



REPUBLIC OF KENYA



KENYA LAW

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**Republic v Principal Kadhi, Mombasa; Patel (Interested Party); Dar & 2 others (Exparte)
(Miscellaneous Application 90 of 2020) [2023] KEELC 16188 (KLR) (6 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16188 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
MISCELLANEOUS APPLICATION 90 OF 2020**

LL NAIKUNI, J

MARCH 6, 2023

BETWEEN

REPUBLIC APPLICANT

AND

PRINCIPAL KADHI, MOMBASA RESPONDENT

AND

MURTAZA TURABALI PATEL INTERESTED PARTY

AND

ALIBHAI ADAMALI DAR EXPARTE

SHABBIR ALIBHAI DAR EXPARTE

ZAINULABIDIN YUSSUFALI DAR EXPARTE

RULING

Introduction

1. By a Notice of Motion application dated 17th May, 2022, instituted by “the Interested Party/Applicant – Murtaza Turabali Patel against the Ex- Parte Applicants”, - Alibhai Adamali Dar, Shabbir Alibhai Dar and Zainulabidin Yussufali Dar and the Respondents herein. The application was brought under the provisions of Sections 1A, 1B, 3A & 95 of the *Civil Procedure Act* Cap. 21, Order 40 Rule 2, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Section 7 of the Appellant Jurisdiction Act Cap. 9 all of the Laws of Kenya.



The Interested Part/Applicant's case

2. The Interested Party/Applicant sought for the following orders that:

- a. Spent.
- b. That this Honorable Court be pleased to stay execution of the Judgment and subsequent Decree/Order herein pending hearing and determination of this application inter - parties.
- c. That the Applicant be granted leave to file their Notice of Appeal out of time.
- d. That the draft Notice of Appeal filed herein be deemed as duly filled upon payment of the requisite court fees/charges.
- e. That the Honorable court do make any other order it deem fit in the circumstances.

3. The said application was based on the following grounds that:

- a. The Judgment on this matter was issued on the 4th April, 2022 and Notice of Appeal ought to have been lodged within 14 days from the date thereof.
- b. The delay was occasioned by the mix-up which occurred during the process of transmission of the copy on the Judgment from the Court registry and to the Applicant for instructions to Appeal therefrom.
- c. The Applicant being dissatisfied with Judgment intended to lodge an appeal.
- d. The Application had been made within reasonable time.
- e. The Applicant had a high chance of success in the appeal.
- f. The Respondent would not be prejudiced of the said leave was granted.

4. The Application was premised on the grounds, the testimonial facts and the averments made out under an 11 Paragraphed Supporting Affidavit sworn by Murtaza Turabali Patel, dated 17th May, 2022 and three (3) annexures annexed hereof and marked as "MTP – "1 – 3". He averred that: -

- i. He was the Interested/Applicant herein hence competent to swear the affidavit.
- ii. Judgment on this matter was issued on the 4th April, 2022 and they ought to have filed and/or lodged their Notice of Appeal within 14 days from the date thereof. A copy of the Judgment was annexed and marked as "MTP – 1".
- iii. The delay in lodging an appeal or Notice of Appeal was occasioned by the delay which occurred during the process of obtaining copies of the Judgment from the Court to his office and obtaining instructions to appeal.
- iv. The said delay was inadvertent and not intended.
- v. They were dissatisfied with the said Judgment and they intended to lodge an appeal. He annexed and marked a copy of the letter requesting copy of proceedings marked as "MPT - 2".



- vi. Their appeal had a high chance of success.
- vii. The Respondent would not be prejudiced if the said leave was granted.
- viii. They had applied for certified copies of proceedings and except to have them expeditiously. He annexed and marked “MTP – 3” was a copy of a letter requesting for certified copies of proceedings.
- ix. They had made this application within reasonable time.
- x. The Affidavit was in support of the application for stay pending appeal.

The Submissions

- 5. On the 11th October, 2022, while all the parties were in Court, it was consented that the Notice of Motion application dated 17th May, 2022 be canvassed by way of written submissions. Upon compliance, the Court reserved 2nd February, 2023 as the date to deliver its ruling.

The written submissions by the Ex – Parte Applicants.

- 6. On 4th October, 2022, the Counsels for the Interested Party/Applicant the Law firm of Messrs. Marende Necheza & Company Advocates filed their written submissions dated even date. Mr. Ondieki Advocate commenced by providing a brief background of this matter. He stated that the submissions was in respect to the Notice of Motion application dated 17th May, 2022 in which the Interested Party/Applicant sought prayers “inter alia” that this Honourable Court be pleased to stay execution of the Judgment and subsequent decree/order delivered on 4th April, 2022. Further, it sought that the Interested Party/Applicant be granted leave to file their Notice of Appeal out of time and that the draft Notice of Appeal be deemed as duly filed upon payment of the requisite court fees/charges.
- 7. The Learned Counsel submitted that the Application was supported by the sworn affidavit of Murtaza Turabali Patel on 17th March, 2022 and filed in Court on the same day. The Counsel informed Court that though served, neither the Ex – Parte Applicant nor the Respondents had filed nor served the Interested Party/Applicant with any response to the Application leaving the Application to be unopposed at the time of writing the submissions.
- 8. The Learned Counsel submitted that the main issue of determination was whether this Honorable Court should exercise its discretion in favor of the Interested party/Applicant and grant stay of execution of the Judgment delivered on 4th April, 2022 and further whether leave should be granted to file the Notice of Appeal out of time and the draft Notice of Appeal be deemed as properly filed after payment of the requisite fees. To rebut on this point, the Counsel relied onto the decisions of: Civil Application No. 67 of 2017, Kenya Alliance Insurance Co. Limited – Versus - Julius Rem Mutabari [2018] eKLR and Miscellaneous Civil Application No. 272 of 2015, Robert Mbuvi Nguta & Another – Versus - Josphat Ndambuki Kituu” where the Honorable Court restated the principles guiding the issue of the Court exercising its discretionary powers to extend time for filing appeal out of time. Similarly, as was in the case of ”Nicholas Kiptoo Arap Korir Salat – Versus - IEBC & 7 Others (2014) eKLR where the Supreme Court of Kenya laid down the applicable principles for extension of time for filing an appeal as follows:
 - i. “Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;



- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay; and
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
9. The Learned Counsel submitted that the granting of leave to file Notice of Appeal out of time was a matter of judicial discretion. Thus, the Interested Party/Applicant humbly beseeched the Court to exercise its discretion in his favor as per the reasons stated in the supporting affidavit and for the interest of justice. On the first three principles, the Counsel held that they were more of persuasive as expressly stated and that it depended on case to case basis. To this end, the Interested Party/Applicant humbly prayed that in the circumstances of this case there were reasons enough to satisfy the Court to exercise its discretion powers in his favor.
10. The Learned Counsel submitted that on the fourth principle whether there was a reasonable reason/ cause for the delay, the Interested Party/Applicant through his supporting affidavit had explained that the delay in taking any appropriate action was caused by the mix up which occurred during the process of transmission of the copy of the Judgment from the ELC Court registry and for the Interested Party Applicant giving instructions to Appeal therefrom. Finally, when the copy of the Judgment had been obtained and the Interested Party/Applicant was fully informed on the determination made by the court. He granted instructions for the Counsels to proceed and appeal against the Judgment. He noted the Notice of Appeal was to be filed out of the statutory time frame of 14 days. The delay in filing the Notice of Appeal was not deliberate nor ill motivated against the Respondents. It was beyond the control of the Applicant. The Learned Counsel urged the Court to consider the reasons given. He humbly urged Court to find the explanation given for the delay as being sufficient enough to warrant the exercise of its discretionary powers.
11. The Learned Counsel submitted that the Applicant appreciates the fact that he was late in filing the Notice of Appeal and he’s seeking this Courts’ leave to file the same out of time. Justice Gikonyo in ”Civil Application No. 67 of 2017, Kenya Alliance Insurance Co. Limited – Versus - Julius Rem Mutabari [2018] eKLR stated that there was no specific measure of what amounts to inordinate delay. However, the Court should be able to discern delay which was unacceptable – one that is prolonged and unexplained. Such would be inordinate delay. He was content to cite the persuasive case of ”Mursal Guleid & 2 Others – Versus - Daniel Kioko Musau [2016] eKLR” where Muriithi J stated:
- “ The application for extension of time was filed on 26th February 2016 about 25 days after the expiry of time. I do not consider that a delay for a period of 25 days is inordinate, even if the court disregarded the explanation given by Counsel in submissions that the advocate who held their brief did not inform them of the ruling date. However, it is not the respondent’s fault that the applicants were on 28th October 2015 before the trial court represented by an



advocate who did not report back to them on the matter of the date for which ruling was reserved.”

12. The Learned Counsel contention was that in the instant case, the Judgment was delivered on 4th April, 2022 and an appeal ought to have been filed within 14 days by filing a Notice of Appeal. The 14 days timeline lapsed on 18th April, 2022 when the Applicant was supposed to have filed his appeal at the Court of Appeal. The Application before the court was filed on 17th May, 2022 that is twenty nine (29) days after the lapse of the 14 days window. Guided by the above holding of Justice Gikonyo in the cited case, it was their submission that the delay was not deliberate or inordinate. They attached a draft Notice of Appeal. Further, he stated that they had even applied for certified copies of typed proceedings for purposes of fast tracking the process of preparing the record of appeal in time if allowed.
13. The Learned Counsel argued that the Ex – Parte Applicant and the Respondent would suffer no prejudice if this Honorable Court granted leave to them to file the Notice of Appeal out of time. On this point he further cited the case of Civil Application No. 67 of 2017, Kenya Alliance Insurance Co. Limited (Supra) where Justice Gikonyo in his final findings held that:

“The amount of delay will not prejudice administration of justice. Here, I admire the opinion by Chesoni J (as he then was) in the case of Ivita – Versus - Kyumbu that the test should be: whether, despite the delay, it is still possible to do justice for all the parties in the suit. Therefore, I allow the Appellant to file appeal in 30 days of today.”
14. The Learned Counsel averred that being guided by the above findings, the delay was not inordinate and that the Ex Parte Applicant and the Respondent would suffer no prejudice if the Applicant was granted leave to file the appeal out of time, and this Honorable Court would still be doing justice to both parties.
15. The Learned Counsel concluded by beseeching the Honorable Court to be given an opportunity to ventilate his issues to the Appellate Court, and this Court to find the delay in filing the Notice of Appeal was not intentional and/or inordinate. The Interested Party/Applicant also prayed for leave to file the Notice of Appeal out of time for the interest of justice to be achieved in the matter. The Respondents were not going to be prejudiced in any manner whatsoever and the same had also not been pleaded or proved of they would be prejudiced and if so to what extent. The Learned Counsel submitted that the balance of convenience tilted in the favour of the Interested Party/Applicant. They prayed that the Application before the Court be allowed as prayed with costs.

Analysis and Determination

16. The court has considered the said application and the annexures thereof and the written Submissions in support and opposition of the Notice of Motion Application dated 17th may, 2022. The Honorable Court holds that the following four (4) issues fall for the determination of the said the application. These are:
 - a. Whether this Honorable Court has jurisdiction to entertain this Notice of Motion Application dated 17th May, 2022;
 - b. Whether this Honorable Court should extend the time within which the Interested Party/Applicant to file the Notice of Appeal; and
 - c. Whether the parties herein are entitled to the orders sought.



d. Who will bear the Costs of the Application?

Whether this Honorable Court has jurisdiction to entertain this Application dated 17th May, 2022.

17. Jurisdiction in any matter is everything. This position was clearly set out in the now famous case of “The Owners of the Motor Vessel “Lillian” - Versus – Caltex Oil Company Limited” where Justice Nyarangi held that:-

“Jurisdiction is Everything. The moment the Court found it had no Jurisdiction, it has to down its tools.....”

18. Further it is not in doubt that the Applicant is seeking for leave to file a Notice of Appeal, out of time and stay of execution. The Court of Appeal in the case of:- “Leo Sila Mutiso Versus - Rose Hellen Wangari Mwangi, (1999) 2 EA 231, laid down the parameters in extending time and stated thus:-

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

The provision of Section 95 of the *Civil Procedure Act*, Cap. 21 provides;

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

19. Further, the provision of Section 7 of the *Appellate Jurisdiction Act* provides that:-

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.”

20. Having the above provisions of law in mind, clearly and it is the Court’s considered view that this Court is clothed with the requisite jurisdiction to hear and determines the Application.

Whether this Honorable Court should extend the time within which the Interested Party/Applicant to file the Notice of Appeal.

21. Under this Sub heading, it is the Interested Party/Applicant’s contention that it has satisfied the conditions set out for the enlargement of time to file a Notice of Appeal. The provision of Section 95 of the *Civil Procedure Act*, Cap. 21 provides:

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

22. Undoubtedly, Judgment was delivered on 4th April, 2022, and the time within which the Notice of Appeal ought to have been filed was 14 days from the said date. That time has since lapsed. However,



the Court still has the unfettered and inherent discretionary powers to enlarge time. In the case of “Vishva Stone Suppliers Company limited – Versus - RSR Stone [2006] Limited [2020] eKLR the Court of Appeal held that:-

The above principles were restated by the Supreme Court of Kenya (M.K. Ibrahim & S.C. Wanjala SCJJ) in Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 others (supra) as follows:-

- “(1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
- (2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
- (3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
- (4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
- (5) Whether there will be any prejudice suffered by the respondent of the extension is granted.
- (6) Whether the application has been brought without undue delay; and
- (7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”

23. The Interested Party/Applicant informed Court that taking the Judgment was delivered on 4th April, 2022, there was a valid Notice of Appeal dated 17th May, 2022. However, it is evident that there was no response or contention to the application before this court. For that, the Applicant gets the benefit of doubt and that the application stands unopposed. But still, the Court has to look at the inner issues of law on this matter. It is my humble consideration that Judgment was delivered on 4th April and the instant application and notice of appeal filed on 17th May, 2023 which gave rise to 43 days delay to file the Notice of Appeal. I have noted from the provision of law and precedents, that although there has not been any measure of the meaning of delay of filing pleadings, certainly a period of 43 days would not in my view be termed as inordinate, unreasonable not undue delay. Perhaps, a delay of a period of two or more months would be in that bracket. Therefore, the Court finds and holds that the Interested Party/Applicant has satisfied the prerequisite for granting the said relief. Besides, as indicated from records, the Ex - Parte Applicant nor the Respondent have not demonstrated what prejudice they would suffer if the time within which was allowed to file the Notice of Appeal is extended. For these reasons, I proceed to grant the orders sought from the application as prayed.

Whether the parties herein were entitled to the Orders sought from the filed Notice of Motion application

24. Under this sub – heading, the Interested Party/Applicant has sought for time to be extended within which to file the Notice of Appeal of which a Draft Notice to that effect has been attached to the Application and urged that the same be deemed as duly filed. Already as a matter of course, the Honorable Court has held that the Applicant warrants the Court’s discretion to allow it file the Notice



of Appeal out of time. Therefore, it follows that the prayer as sought. The same is allowed upon the paying of the requisite fee.

25. Further, the Interested Party/Applicant has sought for the stay of Execution of the Judgement and Decree of this Court delivered on 4th April, 2022 pending the hearing and determination of the appeal at the Court of Appeal. The Court has also considered the written submissions, the cited authorities and the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010.
26. The said provisions of law set out the principles that the court should consider while deciding whether to grant Stay of Execution Pending Appeal. These are: -

“No order for stay of execution shall be made under sub rule (1) unless—

- i. 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
- ii. 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.”

27. There are plethora of decided cases on the issue of grant of Stay of Execution pending Appeal. See ”Civil Appeal No.107 of 2015, Masisi Mwita – Versus - Damaris Wanjiku Njeri (2016) eKLR, where the Court held that: -

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another – Versus - Thornton & Turpin Limited, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-

“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely;- Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.

In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo – Versus - Straman EA Ltd (2013) as follows:-

“In addition, the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory.”

These twin principles go hand in hand and failure to prove one dislodges the other.”

28. It is not in doubt that firstly the Applicant must show that it will suffer substantial loss. Evidently, from the above provisions of law that the Court has discretion to issue an Order of stay of execution. However, the said discretion must be exercised judicially. See the case of: “Canvass Manufacturers Limited – Versus - Stephen Reuben Karunditu, Civil Application No.158 of 1994, (1994) LLR 4853, where the Court held that:-

“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised”.



29. Further in the case of:- ”Stephen Wanjohi – Versus - Central Glass Industries Limited, Nairobi HCC No.6726 of 1991, the Court held that:-

“For the court to order a stay of execution there must be:-

- i. Sufficient cause
- ii. Substantial loss
- iii. No unreasonable delay
- iv. Security and the grant of stay is discretionary”.

30. The Court also considers that it is not the practice of Courts to deprive a successful litigant of the fruits of his/her litigation and that the purpose of stay of execution pending Appeal is to preserve the subject matter. See the case of “Consolidated Marine – Versus - Nampijja & Another, Civil App.No.93 of 1989 (Nairobi), where the Court held that:-

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”

31. First, the Applicants must satisfy that they will suffer substantial loss, unless the orders sought are issued. It is not in doubt that the Applicants did not find the judgment favourable and hence the Notice of Appeal. The Applicants in the Court’s considered view have not demonstrated the loss they will suffer as there is nowhere in the application or their submissions they explain to this court the loss they will suffer if the stay of execution is not granted.

32. As noted the Ex - Parte Applicant nor the Respondent filed any responses to this application. It follows then they have not in any way demonstrated how they will refund or return the decretal award where the Applicants succeeds in their appeal. It is further the observation of the Court that the Respondents have not placed anything on record to oppose this application and return the decretal award.

33. In the case of “Kenya Shell Limited – Versus - Kibiru [1986] KLR 410, the Court held that:-

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money”.

“It is not sufficient by merely stating that the sum of Kshs.20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before Judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

34. Equally in this case, the Court finds and holds that it is not sufficient to merely state that the Respondents are not in a position to return the decretal award or the suit property is likely to suffer alienation or sale. However, the Court must also balance with the fact that the Applicants is not in a



position to know the ability of the Respondents to return the decretal award and are not expected to know. See the case of “Civil Application No. 238 of 2005; National Industrial Credit Bank Limited – Versus - Aquinas Francis Wasike in which the Court of Appeal held: -

“This Court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegations that an appeal would be rendered nugatory because the Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an Applicant to know in detail the resources owned by a Respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

35. Whether or not the Application was filed without unreasonable delay, the Court has already held and found that the delay is excusable. It is evident that this a land decree and balancing the facts, the Court is certain that once the suit property is alienated from the Applicants they may suffer substantial loss if they succeed in the Appeal.
36. Be that as it may, on the issue of Security for Costs, the Interested Party/Applicant has not stated the security he is willing to surrender for the Court to grant the stay but in previous precedence the Court has the discretion to level an amount on the Applicant where the Court feels there will be substantial loss but the Applicants has not quoted their security.
37. In the given circumstances, and in order to be guided on the issue of Security for Costs, the Court will proceed to invoke. It is trite law that the provision of Section 3A of the *Civil Procedure Act*, Cap. 21 is applicable by the Courts where there is a vacuum but not where there are provisions to cater for such as in this instance case. The section relates to the wide powers of the Court to exercise its discretion to the end of justice between the parties.
38. The provision of Section 3A of the *Civil Procedure Act*, Cap. 21 provides as follows;

“Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court”
39. From the pleadings, it is held that the Interested Party/Applicant has $\frac{3}{4}$ shares of the suit property – Plot No. Mombasa/Block XXXII/27 which consists of flats thereon which would be estimated at a sum of Kenya Shillings Twenty million (Kshs. 20, 000, 000.00) or thereabout. Hence, to order for the Security for Costs for a sum of Kenya Shillings Two Hundred and Fifty thousand (Kshs. 250, 000.00) to be placed with the Court is quite reasonable and fair within a stipulated period herein.

Who will bear the Costs of the Application

40. It is now well established that issues of Costs are at the discretion of Courts. Costs mean the award that is granted to a party at the conclusion of a legal action, process and/or proceedings in any litigation. The Proviso of the provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the event. By event here, it means the results or outcome of the legal action, process and/or proceedings herein. (See the Supreme Court case of “Jasbir Rai Singh Rai – Versus – Tarlochan Singh (2014) eKLR; and Rosemary Wairimu Munene – Versus – Ihururu Dairy Co – operative Society (2014) eKLR)

From the instant case, the result are that the Interested Party/Applicant herein has been successful in prosecuting his Notice of Motion application dated 17th May, 2022. However, for the interest of justice, equity and conscience there shall be no orders to costs.



Conclusion & Disposition

41. In the long analysis, from the above detailed analysis of facts and law prefacing of facts and law pertaining to this application I find the Notice of Motion application dated 17th May, 2022 by the Applicants has merit and should be and is hereby allowed with costs to be in the cause and upon the fulfillment of the following pre-conditions: -

- a. That the Notice of Motion application dated 17th May, 2022 by the Interested Party/Applicant herein be and is hereby found to have merit and should and is hereby allowed.
- b. That an Order do hereby issue granting stay of execution of the Judgment and/or subsequent Decree/Order delivered on the 4th April, 2022.
- c. That an order be made hereby issue granting the Interested Party/Applicant leave to file and serve his draft Notice of Appeal out of time within the next fourteen (14) days from the date of the delivery of this ruling.
- d. That an order be and is hereby made for the Interested Party/Applicant to place with this Court a Security for Costs of a sum of Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250, 000.00) within the next thirty (30) days from the date of the delivery of this Ruling.
- e. That an order do hereby issue that failure- to comply with (c) and (d) within the next fourteen (14) days of this ruling and Order (d) as stated herein, the orders herein will automatically lapse and the Judgement and Decree of this Court delivered on 4th April, 2022 will take effect thereof.
- f. That there shall be no orders as to costs.

It is so ordered accordingly.

RULING DELIVERED, SIGNED AND DATED AT MOMBASA THIS 6TH DAY OF MARCH, 2023.

HON. JUSTICE (MR) L. L. NAIKUNI

JUDGE

