in accordance with the EMCA of 1999. Having satisfied all the conditions, NEMA, on 14th April 2020, granted the 1st Respondent an EIA license for the development. A subsequent variation of the said EIA license was granted on 14th May, 2020. It was on the basis of the said EIA License that the 1st Respondent commenced the construction works on the said parcels of land.

19. Vide two letters dated 24th July, 2020 and 28th July 2020, the 2nd Respondent ordered the 1st Respondent to immediately stop the construction works, submit afresh EISA study report within 45 days and to show cause within 14 days why it's EIA License should not be revoked or cancelled. The 1st Respondent filed an Appeal dated 30th July, 2020 under Section 129 (2) of EMCA at the National Environment Tribunal against the decisions of the 2nd Respondent contained in the letters of 24th July 2020 and 28th July, 2020 respectively.

20. According to the Learned Counsel it was worth noting that the 1st Respondent's EIA License dated 14th April 2020 and varied on 14th May 2020 had never been challenged within the statutory timeframe or at all. Matter of fact, it was the finding of the NET that the Appellant knew about the project and the issuance of the License (see Paragraph 25 of the Judgment of the Tribunal). The appeal was premised on a case that was never before the NET. The Appellant was seeking to persuade this Honorable Court on the provision of Section 129 challenge on the issuance of an EIA License which he never made as required by law. He was seeking to hoodwink this Court into looking into a case that was never before Tribunal.

21. The Learned Counsel asserted that the Tribunal sets out and reiterated at Paragraphs 29, 30, 45, 47 and 49 of its Judgment dated 21st April, 2022 the gist of the issues that were before it. At Paragraphs *50* to 66, the Tribunal gave in - depth analyses of the matter in dispute. The 1st Respondent challenged the decision of the 2nd Respondent contained in its letters on 24th July, 2020 and 28th July, 2020 primarily on the basis that the 1st Respondent's Article 47 rights were violated because NEMA failed to accord it the opportunity to be heard.The two letters of 24th July, 2020 and 28th July, 2020 contained three (3) conditions that NEMA required the 1st Respondent to fulfill within a period stipulated therein. These were as follows:-

> "(a) That the order of 24th July 2020 directing projects works to stop immediately is hereby underscored and reiterated:

(b) That you immediately commence the process of submitting a fresh Environmental Impact Assessment Study Report NOTING to engage and obtain the views of stakeholders including the immediate neighbors. This should be submitted within the next 45 days.

(c) That in keeping with section 64 (3) of the Environmental Management and Coordination Act (EMCA), show cause within the next 14 days, why EIA License Number NEMA/EIA/PSL/9181 dated 14th April 2020 should not be cancelled or revoked by the Authority."

22. The prayers in the appeal before this Court are also indicative of what was before the Tribunal: the content of the two letters of 24th and 28th July, 2020 respectively.

23. The Learned Counsel referred the Court to the provision of Section 130 (2) of the EMCA. It meant that the conditions enumerated in the 2nd Respondent's letters dated 24th July, 2020 and 28th July, 2020 would take effect. It would mean that the 1st Respondent would have to:-

a. Stop the construction work.

b. Submit afresh EISA report; and

c. Show cause why its EIA license should not be revoked.

24. But there was a problem. The 1st Respondent had been operating on a valid EIA license. Secondly, the requirement to submit afresh EISA report and to show cause were time constrained meaning they were to be fulfilled within 45 and 14 days from 28th July,2020 respectively. In the absence of an application to reinstate the conditions contained in the 24th July 2020 and 28th July 2020 with new cut-off dates, the Notice of Motion dated 12th July, 2022 has the effect of determining the appeal. This would have the effect of violating the 1st Respondent's constitutional rights under the provision of Article 50. Suffice to say, the drafters of Section 130 (2) of the EMCA did not envisage a scenario that would result in absurdity.

25. The Appellant was seeking the following orders:-

a. This application be certified urgent and prayer (b) hereof be given ex - parte in the first instance.

b. An Interim Order be given to stay or cause to remain unenforceable the Orders of the National Environment Tribunal (NET) issued in NET 30 of 2020 on 27th April 2022 in accordance with the provisions of Section 130 (2) of the Environment Management and Coordination Act, pending the hearing and determination of this application.

c. The Orders of the National Environment Tribunal (NET) in NET 30 of 2020 made on the 21st April 2022 be stayed and remain unenforced until the Appeal lodged herein being Civil Appeal Number 17 of 2022 is heard and determined, as required by the provision of Section 130 (2) of the Environment Management and Co - ordination Act, Cap. 387 Laws of Kenya.

d. The costs of this application be provided for.

26. The Learned Counsel submitted that the prayers sought by the Appellant would place the Court in a peculiar situation. If it granted the prayers sought, it would mean that the 1st Respondent had to undertake and submit afresh EISA report, and submit itself to NEMA to show cause why its license should be revoked or cancelled. The Learned Counsel further asserted that under such a scenario, the case would have been concluded through an interlocutory application and the 1st Respondent

participation in the appeal would thus become an exercise in futility. The Learned Counsel invited the Honorable Court to look at the prayers sought in the appeal which was the actual scenario that would play out (even before the main appeal was heard) if the prayers sought in the Notice of Motion was granted.

27. The Appellant/Applicant had not, in any event, shown the prejudice he would suffer if the prayers sought was not granted because there was none. The Director General of the 2nd Respondent was empowered under provision Section 130 (3) of the EMCA to "take such reasonable action to stop, alleviate or reduce such injury, including the powers to close any undertaking, until the appeal is finalized or the time for appeal has expired." The 2nd Respondent did not exercise these powers because there is no environmental injury that the subject project is causing to the environment.

28. According to the Learned Counsel as a matter of fact, the 2nd Respondent never appealed the decision of the Tribunal and never filed a response. They reiterated that the 1st Respondent continued to undertake the construction works on the project site based on the EIA license granted by NEMA and that license had never been subject of an appeal. The subject appeal on the other hand was only on setting aside the letters by NEMA dated 24th and 28th July, 2020 respectively that primarily violated the 1st Respondent's right under the provision of Article 47 of *the Constitution*.

29. In conclusion, the Learned Counsel urged Court by praying that the Notice of Motion application dated 12th July, 2022 be dismissed with costs and the Appeal be set down for full hearing.

V. Analysis and Determination

30. I have carefully read and considered the pleadings herein, by the Appellant/Applicant, the Respondents, the relevant provisions of *the Constitution* of Kenya, 2010 and statures.

31. In order to arrive at an informed, reasonable and Equitable decision, the Honorable Court has condensed the subject matter into three (3) framed the following issues for determination. These are:-

    a. What are the fundamental legal principles to be considered for granting stay of execution pending the appeal.

    b. Whether the Notice of Motion dated 12th July 2022 meets threshold required for the Orders of the National Environment Tribunal (NET) in NET 30 of 2020 made on the 21st day of April 2022 be stayed and remain unenforced until the Appeal lodged herein being civil appeal number 17 of 2022 is heard and determined, as required by Section 130 (2) of the Environment Management & Co - ordination Act, cap 387 Laws of Kenya.

    c. Who will bear the Costs of Notice of Motion application 12th July, 2022.

Issue No. a). What are the fundamental legal principles to be considered for granting stay of execution pending the appeal.

32. Under this sub – heading, the Honourable Court will examine the main substratum of the application. Based on the provision of the Law and the concurrence of all the Learned Counsels herein, any person aggrieved by the decision of NEMA is at liberty to, at first instance, move and be heard by the NET. Thereafter, the Jurisdiction of this Honourable Court may be invoked by way of an Appeal arising from the decision of the Tribunal. In the case of "Bridge Gate Holding Limited – Versus - National

Environment Management Authority & another [2015] eKLR" Honourable Justice L. N. Waithaka similarly upheld the herein above proposition of the law when he held as hereunder: -

> "……Section 130 provides an avenue for a second appeal to this court should a party to the appeal to the Tribunal not be satisfied with the decision of the Tribunal. From the foregoing statement of the law, there is no doubt that the law does not contemplate a situation where this court would be seized of the dispute herein as a court of first instance.
>
> The upshot of the foregoing is that the suit before this court is premature. It is also unmaintainable against the 2nd defendant on account of misjoinder. Since the suit raises pertinent issues of law and fact, I direct that subject to the procedure contemplated in Section 129 (2), the same be transferred to the NET for purposes of being heard and determined on merit."

33. The fact that the EMCA provides for a process of appeal from the NET to the High Court presupposes that the original jurisdiction of this Honourable Court is excluded whilst the appellate jurisdiction is expressly provided when the Act expressly provides for the appellate jurisdiction of the Environment and Land Court. The provision of Article 23 of *the Constitution* of Kenya, 2010 further provides that the High Court has jurisdiction in accordance with the provision of Articles 70 and 165 of *the Constitution* to hear and determine applications for redress, of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights.

34. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under the provision of Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 which provides:-

> "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.

35. It is trite law that stay of execution pending appeal is a discretionary power bestowed upon this court by the law. In the initial stages of building Jurisprudence around this legal aspect, the Court of Appeal

in the case of "Butt –Versus- Rent Restriction Tribunal {1982} KLR 417" gave guidance on how a court should exercise the said discretion and held that:

> " 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
>
> 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the Judge's discretion.
>
> 3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
>
> 4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
>
> 5. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

36. 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.

37. The provision of Section 1A (2) of the *Civil Procedure Act*, Cap. 21 provides that:- "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under 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."

38. The purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case. The Court of Appeal in the case:- "RWW – Versus - EKW (2019) eKLR" addressed itself on this as hereunder:-

> " The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her Judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
>
> 9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay

however, must balance the interests of the Appellant with those of the Respondent."

(See also Court of Appeal of Uganda in Mugenyi & Co. Advocates – Versus - National Insurance Corporation [Civil Appeal No. 13 of 1984]).

39. Additionally, the Court of Appeal in the case of: "Vishram Ravji Halai – Versus - Thornton & Turpin Civil Application No. Nairobi 15 of 1990 [1990] KLR 365", outlined the requirements for granting stay of execution pending appeal. It held that, whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 (as it then was) of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.

40. Flowing from above legal parameters, 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 order pending Appeal.

    ii. What orders this Court should make

41. 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.

42. 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."

43. 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."

44. 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)"}.

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

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

Issue No. b). Whether the Notice of Motion dated 12th July 2022 meets threshold required for the Orders of the National Environment Tribunal (NET) in NET 30 of 2020 made on the 21st day of April 2022 be stayed and remain unenforced until the Appeal lodged herein being civil appeal number 17 of 2022 is heard and determined, as required by Section 130 (2) of the Environment Management & Co - ordination Act, Cap. 387 Laws of Kenya.

46. Under this sub – heading the Honourable Court will endeavor to decipher on the meritorious aspects of the application by the Appellants/Applicants and whether the parties are entitled to the prayers sought from their pleadings. In order to do so, I shall be applying the above legal principles to the instant case to consider whether the orders for stay of the appeal be granted or not. The first requirement is that there has been filed an appeal before this Court. Secondly, that the intended appeal must be arguable. A cursory look at the Memorandum of Appeal shows that the grounds raised therein are triable, cogent and plausible. This first ground is therefore met. The essence of considering whether the appeal raises triable issues is to avoid the same being rendered nugatory should the decision of the appellate court overturn that of the trial court/tribunal.

47. The third aspect is to consider whether the Application before Court had been filed without undue delay. I noted that the decision in that Tribunal Appeal was rendered by the Tribunal on the 21st day of April 2022. From the record, the Appellant/Applicant timeously commenced this appeal on the 6th day of May 2022, which was within the thirty days period decreed by the Act. Clearly, the Application was filed on 12th July, 2022 and thus there is no undue delay.

48. Fourthly, this Honourable Court must determine whether not granting the order will occasion substantial loss to the Applicant. Substantial loss was explained in the case of "James Wangalwa & Another – Versus - Agnes Naliaka Cheseto [2012] eKLR", 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."

49. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under the provision of Order 42 Rule 6. 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.

50. Regarding the pre-requisite conditions evolving from the law is on substantial loss occurring to the Appellants/Applicants. From the surrounding facts and inferences of the instant case, I am strongly persuaded that indeed, the Appellants/Applicants have proved that it will suffer substantially if the orders for stay of the execution are not granted as prayed. For that reason, the application should succeed.

51. It is not in doubt that the Respondent have the Judgement to their favour delivered by NET. Additionally, I take cognizance it is unfortunate that the Respondents have had to wait for long to enjoy the fruits of their Judgment. However, this being a Court that serves substantive justice and balances the interest of all parties, hypothetically, it is my considered view that if this Court were to deny the Appellant/Applicant the order for stay of execution, it would place them at a more prejudicial position than the Respondents. I do admit that the Appellant/Applicant has attempted to demonstrate that they are likely to suffer loss should their properties be attached and sold off. Thus, in the given circumstances, I discern that the Appellants/Applicants would suffer substantial loss.

52. The elephant in the room is with regard to 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 of costs. In this particular case the issue in contention was that the 1st Respondent was a proponent of a residential development called "Naurus" in Nyali, Mombasa. The development straddles three (3) parcels of land known as Land Reference Numbers MN/1/5503, MN/1/5504 and MN/1/3412. Clearly, the proponent has already expended a colosal amount to put this development at the behest of the approvals made and received from all the relevant statutory authorities including the NEMA. The project proponent (1st Respondent herein) applied to the 2nd Respondent (NEMA) for an EIA license for the project in accordance with the Environmental Management and Co - ordination Act, 1999. Having satisfied all the conditions, NEMA, on 14th April 2020, granted the 1st Respondent an EIA license for the development. A subsequent variation of the said EIA license was granted on 14th May, 2020. It was on the basis of the said EIA License that the 1st Respondent commenced the construction works on the said parcels of land. By all means, although no Valuation report was produced by any the parties, this being a high end suburbs of the County of Mombasa, the Honourable Court takes judicial notice that the project would highly costly with heavy financial and other resources expended on it. Presumably, the appeal was not to be successful, it may be very difficult for the Appellant/Applicants to compensate the Respondents herein for the losses or suffering incurred.

53. The two letters were issued ordering the 1st Respondent to immediately stop the construction works, submit a fresh EISA study report within 45 days and to show cause within 14 days why it's EIA License should not be revoked or cancelled. The 1st Respondent filed an Appeal dated 30th July, 2020 under Section 129 (2) of EMCA at the NET against the decisions of the 2nd Respondent contained in the letters of 24th July 2020 and 28th July, 2020 respectively.

54. Notwithstanding of the fact that this particular application the issue in dispute where title to the land can be offered but at least some monetary need to be committed as security for the performance of the

decree . In saying so I seek refuge from the case of "Aron C. Sharma – Versus - Ashana Raikundalia T/ A Rairundalia & Co. Advocates" the court held that:

> " The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the Judgment Debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose."

55. Therefore, in the interest of justice and fairness, it behooved the Applicant herein to furnish substantial security as stipulated by the law and as I have directed herein below. Stay of execution is exactly what it states. It matters not whether the issue in contention is the amount awarded in the ruling/ order, 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 legal parameters set out in Order 42 Rule 6.

56. The Court observed in the case of:- "Gianfranco Manenthi & Another – Versus - Africa Merchant Assurance Company Limited [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)

57. As already demonstrated in "James Wangalwa & Another – Versus - Agnes Naliaka Cheseto (supra)" the three (3) conditions for granting stay of execution pending appeal must be met simultaneously. In the end I grant the stay of execution on based on the fulfilment of the stringent Pre – Conditions stated herein and that none of the parties interferes with the said property.

Issue No. b). Who will bear the Costs of Notice of motion application dated 12th July, 2022

58. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of "Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In the present case, the Honourable Court elects to have the costs to be in the cause.

VI. Conclusion & Disposition

59. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. In the interest of natural Justice, Equity and Conscience the Appellant/Applicant to be accorded an opportunity to be heard by this Honourable Court on the issues in question hereof.

60. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-

    a. That the Notice of Motion application dated 12th July, 2022 be and is hereby found to have merit and is hereby allowed as per the Court's discretion and the preservation of the suit property upon fulfilment of the Pre – Conditions set out herein below.

        i. The Honorable Court be and is hereby pleased that the Orders of the National Environment Tribunal (NET) in NET 30 of 2020 made on the 21st day of April 2022 be stayed and remain unenforced until the Appeal lodged herein being Civil Appeal Number 17 of 2022 is heard and determined, as required by Section 130 (2) of the Environment Management & Co - Ordination Act, Cap. 387 Laws of Kenya.

        ii. No party shall interfere with the suit property pending the hearing and final determination of the appeal.

        iii. The Appellant/Applicant compiles, files and serves a Record of Appeal within the next thirty (30) days from the date of the delivery of this Ruling.

        iv. For expediency sake, the matter be mentioned on 10th February, 2025 for purposes of confirming compliance, admission and taking direction on the disposal of the appeal pursuant to the provision of Section 79B of the *Civil Procedure Act*, Cap. 21 and Order 42 Rules, 11, 13 and 16 of the Civil Procedure Rules, 2010.

        v. The Appeal to be set down for hearing and final determination within the next ninety (90) days from the date of the delivery of this Ruling hereof.

        vi. The Appellant/Applicant directed to deposit a sum of Kenya Shillings Twenty Million (Kshs. 20, 000, 000.00/=) within the next fourty five (45) days from the date of this Ruling in an interest earning joint escrow bank account to be held at a reputable

Commercial Bank Account in the names of the Law firms of Messrs. Paul O. Buti Company Advocates and Sagana, Biriq, Muganda & Company Advocates as security of costs for the due performance of such Decree of the Court.

b. That failure to fulfil any of these Pre – Conditions clearly stipulated above the Notice of Motion application dated 12th July, 2022 shall stand automatically dismissed thereof without further reference to this Court.

c. That the cost of these application will be in the cause.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 4TH DAY OF DECEMBER 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. Mr. Paul O. Buti Advocate for the Appellant/Applicant.

c. Mr. Sagana Advocate for the 1st Respondent.

d. No Appearance for the 2nd Respondent.

*HON. JUSTICE L.L. NAIKUNI (ELC)**