



Moalin t/a Gaab Transporters Ltd v Mohammed & another (Environment and Land Appeal 45 of 2021) [2023] KEELC 16660 (KLR) (7 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16660 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 45 OF 2021**

**LL NAIKUNI, J
MARCH 7, 2023**

BETWEEN

**MOHAMED MOHAMED MOALIN T/A GAAB TRANSPORTERS
LTD APPELLANT**

AND

SALLY OYERA MOHAMMED 1ST RESPONDENT

IGARE AUCTIONEERS 2ND RESPONDENT

RULING

I. Background

1. The Appellant/Applicant, Mohamed Mohamed Moalin t/a Gaab transporters Limited filed an Amended Notice of Motion application dated 8th November, 2022 brought under the provision of Order 45 Rule 1, Order 50 Rule 6, Order 42 Rule 6 of the *Civil Procedure Rules*, 2010 and Sections 1A, 1B and 95 of the *Civil Procedure Act*, Cap. 21.

II. The Appellant/Applicant's case

2. The Appellant/Applicant sought for the following orders:-
 - a. Spent.
 - b. That this Honorable Court to review and or set aside its orders of 11th October, 2022 which allowed the application for contempt and found the Appellant/Applicant guilty of Contempt of court orders and condemned him to serve civil jail term of four (4) months or in the alternative to immediately pay to the Respondents Kenya Shillings One Million Five Hundred (Kshs. 1,500,000/-).



- c. That this Honorable court do restore the orders of 13th October, 2021 requiring the Appellant to deposit the Kenya Shillings One Million (Kshs. 1,000,000/-) security to the court and proceed with the appeal.
 - d. That in the further alternative to prayer (ii) above, this Honourable Court do grant stay of execution of the said orders pending the hearing and determination of the appeal
 - e. That this Honorable Court do grant prayer 3B herein above in the interim pending the hearing and determination of this application in the alternative.
 - f. That Costs of this application.
3. The Application is based on the averments made out under the contents of a 12 paragraphed Supporting Affidavit sworn by Mohamed Mohamed Moalin dated 8th November, 2022 with three (3) annexures marked as “MMM – 1 to 3”). The Applicant averred
- i. He was the Appellant/Applicant herein hence competent to swear the affidavit.
 - ii. Sometimes on 10th August, 2021, the Appellant filed this appeal challenging the decision of the Business Premises Rent Tribunal delivered on 30th July, 2021 dismissing his application seeking the tribunal to declare the Respondents actions of levying distress against him as illegal and for prohibiting orders against them from removing the proclaimed goods and or in any other manner whatsoever interfering with his peaceful occupation of the demised premises. He annexed a ruling and marked it as “MMM – 1”.
 - iii. On 23rd August, 2021, the Appellant filled an application under the provision of Order 42 Rule 6 and Order 40 of the Civil Procedure Rule, 2010 seeking an order of stay of the execution of the Business Premises Rent Tribunal orders of 30th July, 2021 pending the hearing and determination of the appeal. In the alternative, the application sought restraining orders against the Respondents from carrying away his proclaimed goods pending the hearing and determination of the appeal.
 - iv. On 13th October, 2021 this Honourable Court granted the Appellant’s application on condition that he deposits a sum of Kenya Shillings One Million (Kshs. 1,000,000/-) in the joint accounts of the parties advocates within 30 days from the date of the said order.
 - v. The Appellant was unable to meet the condition of the stay orders prompting the Respondents to file an application for contempt under Order 40 Rule 3(1) of the Civil Procedure Rules, 2010. This application was filed on 25th February, 2022.
 - vi. On 11th October, 2022 this Court allowed the application for contempt and condemned the Appellant to serve civil jail for 4 months in the alternative to pay the Respondents a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/-) within three (3) days of the said orders failure to which the Appellant be arrested. He annexed and marked “MMM – 2” a copy of the ruling.
 - vii. The Appellant sought the advice of another lawyer. The new Advocates advised him that there was an apparent error on the face of the record for the following reasons: -
 - a. By law a party could not be found in contempt of an order for conditional stay granted under Order 42 Rule 6 of the Civil Procedure Rules, 2010. Failure to meet the condition only exposes the Appellant to execution proceedings before the trial court or tribunal.



- b. There was no finding by the tribunal that the Appellant do pay the Respondents Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/-) and this court had no jurisdiction to order the Appellant pay the Respondents the said amount.
 - c. Whereas a court has jurisdiction to punish for contempt it could only impose a reasonable fine payable to court in the alternative to civil jail or in addition thereto.
- viii. In the alternative the grounds raised in clause 7 herein above constituted sufficient reasons to enable this Court review its said orders.
 - ix. The Appellant believed he had a meritorious appeal both before this court and in the Court of Appeal with a high chance of success and he was thus desirous of prosecuting his appeal to its fruitful end. He annexed and marked as “MMM – 3” was a copy of the Notice of Appeal.
 - x. Jailing the Appellant would not solve the rent dispute before Court and should live the issue unresolved. Further it would prejudice the hearing and determination of the appeal itself.
 - xi. It was in the interest of justice that this application be allowed.

III. The Respondent’s case

4. The Respondent herein Sally Oyera Mohammed responded through a 10 Paragraphed Replying affidavit dated 16th November, 2022 with one annexure marked as “SOM – 1”. She deponed as follows that:

- a. She was the 1st Respondent/ Landlord herein and competent to swear this affidavit.
- b. She had already filed a Replying Affidavit to the Notice of Motion application dated 14th October, 2022 which was on record.
- c. The amended notice of motion application dated 8th November, 2022 was bad in law and incompetent because;
 - i. It was filed without leave.
 - ii. It sought for review of orders dated 8th November, 2022 and again there is a Notice of Appeal filed on 9th November, 2022 of the same orders. This was contrary to the provision of Order 45 Rule 1(1) of the Civil Procedure Rules, 2010 which states;

“ 45 Rule 1(1) Any person considering himself aggrieved-

- a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. By a decree or order from which is hereby allowed,.....may apply for a review of judgment to the court which paused the decree or made the order without unreasonable delay

From the above it is clear that no review lies where the party has appealed.

- iii. It was filed with unreasonable delay i.e. 29 days later.
- iv. The Applicant was already in contempt of court as found by this Court. He could not be heard until and unless he purged that contempt. The Respondent could not seek



orders from the same Court whose orders he destroyed. Her advocate had would be raising a preliminary objection accordingly.

- d. In any event the amendments challenged this Court's orders which amounted to an appeal before the same court. Hence, the same could not be allowed.
- e. On 13th October, 2021 and 16th November, 2021 respectively, this Court issued orders which were very clear on record. The Applicant had not challenged the same for any clarity.
- f. There were no grounds for review of the orders nor was there any sufficient reason for the same.
- g. Furthermore, Mr. Abubakar Advocate for the applicant undertook to negotiate this matter with her advocate Mr. Mutisya to pay the decretal amount which he never did, thereby misleading. This was taking the Counsel and the Court for granted so as to buy time, an act of bad faith. Both the Counsel and the applicant (as an officer of court should always speak the truth). Her advocates wrote a letter to this effect (as per copy marked as "SOM -1")
- h. The Applicant's application for further review should not be allowed because;
 - i. That the Applicant had been granted several extensions of time which he never complied with before.
 - ii. That the Applicant had already been found guilty of contempt and could not seek any further indulgence of the court before he purged the contempt.
 - iii. That the Applicant was taking this Court for granted and in circles and to appear useless and to act in vain and Court never acted in vain.
 - iv. That the application was an abuse of Court process.
- i. The Application was a continuing mockery, circus and disrespect of this court and should be dismissed so as to restore the respect and dignity of this court the Constitution (2010) and the Rule of Law.

IV. Analysis and Determination

5. The parties herein consented to have the application determined without canvassing of written submissions and a ruling date was fixed for the 7th February, 2023.
6. I have considered all the pleadings filed in this matter and the relevant provisions of the law. For the Court to arrive at just and fair decision, the following issues will form the basis and guide for the determination:-
 - a. Whether the Appellant/Applicant herein through its Notice of Motion application dated 8th November, 2022 has made a case for review and or setting aside of this Court's orders of 11th October, 2022 which allowed the application for contempt and found the Appellant/Applicant guilty of contempt of court?
 - b. Whether the Honourable Court can restore its orders issued on 13th October, 2021 requiring the Appellant/Applicant to deposit a sum of Kenya Shillings One Million (Kshs. 1,000,000/-) as security for Costs to the court and hence proceed on with the filed appeal?
 - c. Whether the Appellant's application is merited to grant stay of execution of the said orders pending the hearing and determination of the appeal to the Court of Appeal?
 - d. Who will bear the costs?



ISSUE No. a). Whether the Appellant/Applicant herein through its Notice of Motion application dated 8th November, 2022 has made a case for review and or setting aside of this Court's orders of 11th October, 2022 which allowed the application for contempt and found the Appellant/Applicant guilty of contempt of court?

7. Under this Sub heading, the Honorable Court has been engaged on matters of review, varying and/or setting aside of its own orders and Contempt of Court orders and the consequences thereof.

The provision of Section 80 of the [Civil Procedure Act](#), Cap 21 provides that:

Any person who considers himself aggrieved-

- a. By a decree or order in which an appeal allowed by this Act, but from which no appeal has
- b. By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

8. The provisions of Order 45 Rule 1 of the [Civil Procedure Rules, 2010](#) provide for the review of a decree or order as follows:-

1. (1) Any person considering himself aggrieved: -

- a) By a decree or order from which an appeal is allowed but from which no appeal has been preferred or
- b) By a decree or order from which no appeal is hereby allowed, and from whom the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay.

9. There are three (3) limbs which are discernible from part (b) above:-

- a. Discovery of new and important matter or evidence.
- b. Mistake or error apparent on the face of the record.
- c. Any other sufficient reason

From the above provisions of the law, it is quite clear that while the provision of Section 80 of the [Civil Procedure Act](#), Cap. 21 sets out the policy and hence gives the Court the to make orders for review, the provision of Order 45 sets out the conditions and procedure to be met in a review proceedings.

10. In the case of "[Republic v Public Procurement Administrative Review Board & 2 Others](#)" the court held that:-

Section 80 gives the power of review and Order 45 sets out rules. These rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review.

11. In the present application, the Appellant/Applicant has not demonstrated that there has been discovery of new and important matter of evidence, or that there is an error apparent on the face of



the record. As stated out review can also be allowed for any other sufficient reason. The expression sufficient reason means a reason sufficiently analogous to those specified in the rule.

12. In meaning of “Sufficient reason” was well spelt out in the case of “*Shanzu Investments Limited v Commissioner for Lands* (Civil Appeal No 100 of 1993) the Court of Appeal held that:-

“Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by section 80 of the *civil procedure act*: and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”

13. From the instant case, the Appellant/Applicant is seeking to have the orders of contempt of court issued by this court on 11th October, 2022 reviewed and instead for the court to restore to earlier orders it issued on 13th October, 2021. For ease of reference, on 13th October, 2021 ordered the Appellant/Applicant to deposit a sum of Kenya Shillings One Million (Kshs. 1,000,000/-) in Court as security for Costs and hence to proceed on with the appeal. However, he never complied with this orders. Resultantly, this led the Respondent to move court seeking orders of Contempt of Court orders. He held that the Appellant/Applicant had willfully and deliberately disobeyed the Court orders. Upon hearing the application, on 11th October, 2022 the Court in its ruling found that indeed the Appellant/Applicant was in breach of and thus in contempt of Court orders. The Appellant was condemned to serve civil jail for a term of four months effectively and/or in the alternative to immediately pay up the Respondent herein a sum of Kenya Shillings One Million Five Hundred (Kshs. 1,500,000/-). Clearly, this never happened. However, he was granted an extension of seven (7) more days but which he still failed to comply.
14. The Appellant/Applicant has not explained to the Court why upto now he failed with the orders of 13th October, 2021. For these reasons, he has not made out a case for the Orders of 11th October, 2022 to be reviewed or set aside. The prayer is unsubstantiated and therefore denied. The application fails.

ISSUE No. b). Whether the Honorable Court can restore its orders issued on 13th October, 2021 requiring the Appellant/Applicant to deposit a sum of Kenya Shillings One Million (Kshs. 1,000,000/-) as security for Costs to the court and hence proceed on with the filed appeal?

15. The principles upon which this Court grants relief under Rule 5(2)(b) of the *Court of Appeal Rules* are well settled and they are that to succeed, an applicant must show that he has an arguable appeal and that if the orders sought, be they of stay of execution or injunction are not granted, the said appeal would be rendered nugatory or useless, illusory, academic and of no effect. By an arguable appeal is meant, not one that must necessarily succeed but one that is not trifling, and raises at least one bona fide point that calls for a response from the respondent and is worthy of decision by the Court hearing the appeal. See, *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others* [2013] eKLR and *Kieni Plains Co. Ltd & 2 Others v Ecobank Kenya Ltd* [2018] eKLR.
16. From the above stated facts, the Appellant/Applicant has not in any way shown the court why they disobeyed the court orders on the 13th October, 2021. Hence the application made on 15th February, 2022 by the Appellant/Applicant seeking the prayers thereof and the consequential orders made for contempt of Court orders of 11th October, 2022 thereof fails. This court is of the opinion that the Appellant has not proved they have merit on this prayer.



ISSUE (c) Whether the Appellant’s application is merited to grant stay of execution of the said orders pending the hearing and determination of the appeal to the Court of Appeal

17. On 30th July, 2021, the Honorable Vice Chairman of the BPRT delivered a ruling and the subsequent orders against the Appellant. Being aggrieved, the Appellant lodged an appeal before this Court against the whole decision under the statutory period under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*. The provision of Section 15 (1) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* provides that:

“

“(1) Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the Environment and Land Court:

Provided that the Environment and Land Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.”

18. The Appellant/Applicant also applied for stay of execution of these orders vide a Notice of motion application. On 13th October, 2021 this Court granted him conditional orders and as stated above he has been failing to comply all the through. Be that as it may, through the instant application, dated 8th November, 2022, the Appellant/Applicant has once again approached this Court seeking among other orders for stay of execution this being the second time he is doing that. In the case of “*Visbham Ravji Halai v Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the power of the Court of Appeal to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 Rule 6 of the *Civil Procedure Rules, 2010* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing, I would add that the 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 under the provision of Sections 1A and 1B of the *Civil Procedure Act, 2010* 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, 2010* or in the interpretation of any of its provisions. According to the provision of Section 1A (2) of the *Civil Procedure Act, Cap. 21*:

“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.”

19. Given the above legal position, the Court must make sure that the fettered discretion is exercised judicially. The Appellant needs to satisfy the Court, first, that the appeal, or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the results or the success could be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he fails to demonstrate the other limb.

20. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such



circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See “Suleiman v Amboseli Resort Limited [2004] 2 KLR 589. This was the position of Warsame, J (as he then was) in the case of:- “Samvir Trustee Limited v Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997 where he expressed himself as hereunder:

“..... A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his Judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his Judgement; hence the consequence of a Judgement is that it has defined the rights of a party with definitive conclusion..... The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

21. The very initial cases on this issue of stay of exercise was the case of: “Butt v Rent Restriction Tribunal [1979], the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, 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 the appeal court reverse the judge’s discretion. Thirdly, 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. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
22. In this case the Appellant has failed to fulfil the four conditions prevalent for granting of the stay of execution. Firstly, with regard to sufficient cause, on 13th October, 2021 in the presence of both Counsels for the parties herein this Court ordered that the Appellant deposits a sum of Kenya Shillings One Million (Kshs. 1,000,000/-) in the joint names of the Advocates for both the parties herein within 30 days. The Appellant did not comply with the orders and on 15th October, 2021 he was granted a further 7 days but still failed to comply. On 11th October, 2022 this Court ruled on a Notice of Motion application dated 15th February, 2022 where this Court concluded that:
 - a. That the Notice of Motion application dated 15th February, 2022 by the Respondents/ Applicants herein be and is hereby allowed with costs.
 - b. That the Appellant/Respondent herein be and is found guilty of contempt of Court orders and proceed to punish him for the said offence of contempt.



- c. That taking that the interim orders granted to the Appellant were conditional on him paying a sum of Kenya Shillings One Million (Kshs 1,000,000/-) which he failed to pay and are hereby vacated henceforth.
 - d. That the Appellant/Respondent be and is condemned to serve Civil Jail term of four (4) months effectively and/or in the alternative to immediately pay up the Respondent herein a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs 1,500,000/-).
 - e. That costs of the application to be borne by the Appellant.
23. Secondly, the Appellant/Applicant will not suffer any substantial loss if not granted the orders. He was found by the ruling of the BPRT to be a defaulter and hence in rental arrears. It is for these reasons that the Tribunal on 30th July, 2021 ordered that he be Levied for distress for rent arrears and recovery of costs. On the contrary, its actually the 1st Respondent who has continued to suffer loss caused by the acts of the Appellant/Applicant.
24. Thirdly, with regard to security for him to be considered for stay orders. The Court, in the case of “[RWW v EKW](#) [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“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.

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.”

25. From the record, it is clear that the Appellant has offered no security as a condition for stay. The offer for security must always originate from the Applicant in any application for stay. There being none in this application and that the one prescribed by the court was defied by the Appellant, I am constrained to exercise my discretion in favour of the Appellant/Applicant. In the case of “[Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others](#) [2015] KLR, it was said:

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”



26. In *RWW v EKW* (*supra*), the Court said:-

“The other condition for granting stay orders is on the security to be offered. The law is that a party seeking stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant.....”

27. From the above decisions it is clear that the issue of security is discretionary, and it is upon the Court to determine the same. In an application for stay such as this one the Court must consider the overriding objective and balance the interest of the parties to the suit since the court is enjoined place the parties are on equal footing. Since the overriding objective aims, inter alia, to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act, the balancing of the parties' interest is paramount in an application for stay of execution pending appeal. However, the law still remains that where the applicant intends to exercise its undoubted right of appeal, and in the event it was eventually to succeed, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the Respondent who has a decree in his/her favour should not, if the Applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security, and it is trite that once the security provided is adequate its form is a matter of discretion of the Court. See ”*Nduhiu Gitahi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100.

28. Accordingly, while appreciating that this Court had already ordered that the Appellant/Applicant do pay the Respondents Kenya Shillings One Million (Kshs. 1,000,000/-) to a joint account managed by both the Advocates on record which conditional to the extent that where the Appellant/Applicant did not pay then the same will lapse. There is no other chance available for the Applicant/Appellant to make another proclamation again. On that front the application fails.

ISSUE No. (d) Who will bear the costs of the Application

29. It is trite law that the issue of costs is at the discretion of the Court. Costs mean the award that a party is given after the conclusion of any legal action, process or proceedings of any litigation. The provision of Section 27(1) of the *Civil Procedure Act* holds that costs follow the events. By event it means the results or outcome of the said legal action, process or proceedings thereof.

30. In this case the Respondents have succeeded in opposing the Application. Therefore, it follows that they deserve the orders to be borne by the Appellant/Applicant herein.

I. Conclusion & Disposition

31. Ultimately, after conducting an in-depth and elaborate analysis of the framed issues hereof, the Honourable Court is of the strong view that the Appellant has not been able to successfully establish their case on preponderance of probability. Thus in the view of the foregoing and for avoidance of doubt I do order as follows:

- a. That the Notice of Motion application dated 8th November, 2022 by the Appellant/Applicant herein be and is hereby found to lack merit and is hereby dismissed with costs.
- b. That this Honourable Court has found that the Appellant/Applicant has not made out a case to have this Court Review and or set aside its orders of 11th October, 2022 which allowed the application for contempt and found the Appellant/ Applicant guilty of contempt of Court orders and condemned him to serve civil jail term of four (4) months or in the alternative



to immediately pay the Respondents Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/-) which order still stands.

- c. That this Honourable Court do hereby decline to restore the orders of 13th October, 2021 as restoration of this order will invalidate the Court's discretion and the orders made thereafter would have been made in vain.
- d. That this Honourable Court is not convinced by the Appellant to grant a stay of execution which had already been granted on the 13th October, 2021 and the Appellant/Applicant was adjudged in contempt of the said order.
- e. That this Honourable Court had granted the Appellant Interim orders on 13th October, 2021 which lapsed automatically due to non - compliance.
- f. That the cost of this application be borne by Appellant.

It Is So Ordered Accordingly.

RULING DELIVERED BY MICROSOFT VIRTUAL TEAMS, SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MARCH 2023.

HON. JUSTICE L. L. NAIKUNI, (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:

- a) M/s. Yumna, Court Assistant;
- b) Mr. Khamisi Salim Advocate holding brief for Mr. Aboubakar Advocate for the Appellant
- c) Mr. Mutisya Advocate Advocates for the 1st Respondent.
- d) No appearance for Advocates for the 2nd Respondent

