



REPUBLIC OF KENYA



**Mkangi v Ngala (Environment and Land Appeal E017 of 2023)
[2024] KEELC 13670 (KLR) (4 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13670 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E017 OF 2023
LL NAIKUNI, J
DECEMBER 4, 2024**

BETWEEN

COLLINS MKANGI APPELLANT

AND

HADIJA KAZUNGU NGALA RESPONDENT

RULING

I. Introduction

1. Before the Honourable Court for its determination is Notice of Motion dated 17th August 2023 filed by Collins Mkangi, the Appellant/Applicant herein. It was brought under the dint of the provision of Sections IA, 1B, 3A of the *Civil Procedure Act*, Cap. 21 Order 42 Rule 6(1) and (6) and Order 51 Rule 1 of the Civil Procedure Rules 2010.
2. Upon service, while opposing this application the Respondents filed their response vide a Replying Affidavit dated 19th February 2024. The Honourable Court shall be dealing with the issues on its own merit later on.

II. The Appellant/Applicant's case

3. The Appellant/Applicant sought for the following orders:-
 - a. Spent.
 - b. That Hamida Kahonzi Ngala be made a party in the intended appeal in place of the deceased Respondent herein Hamida Kahonzi Ngala,.
 - c. That this Honourable Court do issue a temporary injunction to restrain the Respondent whether by herself or through her legal representative(s), her agents, servants and/or employees or anyone deriving title through her or otherwise howsoever from evicting the appellant/



Applicant and/or in any manner interfering with the Appellant/Applicant's occupation of the suit property known as LR 2129 Section 1 Mainland North pending the hearing and determination of this application.

- d. That this Honourable Court do issue a temporary injunction to restrain the Respondent whether by herself or through her legal representative(s), her agents, servants and/or employees or anyone deriving title through her or otherwise howsoever from evicting the Appellant/Applicant and/or in any manner interfering with the Appellant/Applicant's occupation of the suit property known as LR 2129 Section 1 Mainland North pending the hearing and determination of the intended appeal.
 - e. That the costs of this application be provided for.
4. The application is premised on the grounds on the face of the application and further supported by the affidavit of Collin Mkangi the appellant.
- a. It is the appellant's case that on 4th August 2023, the magistrate court dismissed his application seeking to set aside the *ex parte* Judgement made in Mombasa Chief Magistrates Court Civil Case No. 1572 of 2019, Collins Mkangi versus Hamida Kahonzi Ngala,.
 - b. As a consequence of the said dismissal, the Respondent's legal representative, Hamida Kahonzi Ngala, has threatened to execute the lower court's judgement by evicting the Appellant from the suit property.
 - c. The appellant claims that unless an order of injunction is granted, he shall be evicted from the suit property from where he runs a garage business and the appeal herein will be rendered nugatory, and the Appellant shall also suffer irreparable damage.
 - d. He argues that he is ready and willing to deposit such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
 - e. He has brought this application without unreasonable delay and it is therefore in the interest of justice and fairness that the application be allowed since the Respondent will suffer no prejudice if the orders herein are granted.
 - f. In his supporting affidavit, the appellant raised several averments, he deponed that he filed the civil case of "Mombasa Chief Magistrates Court Civil Case No. 1572 of 2019, Collins Mkangi versus Hamida Kahonzi Ngala," in which he was seeking a permanent injunction restraining the Respondent from evicting him and/or dealing in any manner with his occupation in LR 2129 Section 1 Mainland North (the suit property).
 - g. He maintained that on 10th May 2023, he learnt that an *ex parte* judgement had been passed in the aforesaid suit following the service of a letter from the legal representative of the Respondent, one Hamida Kahonzi Ngala demanding *inter alia* that he vacates or be evicted from the suit property.
 - h. His advocates on record promptly perused the court file and established that the deceased Respondent obtained an *ex parte* judgment on 17th November 2021.
 - i. It was also discovered that his pleadings were struck out on 6th April 2021 because the advocate who drew and filed them, Mr. Angelo Owino did not have a practicing certificate and hence he stopped appearing in court.



- j. The deponent argued that the Respondent did not also serve him with any hearing notices and as a consequence she prosecuted her Counterclaim without his knowledge and participation. Based on the aforesaid reasons, his advocates on record promptly filed an application seeking to set aside the aforesaid *ex parte* judgement. On 4th August 2023 the trial magistrate dismissed the application seeking to set aside the *ex parte* judgement on the basis that he did not attach a copy of the draft defence to the counterclaim. He argued that he raised triable issues and hence the trial magistrate erred in holding that failure to attach a draft defence was fatal to my application. He was aggrieved by the said Ruling, and instructed his advocates on record to appeal against the said Ruling.
- k. Further the appellant claimed that as a consequence of the said dismissal, the Respondent's legal representative, Hamida Kahonzi Ngala, has threatened to evict him from the suit property as evidenced by a letter dated 7th August, 2023. He argued that unless an order of injunction is granted, the Respondent's legal representative, would evict him from the suit property and the appeal herein will be rendered nugatory. He maintained that he was in occupation of the suit property where he runs a garage business his only source of income, thus if he is evicted from the suit property he stands to suffer irreparably.
- l. He deponed that Respondent is deceased; the court allows her legal representative to be made a party in the intended appeal.
- m. He informed the court that he is willing, ready and willing to deposit such security as the court orders for the due performance of such decree or order as may ultimately be binding on me.

III. The responses by the Respondent

- 5. Hamida Kahonzi Ngala, the respondent herein responded to the application vide a Replying Affidavit dated 19th February 2024.
 - a. He deponed that the Appellant herein the original plaintiff in MSA CMCC No. 1572 of 2019. The appellant is a tenant on Plot No. 2129/Mainland North Shanzu where he has been running a carwash garage and parking space since 1st April 2019 for a sum of Kenya Shillings Thirty Thousand (Kshs. 30,000/=) monthly rent.
 - b. The suit property is owned by the respondent's mother the late Hamida Kahonzi Ngala,. That the appellant paid his rent of a sum of Kenya Shillings Thirty Thousand (Kshs. 30,000/=) for April May and June 2019, but failed to pay rent for July, August September and October 2019.
 - c. He further deponed that on 24 October 2019 his deceased mother (Hamida Kahonzi Ngala,) instructed her agents namely Elegant Investments (1996) Limited a rent collector to demand payment of rent from the Plaintiff / Appellant which had by then accumulated to a sum of Kenya Shillings One Fifty Thousand (Kshs. 150,000/=)
 - d. The appellant refused to pay them and told the agent that he had a court order and was not ready to pay rent until the case he filed at the court of law is heard and finalized.
 - e. The Agent demanded to be given a copy of the said order but he refused.
 - f. On 27th October 2019, the respondent's mother instructed her Advocates on record to check and find out from the court if there was any suit filed in court by the appellant against her and whether there was any order issued by the court. Upon perusal at the CM'S Court civil Registry, the advocate on record found that on 13th September 2019, the appellant through



his former Advocates filed suit “Msa CMCC No. 1572 of 2019 - Collins Mkangi – Versus - Hamida Kahonzi Ngala.”

- g. Where he sought orders that: a permanent injunction be issued against the Defendant from evicting, attaching, selling, removing and or dealing in any other way the Plaintiff’s occupation on Plot No. LR. 2129 Mainland North and costs of the suit.
 - h. Alongside the Plaint, the appellant filed an application that was heard *ex parte* on 9th October 2019, which restrained the Respondent from collecting rent.
 - i. The Respondent was never served with the plaint nor the said application. What followed was the respondent applying on 17th February 2020 to set aside the said orders of 9th October 2019 as well Defendant’s written statement of Defence and Counter - Claim, Verifying Affidavit, Notice of Appointment of Advocates and Memorandum of Appearance. On 9th March the Appellant (Plaintiff therein) through his former Advocates filed in Court a Replying Affidavit.
 - j. On 18th November 2020, the respondent filed a Notice of Preliminary Objection seeking to strike out the suit on the ground that the Plaint dated 11th September 2019 was drawn and filed by M/s. Angelo Owino and Co. Advocates be struck out because the pleadings were drawn and filed by an Advocate without a practicing certificate.
 - k. This was said to be in contravention of Order 9 Rule 1 of the Civil Procedure Rules. The said objection was heard on 24th November 2020 and the Court directed parties to file their written submissions the Court further fixed the matter for mention on 9th March 2021 to confirm the filing of submissions and the Court to give a ruling date. On 27th January 2021 the Respondent’s Counsel filed the defendant’s submissions in support of the Notice of Preliminary Objection. On 9th March 2021, the matter came up for mention before the Chief Magistrates Court and the Court fixed the same for the Ruling to be delivered on 6th April 2021, and on the said date the Court struck out and dismissed the Plaintiff’s case with costs to the Defendant.
 - l. After the Appellant’s case was dismissed, the matter was listed for the hearing of the Defendant’s Counter - Claim on 3rd February 2022. Which was notified to the Appellant and his former counsel Angelo Owino vide a hearing notice dated 21st January 2022. The deponent maintained that on 21st January 2022, he accompanied the process server Mr. Maurice O. Abuoro to the Plaintiff’s place of business at Shanzu where they found the appellant and served him. The appellant accepted the service but he refused to sign on the original Document. On the same day, the process server proceeded to the offices of Mr. Angelo Owino Advocates, situated at Amir suite No. A4 along Sauti ya Kenya Road Ganjoni, he served a copy of the Hearing Notice upon Mr. Angelo Owino Advocate. Mr. Owino Advocate accepted the service but he refused to sign at the original document.
6. The matter was then listed for haring on 3rd February 2022, in the presence of the original Defendant (Hamida Kahonzi Ngala,) and her Advocate Ms. Arika and in the absence of the appellant and his Advocate Mr. Owino. The suit was adjourned to 10th March 2022 and the court directed that the Appellant be served personally with the hearing Notice. On 22nd February 2022, the Defendant’s advocate issued a Hearing Notice for service upon Mr. Collins Mkangi the Plaintiff herein. The said notice was served upon the Plaintiff by the Process Server, Mr. Maurice O. Abuoro in his place of business, where he accepted the service but he refused to sign the original documents. On 10th March 2022, in the presence of the Respondent herein, the court granted leave to the Respondent to file a list



- of documents, a list of witnesses and a statement within 14 days. The court directed the Defendant's Counter - Claim to be heard on 7th April 2022.
7. On 18 March 2022 the original Defendant Hamida Kahonzi Ngala, donated power of Attorney to the deponent to take over the suit due to sickness. That on 28 March 2022, the Defendant's Advocate issued a hearing notice to be served upon Mr. Collins Mkangi. On 29 March 2022, the Process Server Mr. Maurice O. Abuoro served the Plaintiff at his place of work in Shanzu where he accepted service but refused to sign on the original document. On 7th April 2022, in the presence of the deponent and his Advocate Ms. Arika and the absence of the Plaintiff, the court heard the evidence of the Defendant and made an order that parties file and exchange their submissions and the court fixed the matter for mention on 21st April 2022. On 20th April 2022, the Defendant filed and served their submissions to the Counter - Claim, and later filed a return of service.
 8. When the matter was mentioned on 21st April 2022 the court directed the judgement would be delivered on 17th November 2022. On 17 May 2022, the original Defendant herein Hamida Kahonzi Ngala, passed on. On 17 November 2022, the court allowed the Defendant's Counter - Claim with costs. On 23rd February 2023, the deponent applied for a limited Grant of Letters of administration ad-litem at the Chief Magistrate's court at Mombasa Family Division being succession cause No. E026 OF 2023. On 28th February 2023, the court issued the deponent with a limited Grant of Letters of Administration ad litem, which led to filing an application dated 26th May 2023 seeking to be made a party in the suit in her capacity as the personal representative of the original defendant.
 9. Further on 22nd May 2023, the Appellant filed an application under certificate of urgency where he sought inter alia the setting aside of the Judgement dated 17th November 2021 and for leave to file and serve a Defence to the Counter - Claim. The Defendant opposed the application vide a Notice of Preliminary Objection and on 4th August 2023 the court ruled in favour of the deponent and dismissed the application with costs. The deponent then filed a decree on the Counter - Claim and certificate of costs on 19th September 2023 to the tune of a sum Five Fifty Two Thousand Nine Fourty Hundred (Kshs. 552,940.00/=) for the approval of the court. The same was approved and on 22nd September 2023, the court signed the said decree and certificate of costs. Later on 25th September 2023, the Honourable Court issued an Eviction order against the plaintiff /Applicant herein to be evicted from plot No. L.R 2129 Mainland North and the same address to Mungami Auctioneers for execution. On 28th September 2023, the Honourable Court issued warrants of attachment of movable properties of the Plaintiff/Applicant and the same was addressed to Mungami Auctioneers for Execution. On 30th October 2023, the said Auctioneers served the Applicant herein with a proclamation of Attachment of movable property in which he gave them 7 days to settle the decretal sum in default to remove the property under attachment for Auction.
 10. On 17th November 2023, the defendant was served with an application by the plaintiff dated 18th May 2023. The deponent admitted the contents of paragraphs 1 and 2 of the supporting Affidavit of Collins Mkangi are admitted. With regard to the contents of Paragraphs 3,4,5,6,7,8,9,10,11,12,13 and 14 of the supporting Affidavit of Collins Mkangi, she replied with Paragraphs 2, 3, 4, 5, 6,7, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32 and 34 of this Replying Affidavit. The deponent maintained that the Appellant had not paid rent at the rate of a sum of Kenya Shillings Thirty Thousand (Kshs. 30,000/=) per month from July 2019 to date which has now accumulated to a sum Kenya Shillings One Million Six Hundred and Fifty (Kshs. 1,650,000.00/=) together with taxed costs a sum Kenya Shillings Five Fifty Two Thousand Nine Fourty Hundred (Kshs. 552,940.00/=) making a total of a sum of Kenya Shillings Two Million Two Hundred and two thousand Nine Fourty (Kshs. 2,202,940.00/=). The court was urged to dismiss the application as the same had no merits. The said



application was deemed unnecessary and only intended to further consume the limited resources of this Honourable court which convoluted and prolonged litigation herein.

11. The Appellant filed a supporting affidavit dated 1st August 2024 where he deponed that the decision made by this court in the Civil Case of “Mombasa ELC No. 186 of 2013 Rapan Limited – Versus - Keith Ngala Kazungu” with regards to LR No. 2129/I/MN the suit property herein. Where the court held that the suit property belongs to Rapam limited and the decision has not been overturned. He deponed that as such the judgement or any proceedings in Mombasa Chief Magistrate Civil Suit No. 1572 of 2019 was in futility. The deponent urged the court to exercise its supervisory jurisdiction and halt any further proceedings in the lower court suit. It was argued that the court should not waste its time deciding arising from a suit which had been rendered moot.

IV. Analysis and Determination

12. I have considered the application, responses to it as well as submissions filed herein, the relevant provision of *the Constitution* of Kenya, 2010 and the statutes.
13. In order to arrive at an informed, fair and reasonable decision , I crafted the following three (3) for consideration. These are namely:-
 - a. Whether the Notice of Motion application dated 17th August, 2023 has any merit.
 - b. Whether the parties herein are entitled to the relief sought.
 - c. Who will bear the costs of the application.

ISSUE No. a). Whether the Notice of Motion application dated 17th August, 2023 has any merit.

14. Under this sub – heading the Honourable Court will endeavour to examine the substrata of this matter herein. This appeal herein was instituted vide a Memorandum of Appeal dated 11th August 2023, where the Appellant sought to have the ruling delivered on 4th August 2023 in “Mombasa Chief Magistrate Civil Suit No. 1572 of 2019 Collins Mkangi – Versus - Hamida Kahonzi Ngala,” in respect to an application dated 18th May 2023, be set aside, and substituted with an order allowing the appellant’s notice of motion dated 18th May 2023. The appellant herein was the plaintiff in the trial case, he filed an application dated 18th May 2023 and sought to make Hamida Kahonzi Ngala a party in the suit in place of the deceased defendant Hamida Kahonzi Ngala,, as well as set aside the Judgement delivered on 17th November 2021 and leave to file a Defence to the Counter - Claim. The said application was heard and determined on 4th August 2023 by Hon. J.B Kalo (Chief Magistrate).
15. In the said ruling, the trial court held that the prayer to join Hamida Kahonzi Ngala as a party to the suit could not be considered in the Appellant’s application for the reason that Hamida Kahonzi Ngala had filed an application dated 22nd May 2023 seeking to be joined as a party herein. The Learned Magistrate proceeded to find that it was appropriate for the orders to enjoin Hamida Kahonzi Ngala as a party or not be made in her application rather than in the Appellant’s application. The Learned Magistrate was of the view that the prayer of amending the Defence to properly entrench her as a party to the suit was lacking in the Appellant’s application. The trial court held that it shall consider the application to enjoin Hamida Kahonzi Ngala separately.
16. The Learned Magistrate continued determining the prayer of setting aside the ex - parte Judgement dated 17th November 2021. The trial court held that where a party asks for a chance to be heard the court is obligated to consider the request liberally with a view not to curtail his right to be heard. However, the court found that the appellant herein had not annexed the proposed defence to the



counterclaim on the supporting affidavit of the application and that the issues enumerated in the supporting affidavit do not satisfy the requirement to annex the proposed Defence to the Counter - Claim. Consequently, the trial court found the application dated 18th May 2023 lacking merit and dismissed it with costs to the defendant.

17. On 17th November 2021 the Hon. J.B Kalo (Chief Magistrate) delivered a ruling in the Civil Suit of “Mombasa Chief Magistrate Civil Suit No. 1572 of 2019 Collins Mkangi – Versus - Hamida Kahonzi Ngala,. He held that the appellant’s suit stood dismissed for failure to attend the hearing of the suit as well as failing to render any testimony. The Learned Magistrate further found that the Respondent’s Counter - Claim was undefended and unchallenged by the Appellant. As such the trial court found that the respondent had proved her Counter - Claim and entered Judgement in her favour as follows:
- a. An order of vacant possession is hereby issued in favour of the defendant as against the plaintiff for business premises occupied by the plaintiff on Plot No. LR No. 2129 Mainland North.
 - b. The defendant shall have costs of the main suit and the counterclaim together with the interest thereon.
18. The first prayer sought is the addition of Hamida Kahonzi Ngala as a party in the intended appeal in place of the deceased Hamida Kahonzi Ngala,. The court’s discretion to enjoin a party to a case post judgement is only exercised in exceptional and justifiable circumstances. The Court of Appeal in Merry Beach Limited – Versus - Attorney General & 18 others [2018] eKLR held,

“It follows that ideally a court can either on its own motion or by an application only enjoin a party before passing Judgment in the matter before it. This Court appreciated as much in Kenya Airports Authority – Versus – Mitu - Bell Welfare Society & 2 others [2016] by holding that:-

“Black’s Law Dictionary 970 (10th ed. 2014 states that in law, a judgment is a decision of a court regarding the rights and liabilities of parties in a legal action or proceeding. A Judgment is the final court order regarding the rights and liabilities of the parties; it resolves all the contested issues and terminates the law suit; it is the court’s final and official pronouncement of the law on action that was pending before it. A Judgment has the effect of terminating the jurisdiction of the court that delivered the Judgment. Save as expressly provided for by law (for example in revisionary jurisdiction or under the slip rule) a judgment makes the court *functus officio* and transfers jurisdiction to an appellate court if appeal is allowed. It marks the end of litigation before the court that pronounced the judgment. When used in relation to a court, *functus officio* means that once a court has passed a judgment after a lawful hearing, it cannot reopen the case. The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter.”

However, there are exceptional circumstances that could justify a court to enjoin a party even after judgment has been passed. One such exception is where a matter has been determined and adverse orders have been issued against a party who was neither given notice of the suit nor heard on the issue in dispute. In joining such a party a court would also have to set aside the judgment entered to give him/her an opportunity to be heard. See J M K – Versus - M W M & Another (supra).”



ISSUE No. b). Whether the parties herein are entitled to the reliefs sought

19. Under this Sub – title, the Honourable Court will examine on the reliefs sought by the parties herein. The circumstances of this case do not call for the joinder of Hamida Kahonzi Ngala a party in this appeal in place of Hamida Kazungu Ngala. For the reason that the same application has been made by Hamida Kahonzi Ngala at the trial court, whether the said application has been heard and determined by the trial court, is not known by this court. This was confirmed by the trial court in the ruling dated 4th August 2023, where the Learned Magistrate noted that Hamida Kazungu Ngala filed an application dated 22nd May 2023 seeking to be enjoined as a party to the suit. The Learned Magistrate did not err in facts or in law by finding that the order whether or not to enjoin Hamida as a party to the suit ought to be heard and determined in that application as opposed to the appellant’s application dated 18th May 2023. I therefore find that the prayer for enjoinder is not tenable.
20. Secondly, the appellant seeks an injunction pending the determination of this appeal. The provision of Order 42 Rule 6 (6) of the Civil Procedure Rules, 2010 grants this court the discretionary powers to grant a temporary injunction pending hearing and determination of an appeal. It provides:
Notwithstanding anything contained in sub - rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
21. The provision of Section 79G of the *Civil Procedure Act*, Cap. 21 provides for the time within which appeals from subordinate courts to the High Court can be filed as follows:
Every appeal from a subordinate court to the High Court shall be filed within 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.
22. In the instant appeal, the ruling was delivered on 4th August 2023 and the Memorandum of Appeal was filed on 11th August 2023 which is within the statutory period. The Appellant has complied with the above law and as such is rightfully before this court for the said prayer to be determined. The court in the case of “Gladys Ong’udi Okoth – Versus - Richard Ouma Odie (2021) eKLR held that:-
“The cases of Patricia Njeri & 3 Others – Versus - National Museum of Kenya [2004] eKLR, Giella - Versus - Cassman Brown [1973] EA 358 and Mrao Limited – Versus - First American Bank of Kenya Ltd & 2 others [2003] eKLR have long settled the principles that have guided courts in determining whether or not an Applicant has met the threshold to warrant the grant of an injunction pending appeal. The principles are set out as follows: -
a. An order of injunction pending appeal is discretionary which will be exercised against an applicant whose appeal is frivolous;
b. The discretion should be refused where it would inflict greater hardship than it would avoid;
c. The Applicant must show that to refuse the injunction would render the appeal nugatory;



- d. The Applicant must present a prima facie case with probability of success;
 - e. The Applicant must demonstrate that she will suffer irreparable injury if a temporary injunction is not granted; and
 - f. The Applicant must show that the balance of convenience tilts in her favour.”
1. What an injunction pending appeal meant to do is to maintain the status quo. The status quo in this case would be the Appellant’s continued use of the suit property as a garage. To determine whether he has met the threshold set above, the court has perused the ruling of the lower court and the Memorandum of Appeal. The trial court in its ruling dated 4th August 2023 dismissed the appellant’s application dated 18th May 2023 which sought to set aside the Judgement delivered on 17th November 2021; on the ground that the Appellant had not annexed a draft Defence to the Counter - Claim. The Memorandum of Appeal on the other hand, the appellant argued that the trial court failed to consider that his supporting affidavit was enough in finding that he had a triable defence against the counterclaim and prayed for the setting aside of the said ruling and be substituted with the orders prayed for in the application dated 18th May 2023.
 2. At this stage, the court is to consider whether the appellant has demonstrated he has an arguable case through the grounds of appeal, in light of the ruling of the magistrate’s court. I have perused the grounds of appeal against the evidence that was presented by the Appellant at the lower court, and I am not persuaded that they establish an arguable appeal. Also, the appellant has not established the irreparable injury he stands to suffer is the orders are not granted. He only stated in his supporting affidavit that he runs a garage business on the suit property as his sole income. Irreparable injury is a matter of evidence and none has been placed before this court, hence I am not satisfied that the Applicant stands to suffer irreparable injury.
 3. No evidence was presented to this court by the Appellant to show that the appeal was not frivolous or that it would be rendered nugatory if the order for injunction pending appeal was denied. In the grounds on the face of the application, the appellant is contending that he is willing to deposit security for the due performance of the decree, yet the application before court is one of injunction pending appeal as opposed to stay of execution pending appeal. There is no material that has been placed before this court that would warrant it to find that the balance of convenience tilts in favour of granting the injunction pending appeal.

ISSUE No. c). Who will bear the costs of the application

26. It is now well established that the issue of Costs is at the 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 Black Law Dictionary defines cost to means:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

27. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. By following events means the outcome or result of the legal process. The provision of Section 27 provides as follows:-

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion



of the court or Judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or Judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

28. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.
29. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.
30. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “*Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited* [2014] eKLR” the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”
31. In this case, the Respondents shall have the costs of the Notice of Motion application dated 17th August, 2023 to be paid by the Appellants.

V. Conclusion & Disposition

32. Consequently, the appellant has failed to establish that he is entitled to the discretion sought on Preponderance of Probabilities and the balance of convenience thus the application must fail. I proceed to order as follows:-
 - a. That the Notice of Motion application dated 17th August 2023 by the Appellant herein be and is hereby found to lack merit and thus its dismissed with costs.
 - b. That the matter to be mentioned on 28th January, 2025 on Notice to Show Cause why the Appeal should not be dismissed for want of prosecution under the provision of Order 42 Rules 20 and 35 of the Civil Procedure Rules, 2010.
 - c. That costs of the application be awarded to the Respondent herein to be borne by the Appellant herein.

It is ordered accordingly



RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED THIS4THDAY OF.....DECEMBER.....2024.

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HON. MR. JUSTICE LL. NAIKUNI

Ruling delivered in the presence of:
M/s. Firdaus Mbula, the Court Assistant.
Mr. Ngigi Advocate of the Appellant.
No appearance for the Respondent.

