Sibo & 2 others v Lunani (Environment and Land Appeal E007 of 2024)
[2024] KEELC 13736 (KLR) (3 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13736 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL E007 OF 2024

LL NAIKUNI, J

DECEMBER 3, 2024

BETWEEN

ROBERT YOTA SIBO ..... 1ST APPELLANT

BUXTON MBUGUA MUGO ..... 2ND APPELLANT

PERIS WAKIO KIAMBU ..... 3RD APPELLANT

AND

KELVIN LUNANI ..... RESPONDENT

RULING

I. Introduction

1. What is before the Honourable Court for its determination is a Notice of Motion application dated 12th August 2024. It was instituted by Robert Yota Sibo, Buxton Mbugua Mugo and Peris Wakio Kiambu, the 1st, 2nd & 3rd Appellant/Applicants herein. The Appellants moved the Honourable Court under the Certificate of urgency dated even date under the provision of Sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*, Cap. 21; Order 22 Rule (1); Order 40 Rule 1 and Order 51 of the Civil Procedure Rules, 2010.

2. Upon service, and while opposing the application the Respondents filed their responses through a Replying Affidavit dated 6th September, 2024 accordingly. The Honourable Court shall be dealing with it indepth at a later stage of this Ruling hereof.

II. The 1st, 2nd & 3rd Appellants/Applicants' case

3. The 1st, 2nd & 3rd Appellants/Applicants sought for the following orders:

    a. Spent.

b. That there be a stay of execution of the Decree emanating from the Judgment delivered by Hon. Joshua Nyariki (SRM) in Mombasa MCELC NO. E076 OF 2023 on the 16th July, 2024 pending the hearing and determination of this application.

c. That there be a stay of execution of the Decree emanating from the judgment delivered by Hon. Joshua Nyariki (SRM) in Mombasa MCELC NO. E076 OF 2023 on the 16th July, 2024 pending the hearing and determination of the Appeal.

d. That costs of this application abide the outcome of the appeal.

e. Any other orders the court may deem fit to issue.

4. The said application is surmised by 8 grounds and accompanied by a 14 paragraphed affidavit sworn by Peris Wakio Kiambu, the 3rd Appellant/Applicant herein. She averred as follows that:

a. She was the 3rd Appellant/Applicant herein fully conversant with the matter and authorized to swear this affidavit from the 1st and 2nd Appellants/Applicants herein.

b. on 16th July 2024, the Honourable Court entered Judgment in favour of the Respondent as against the Appellants/Applicants by issuing an order of vacant possession and demolition of the structure erected on the suit property.

c. Consequently the Respondent/Decree – Holder had extracted the decree and had threatened to execute on expiry of the 30 days stay granted by the trial court which was to happen on 17th August 2024.

d. That unless the stay of execution was granted pending hearing and determination of this application and appeal, they would suffer loss and prejudice and the appeal would be rendered nugatory and the weighty issues would be rendered a mere academic exercise if the orders sought were not granted.

e. She had heavily invested on improving the suit property since purchasing it from the 2nd Appellant by building a house therein and shall suffer heavy financial losses in the event this honorable court never granted her temporary relief pending determination of this application and the appeal.

f. Her advocates had notified the court in writing requesting for typed proceedings and certified copy of the Judgment in order to aid in preparation of the record of appeal.

g. She was ready and willing to abide and comply with any terms and conditions the court may deem fit to impose.

h. She was informed by her advocates that the appeal had a reasonable chance of success and if execution were to proceed it would render the appeal nugatory.

i. The Respondent never stood any prejudice if the orders sought were granted.

j. It was only fair and just that the application herein be allowed to enable the appellate court effectively and completely adjudicate on the questions raised by the Applicants.

k. The Court ought to allow the application in the interest of justice and equity.

l. The application was made without unreasonable delay and brought in good faith.

III. The Respondent's reply

5. As already stated, while opposing the application, the Respondent filed a 19 Paragraphed Replying Affidavit dated on 6th September 2024 sworn by Kevin Lunani. He averred as follows:

    a. He was a male adult and the Respondent in the appeal herein.

    b. The application was non - meritious, misconceived, defective and actuated by bad intent as its sole purpose and design is to deny the respondent of the fruits of Judgment rendered on 16th July 2024 and should be dismissed in limine for the following reasons:

        i. That the application never satisfied the requirements for grant of the orders of stay of execution.

        ii. That the application had been filed after undue delay.

        iii. That the applicant would not suffer any substantial loss.

        iv. That the application was fatally defective as the respondent had not triggered any execution proceedings.

        v. That the application was non-meritorious and actuated by bad intent and solely designed to deny the respondent the enjoyment of the fruits of the Honourable Court's Judgment.

        vi. That the application was devised to draw out litigation and delay justice and offended the equitable maxim that justice shall not be delayed.

        vii. That the supporting affidavit never espoused sufficient cause to warrant the exercise of the Honourable Court' s discretion.

    b. However, if the Court were so inclined to the contrary, he wished to then respond to the contents of the Notice of Motion application and supporting affidavit.

    c. He denied and gave his own version of the story and that on 16th July 2023 Judgment was delivered in favour of the Respondent and that it was true that a decree was extracted on 24th May 2024 and served upon the Appellants on 29th July 2024;

    d. There was no imminent threat of execution as purported by the Appellants as no warrants of arrest had been issued.

    e. The Appellant did not stand to suffer any substantial loss. On the contrary, it was the Respondent who stood to suffer by existence of the structure erected upon his land.

    f. In any case, the Respondent was a successful litigant and had a right to execute and that execution would not cause substantial loss.

    g. Further, the Respondent was the legal and beneficial owner of the suit property known as Kadzandani Plot No. 244, 243 & 241/MN/I measuring 45ft by 65ft and not the 3rd Appellant who claimed to have purchased the suit property from the 2nd Appellant and therefore the structures erected therein were already causing losses to the Respondent and should be demolished as directed by the Trial Court in its Judgement.

    h. The Judgement was delivered on 16th July, 2024 and the Appellants were granted 30 days automatic stay of execution which was convenient to seek any preferred reliefs. But contrary to

that, the Appellants/Applicants had proceeded to file the appeal together with the Application at the eleventh hour in a bid to frustrate the Decree – Holder being the Respondent herein from realizing the fruit of the Judgement rendered on the 16th July, 2024.

i. The Appellants had not made any undertaking for furnishing security for costs of staying execution of Judgment being costs to the Respondent.

j. Consequently, the Appellants were underserving of the orders sought and the application herein should be disallowed.

k. He was advised by his Advocates that the Appellants were vexatious litigants who had filed this application in bad faith.

l. The Appellants had not adduced any factual reasons to warrant the discretion of the court neither had they met the threshold for grant of stay pending appeal.

m. In conclusion he requested the court to dismiss the application for the reason that it was made in bad faith and abuse of the court process.

IV. Submissions.

6. On 17th October, 2024 while all parties were present Court were directed to have the application dated 12th August, 202 be canvassed by way of written submissions. Pursuant to that, all the parties obliged. Thus, the Honourable Court reserved 3rd December, 2024 for the delivery of the Ruling accordingly.

A. The Written Submission by the 1st, 2nd & 3rd Appellants/ Applicants.

7. The 1st, 2nd & 3rd Appellants/Applicants through the Law firm of Messrs. Muthee & Partners LLP Advocates filed their written submissions dated 4th November, 2024. Mr. Okong'o Advocate commenced his submissions by recounting the brief background of the application. He stated that the Applicants sought for the reliefs as stated herein. He held that the application was opposed by the Respondent.

8. To support his submissions, he relied on the following three (3) issues to be considered by the Honourable Court.

   Firstly, whether the Applicants had met the threshold for the grant of orders sought?. To begin with, the Learned Counsel relied on the case of "RWW – Versus - EKW(2019) eKLR" where the court stated that the purpose of stay of execution was to preserve status quo pending hearing of appeal and that the court should weigh this right against the success of a litigant who should not be deprived of his fruit of Judgment. On this point, he submitted that they had sufficient cause to warrant grant of stay of execution as the Memorandum of Appeal herein raised triable issues on both fact and law thus the appeal being arguable ought to be preserved. He contended that the Respondent after allegedly purchasing the suit property in from the 1st Appellant in the year 2005, he left the suit property unattended until the year 2023 (eighteen years later) when he saw the need to utilize the same. Therefore, he submitted that if the Respondent could leave the suit property unattended for all those years then no loss would occur to the same if the stay of execution was granted. Furthermore, the Learned Counsel argued that no evidence was tendered to show any immediate urgency to utilize the suit property.

9. The Learned Counsel relied on the provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010 which requires an applicant to demonstrate that:

   a. Substantial loss may result to the applicant unless the order was made;

b. The application was made without unreasonable delay; and

c. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as given by the applicant.

i. On substantial loss

10. The Learned Counsel reiterated the civil case of "RWW – Versus – EKW" (Supra) where the court cited case of "James Wangalwa & Another – Versus - Agnes Naliaka Cheseto Misc App. 42 of 2011 (2012) eKLR" where the court held that execution never amounted to substantial loss as execution is a lawful process therefore "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...."

He argued that the court had issued an order of vacant possession and ordered the 3rd Appellant to demolish the structure in the form of a Swahili house erected on the suit property which the Appellants consider severely harsh.

11. The Learned Counsel also relied on the case of "Antone Ndiaye – Versus - African Virtual University 2015 eKLR" where the court cited the decision in of "Sewakarubo Dealzon – Versus - Ziwa Abby HC TOOMAD 178 OF 2015" where the court stated as follows:

> " Substantial loss is a qualitative concept. It refers to any loss, great or small, that is real, worth or value, as distinguished form a loss without value or loss that is merely nominal, insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals especially in a commercial court such as ours where the transactions typically tend to lead to colossal decretal amounts."

On this foundation counsel argued that in paragraph 6 of third appellants affidavit, she stated that he has heavily invested on improving the suit property since purchasing it from the 2nd Appellant by building a house therein and that she shall suffer heavy financial losses in the event this honourable court did not grant orders of stay of execution pending the appeal.

12. The Learned Counsel also argued that the court should take into consideration the fact that the 3rd Applicant was a bona fide purchaser for value without notice. He submitted that the 3rd Appellant purchased the suit property from the 2nd Appellant unaware of the circumstances that eventually led to the culmination of the suit. The Learned Counsel averred that the 3rd Appellant stood to suffer the most having improved the suit property upon purchasing it and allowing the intended execution would stifle her financially and emotionally.

ii. On unreasonable Delay

13. The Learned Counsel argued that there was no inordinate delay in filing this application. He informed Court that it was was filed on 14th August 2024 while the Judgment in the trial court was delivered on 16th July 2024. It meant the application was within the 30 days period granted by the court for stay of execution. He further argued that Paragraph 12 of the Respondent's Relying Affidavit where the Respondent averred the Appellants was frustrating him from realizing the fruits of his Judgment as having no basis.

iii. On Security

14. The Learned Counsel submitted that provision of security was discretionary. He humbly prayed that the court should not impose the condition for depositing security. This was because the subject matter was immovable property which would be available for the successful party upon determination of the appeal. Nevertheless, he stated that they were ready to abide by any conditions the Court may deem fit to impose. To buttress on this point, he cited the case of "Dr. Paul Mubia Mathu – Versus - Ibrahim Kariuki Gichimu 2004 KEHC 1191 (KLR) where the court adopted the principles set out in the case of:- "Rosengrens Limited – Versus - Safe Deposit Centres Limited [1984] 3 ALL ER 198" as follows:

> " The process of giving security is one which arises constantly ..So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way which is least disadvantageous to the party giving that security. It may take many forms. A bank guarantee and payment into court are but two of them.....so long as it is adequate, then the form of it is a matter which is immaterial."

Based on the above principles an order prohibiting transfer of the property would be sufficient to cover the Respondent's interests in the event the appeal is unsuccessful and that in any event the suit property was adequate security as it would be available for the successful party upon determination of the appeal.

15. In conclusion he relied on the case of "Butt – Versus - Rent Restriction Tribunal (1982) KLR" where the court gave guidance on how such discretion should be exercised:-

> " 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."

16. As a result of the foregoing, the Learned Counsel urged this Court to find the application meritorious and that the appeal has strong and arguable grounds with a likelihood of succeeding .He further stated that the appeal raises triable issues and it would be in the interest of justice that this court grants the orders sought.

B. The Written Submissions by the Respondent

17. The Law firm of Messrs. Ameli Inyangu & Partners for the Respondent filed their written submission dated 9th November, 2024. Mr. Adhoch Advocate commenced his submissions by providing the Court with the background of the matter in issue emanating from the filed application by the Appellants/ Applicants herein. The Learned Counsel relied on the provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010 . He submitted that these conditions were set out from the cases of: "James Wangalwa's (Supra) and "the RWW" being:-

    i. Whether the Applicants would suffer substantial loss if the order sought was not granted?

    ii. Whether security for costs should be provided?

    iii. Whether the application has been made without unreasonable delay?

i. Whether the Applicants will suffer substantial loss if the order sought is not granted?

18. The Learned Counsel referred to the case of "Nairobi Misc Case 1561 of 2007 Century Oil Trading Company Limited – Versus - Kenya Shell Limited Nairobi [2008] eKLR" as was cited in the case of "Charles Njoroge Njeri – Versus - Joseph Karomo Guchora (2021) eKLR where the court stated that substantial loss cannot mean the ordinary loss to which every judgment debtor is subjected to after losing a case. The court held that substantial loss must mean something in addition and that where execution of a money decree was sought to be stayed, the court shall in considering whether the applicant would suffer substantial loss, the financial position of the applicant and respondent becomes an issue. Based on this counsel argued that the Appellants failed to particularize the nature of the loss they would suffer and also failed to adduce evidence of what substantial loss the Applicant would be occasioned if the orders sought were not granted.

19. The Learned Counsel in submitting to the averment by the Appellants that execution would completely destroy the investment referred to the case of:- "Bubble Engineering Company Limited – Versus - Maseno University (2015) eKLR" where the court stated that for one to demonstrate substantial loss, the applicant must show that the respondent is a man of straw incapable of refunding the decretal amount should the appeal succeed. They argued that the appellants have not proved that the Respondent would be incapable of reimbursing them in the event the appeal was determined in the Appellant's favour.

20. The Learned Counsel also quoted the case of "Stephen Gakere Macharia – Versus - Nic Bank Limited (2019) eKLR" where he submitted that the Appellants had failed to prove that there was a threat of execution or that in the event of an execution he would be irreparably prejudiced pending determination of the appeal.

ii. Whether security for costs should be provided?

21. The Learned Counsel averred that despite the decree herein being not a money decree, the Appellants have not stated their willingness to provide security for Judgment as was directed by the court in the case of "Wycliff Sikuku Walusaka – Versus - Philip Kaita Wekesa 2020 eKLR" where the court held that the offer for security must of course come from the Appellants as a sign of good faith to demonstrate an application for stay of execution. On this basis he asked the court to order that the Appellants depositing security for costs equivalent to the value of the suit property.

iii. Whether the application has been made without unreasonable delay?

22. On this issue, the Learned Counsel relied on the case of "Jaber Mohsen Ali & Another – Versus - Prisciallah Boit & Another [2014] eKLR" and stated that the application was filed almost a month after the Judgement had been delivered in the trial court on 16th July 2024 when they could have moved the court almost immediately but opted to choose indolence. They stated that no sufficient explanation for the delay was given and that alone the application should be dismissed. He relied on the case "Charles Nyamwega – Versus - Asha Njeri Kimata & Another (2017) eKLR".

23. On the issue of costs, the Learned Counsel submitted that since the Appellants failed to prove they are deserving of the orders sought, that costs to be awarded to the Respondents.

C. Analysis and Determination

24. I have keenly considered all the filed pleadings with reference to the application dated 12th August 2024 and the Replying Affidavit sworn on 6th September 2024, the written submissions and the myriad of authorities cited by the Learned Counsels, the relevant provision of *Constitution of Kenya, 2010* and the statures.

25. For the Honourable Court to reach an informed, reasonable and fair decision it will consider three (3) issues for its determination. These were:-

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

    b. Whether the application dated 12th August, 2024 by the Appellants/ Applicants herein has met the requirements for stay of execution pending appeal?

    c. Who will bear the costs of the application?

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

26. Under this sub – heading, the Honourable Court will be dealing with the substrata on whether to grant stay of execution or not. Stay of execution pending appeal is governed by the provision Order 42 Rule 6 (1) which states 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."

27. The Courts have extensive deliberated on this issue and arrived at strong and elaborate Jurisprudence. Thus, there will be no need to re - invent the wheel hereof. Its instructive to note that most of the cases, the laws cited by both parties are based on the old civil procedure rules which are now bankrupt and have no effect in the civil procedure rules. There are only three requirements which the court will focus on.

28. Thus, the requirements are provided in Order 42 rule 6 (2) of the Civil Procedure Rules which states:

> " 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 When it comes to substantial loss, I fully concur with the legal principles founded in the case of "James Wangalwa" case (Supra) emphatically referred to by both the Learned Counsels to the effect that execution in itself is not substantial loss. Further that the Honourable Court is guided by the principles in the cases of "Antone Ndiaye and the Century Oil Trading Company"; "Kenya Shell Limited vs Benjamin Karuga Kibiru & Another [1986] eKLR". In a nutshell, they held thus:
>
> > " It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an Appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay."
>
> (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."

c). The application was made without undue delay.

Issue No. b). Whether the application dated 12th August, 2024 by the Appellants/Applicants herein has met the requirements for stay of execution pending appeal?

29. Under this sub – heading, the Honourable Court shall endevour to apply the above stated legal principles to the instant case. On 16th July, 2024, the trial Court delivered its Judgement in favour of the Respondent. It ordered that the Appellants to demolish her structure on the suit land. However, at the same time on the material day, it stayed by the said orders for 30 days which were to lapse on 17th August 2024. Based on the legal ratio founded in the provision of Law and as was rightly stated in the case of "James Wangalwa" (Supra), the fundamental purpose for stay of execution is for preservation of the subject matter. In the instant case, the subject matter in this suit is the Swahili house belonging to the 3rd Appellant. However, execution is a lawful process and therefore to buttress this lawful process the 3rd Appellant states that she heavily invested on the Swahili house as a purchaser for value without notice and that demolishing the house is severely harsh, drastic and would take a toil on her financial and emotional stability. Their contention was that if the Appellants successfully prosecute the appeal without stay orders, the house would definitely have been demolished and would have lost whatever value she was getting from the swahili house whether in terms of rent or residence and the court can only speculate as she did not expressly state what she does with the house.

However, at the same breath, this interest must be balanced with interests of the Respondent in enjoying the fruits of his Judgment as was held in the case of"- Machira T/A Machira & Co Advocates vs East African Standard [2002] eKLR: "To be obsessed with the protection of an Appellant or intending Appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his

judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way Applications for stay of further proceedings or execution, pending Appeal are handled. In the Application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court."

30. The Respondent sensationally claimed that the Appellants are vexatious litigants which proof was not adduced neither can the abuse of process be seen by this court as the Appellants had the right to apply to this court pursuant to the provision of Order 42 rule 6 (1) civil procedure rules. Thus, I discern that there exists substantial loss to be incurred by the Appellants/Applicants if the application was disallowed.

b). Whether application has been made without unreasonable delay

31. The court does not agree with the Respondent that there was inordinate delay between the delivery of the Judgment and the filing of the application. In the case of "Charles Nyamwega case" (Supra) that was relied on by the Respondent, the delay was for three and a half months. In the instant case, while the Judgment was delivered on 16th July, 2024, the application was filed on 12th August, 2024 a quick computation it was a period of twenty six (26) days from that date hereof. Furthermore, immediately the Applicants were granted thirty (30) days while awaiting them to move Court formally. By no means, the days ought to have started running from 16th September, 2024. For these reasons, I hold that there any undue and unreasonable delay as the stay period had not lapsed by the filing of the appeal and instant application.

c). 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

32. The Appellants submitted that security for costs is a discretion of the court but is not necessarily a must. The court is of a different view which is that security for costs are exactly as the name suggests, security for any costs incurred by the Respondent in case the appeal fails. 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."

33. In direct relation to the above legal parameters, the 3rd Appellant redeemed herself in paragraph *8* where she undertakes that she would be willing to abide with any terms and conditions as this court may impose which the Respondent failed to appreciate. The court is fully satisfied by that undertaking and it will not go further into this.

Issue No. c). Who will bear the costs of the application?

34. It is now well established that the issue of Costs is at the discretion of the Court. Costs mean the award that is granted to a party at the conclusion of any legal proceedings of action. The provision of Section 27 of the *Civil Procedure Act*, Cap. 21 states that this court has the power to determine who bears the costs and it usually follows the event unless there is sufficient or good reason to depart from this section.

35. In the case of:- "Republic – Versus - Rosemary Wairimu Munene, Ex-Parte Applicant – Versus - Ihururu Dairy Farmers Co-operative Society Limited Judicial Review application no 6 of 2014" this court held as follows: -

> " The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case."

36. Therefore, it goes without saying that since the Appellants/Applicants have successfully prosecuted the application, they are entitled to the costs of the application.

V. Conclusion and directions

37. In conclusion, having caused such an elaborate analysis to the framed issues herein, the Honorable Court based on the Preponderance of Probabilities and the balance of convenience, it holds that the Appellants/Applicants have established their case. Thus, I proceed to make the following orders: -

    a. That the Notice of Motion application dated 12th August, 2024 be and is hereby found to have merit and thus allowed.

    b. That there be a stay of execution of the Decree emanating from the Judgment delivered by Hon. Joshua Nyariki (SRM)in Mombasa MCELC NO. E076 OF 2023 on the 16th July, 2024 pending the hearing and determination of the Appeal.

    c. That the Appellants granted 30 days leave to compile, file and serve the Records of Appeal.

    d. That for expediency sake the appeal be mention on 17th February, 2025 for purposes of admitting the Appeal and taking direction on the disposal of the appeal under the provision of Section 79B of the *Civil Procedure Act*, Cap. 21 and Order 42 Rules, 11, 16 and 18 of the Civil Procedure Rules, 2010. There be a hearing on 8th April, 2025 and further direction thereof.

    e. That costs of this application abide the outcome of the appeal.

    It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS AND SIGNED ON THIS ..3RD .DAY OF...DECEMBER 2024

.....

HON. JUSTICE MR. L.L. NAIKUNI,

ENVIRONMENT & LAND COURT AT MOMBASA

Ruling delivered in the presence of:-

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

b). Mr. Gathu Advocate holding brief for Mr. Okong'o Advocate for the Appellant.

c). Mr. Otieno Advocate holding brief for Mr. Adhoch Advocate for the Respondent.