



Mwaluma v Kiwoi (Sued in her Own Capacity and in her Capacity as Personal Representative and Administrator of the Estate of Hannington Kiwoi) (Environment and Land Appeal 1 of 2023) [2023] KEELC 20628 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20628 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 1 OF 2023
LL NAIKUNI, J
OCTOBER 5, 2023**

BETWEEN

CRISPUS MWAGOGO MWALUMA APPELLANT

AND

HOLINESS WAMBUGHA KIWOI RESPONDENT

SUED IN HER OWN CAPACITY AND IN HER CAPACITY AS PERSONAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF HANNINGTON KIWOI

RULING

I. Introduction

1. The Appellant/Applicant herein – Crispus Mwangogo Mwaluma, moved this Honorable Court for its determination through filing a Notice of Motion application dated 24th March, 2023 against the Respondent herein. It was brought under the dint of Order 42 Rule 6(1)(2) of Civil Procedure Rules, 2010, Sections 1A,1B and 3A of *Civil Procedure Act*, Cap 21 of the Laws of Kenya.
2. Pursuant to that, the Respondent filed her response through a Replying Affidavit dated 4th April, 2023 accordingly.

II. The Appellant/Applicant’s case

3. The Appellant/Applicant sought for the following orders:-
 - a. Spent.
 - b. That the Judgment and Orders made on the 4th Day of December 2022 in Voi Magistrates Court ELC Number E 39 of 2021, and the execution thereof be



stayed pending the hearing and final determination of this application and the appeal filed herein, and or such further orders of the court as the court may deem fit and just to issue and or direct.

- c. That in particular, the court be pleased to order that execution be stayed of the ruling of assessment of costs dated 22nd February, 2023, pending the hearing and final determination of the appeal herein.
- d. That such further and other relief be granted as this court deems fit and expedient in the circumstances for the purpose of preservation of the suit property.
- e. That the cost hereof be provided for.

4. The Application is based on the grounds, testimonial facts and the averments made out under a 15 Paragraphed Supporting Affidavit sworn by Crispus Mwagogo Mwaluma and dated 24th March, 2023 with five (5) annexures thereto and marked as “CMM – 1 to 5” annexed thereto. The Appellant/ Applicant averred:

- a. On the 4th December, 2022, Judgment was delivered in the lower court in which his suit therein was dismissed with costs. Hence, he was aggrieved by the said decision.
- b. He immediately requested for copies of proceedings and proceeded to file this appeal before the Court (Annexed herewith and Marked as “CMM – 1” is Copy of the Memorandum of Appeal).
- c. In the meantime, the Respondent had obtained certificate of costs and had applied for his arrest and committal to civil jail in execution of the decree for costs. (Annexed herewith and Marked as “CMM – 2” was a copy of notice to show cause served upon himself; And annexures marked as “CMM – 3” being the Ruling on Assessment of Costs).
- d. He was aggrieved by the amount of costs awarded to the Respondent and had made the same the subject of this appeal by way of the amended Memorandum of appeal (Annexed herewith and Marked as “CMM – 4” was a copy of the Amended Memorandum of Appeal).
- e. The sum of Kenya Shillings Four and Eight Thousand Five Seventy Five Hundred (Kshs. 408,575.00/=) granted to the Respondent herein as costs was excessive and punitive to the Deponent, and calculated at bankrupting or rendering him to be a destitute.
- f. In the pending appeal, he had inter alia challenged the whole decision of the trial court and the award of costs which indicate the outrageous sums claimed and allowed in costs to the Respondent herein. (Annexed herewith and Marked as exhibit “CMM – 5” was the Bill of Costs).
- g. For instance, the sum allowed for instruction fees was, firstly unclear as the court in one sentence stated a sum of Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000/-) was sufficient, and in the next line stated a sum of Kenya Shillings Three Hundred and Fifty Thousand (Kshs. 350,000/-) which was 7 (seven) times the maximum amount prescribed under the Advocates Remuneration Order.
- h. Without discussing the merit of the appeal, he had noted that items 11, 12 and 16 had been awarded a sum of Kenya Shillings Five Thousand (Kshs. 5,000/-) each, while the prescribed fee was a sum of Kenya Shillings One Thousand Four Hundred (Kshs. 1,400/-) each, same with items 6 to Finally, service fee of sum Kenya Shillings Five Thousand (Kshs. 5,000/-) for items



26 - 29 exceed the Kenya Shillings One Thousand Four Hundred (Kshs. 1,400/-) prescribed. All despite the court having noted the absence of receipts and vouchers.

- i. The execution herein may take place at any time before the hearing of his appeal and the challenge to the illegal costs awarded.
- j. The sums awarded are extremely high and beyond my current means and he therefore in danger of being committed to jail and his liberty conscribed while his appeal is still pending.

III. The Respondent's case

- a. The Respondent responded through Replying Affidavit dated 4th April, 2023 and filed on the same day. It was the Respondents argument that there is nothing to stay Voi Magistrates ELC No E39 of 2021 having been dismissed.
- b. Whereas the Notice Motion herein sought to stay execution of the award of costs no challenge had been lodged to date to contest the award of costs and the Memorandum of Appeal filed and later amended by the Appellant could not amount to an appeal against an award of costs.
- c. The Respondent further argued that the award of costs is payable to her legal counsel who was capable of refunding the same in the very unlikely event the appeal was to succeed. The appeal if it would thus not be rendered nugatory.

I. Submissions

5. On 24th May, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 9th September, 2022 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and on 6th June, 2023 a ruling date was reserved on Notice by the Honourable Court accordingly.

A. The Written Submissions by the Appellant/Applicant

6. The Appellant/Applicant herein through the Law firm of Messrs. Bosire Nyariki & Company Advocates filed his submissions dated 5th June, 2023. Mr. Bosire Advocate commenced the submission by stating that what was before the Honourable Court for determination was the Appellant/Applicant's Notice of Motion Application dated 24th March, 2023 seeking orders:
 - a. Spent.
 - b. Thatthere be stay of the judgment and execution of Voi Magistrates ELC No. E039 OF 2021 pending hearing and determination of the appeal filed.
 - c. Thatthere be stay of the execution of the award. of costs assessed on the 22nd February 2023 pending hearing and determination of the appeal filed
 - d. Further orders and reliefs for purposes of preservation of the suit property.
 - e. Thatcosts of the Application be in the cause.
7. The Learned Counsel submitted that the aforementioned application has been brought inter alia under the provisions of Order 42 Rule 6 of the *Civil Procedure Act*, Cap. Sections 1A and 3A of the *Civil Procedure Act*, Cap. 21 and all other enabling provisions of the law. The aforementioned application was opposed by the Respondent proceeded to swear and serve a Replying Affidavit, whose



contents they oppose. They urged the Honourable Court not to consider the same and further be persuaded by these submissions.

8. On issues that this Honourable Court was to be guided by when deciding the application, the Learned Counsel relied on the following:
 - i. Stay of judgment and execution of VOI ELC NoE.39 of 2021 pending hearing and determination of the appeal filed.
 - ii. Stay of execution of the award of costs assessed on the 22nd February 2023 pending hearing and determination of the appeal filed.

8. The Learned Counsel argued that the principles guiding the grant of a stay of execution pending appeal was well settled. These principles was provided for under the provision Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 which provides:

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

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

9. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in the provision of Sections 1A and 1B of the *Civil Procedure Act*, Cap. 21 the Court was no longer limited to the foregoing provisions. The courts was now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act*, Cap. 21 or in the interpretation of any of its provisions.

10. The provision of Section 1A(2) of the *Civil Procedure Act*, Cap. 21 provides that:-

“the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective”

while under the provision of Section 1B holds some of the aims of the said objectives to be:-

“the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”

11. Therefore, the Learned Counsel further argued that, an application for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6 (2), aforementioned namely:
 - a. that substantial loss may result to the applicant unless the order is made,
 - b. that the application has been made without unreasonable delay, and
 - c. that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.



12. In the case of “James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR” the Honourable Court observed that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

13. The Learned Counsel submitted that in the instant case, the Appellant/Applicant averred that he stands to suffer substantial loss if stay of execution is not granted. The Respondent has since obtained certificate of costs and have threatened execution. The court, in “RWW v EKW [2019] eKLR”, considered 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.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

14. Additionally, the Learned Counsel averred that there had been no inordinate delay in bringing the instant appeal as the Judgment and decree being appealed against was delivered on the 14th December, 2022 and the Memorandum of Appeal filed later on the 12th January, 2023.

15. Therefore, the Appellant/Applicant contended that the appeal was arguable and that if the reliefs sought were not granted, the intended appeal would be rendered nugatory. To buttress on this point, the Counsel relied on the cases of: “Nairobi Women’s Hospital – v Purity Kemunto [2018] eKLR” and “Regnoil Kenya Limited v Winfred Njeri Karanja [2019] eKLR” for where the court held that an arguable appeal must be one that raised a bona fide issue deserving consideration by a court. Second, that even one bona fide issue would satisfy this requirement.

16. As to the security of costs, the Learned Counsel submitted that this Honourable Court could make appropriate orders which served the interest of justice taking into account the Appellant/Applicant had appealed against the decision of the lower court and stood to succeed once the appealed was heard and determined. Further, the Counsel informed Court that the Appellant/Applicant although being a man of straw had further tried to engage the Respondent to an alternative out of court settlement as guided by the provision Article 159 2 (c) of *the Constitution* of Kenya to show his good-will and willingness to maintain justice and fair balance pending the full determination of the pending appeal. However, the same plea had fallen on deaf ears as no positive response had sufficed instead creating an imminent danger on execution that stood to prejudice him greatly.



17. In conclusion, the Learned Counsel submitted that the Appellant/ Applicant had fulfilled the requirements for grant of stay of execution pending appeal as stipulated under the provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010. It was in the interest of justice that the orders sought were granted and that failure to do so would amount to denying him the opportunity to exhaust his legal remedies.

B. The Written Submission of the Respondent

18. The Respondent through the Law firm of Messrs. Sharia Nyange Njuguna & Company Advocates filed her written submissions dated 2nd June, 2023. Mr. Nyange Advocate commenced his submissions by stating that the Appellant via a Notice of Motion application dated 24th March 2023 sought for the orders of:

- a. Stay of the Judgment and execution of Voi Magistrates ELC No E39 of 2021 pending hearing and determination of appeal filed.
- b. Stay of execution of the award of costs assessed on the 22nd February 2023 pending hearing and determination of the appeal herein filed.
- c. Further Orders and reliefs for purposes of preservation of the suit property.

19. The Learned Counsel rehashed on the Appellants' case to wit; that he had already filed an appeal, the Respondent had also obtained a certificate of costs and was in the process of intending to execute the same by way of committing the Appellant to civil jail. The Appellant argued that the award of costs was punitive and aimed at rendering him bankrupt. The Counsel stated that according to the Appellant, he had raised issues with the taxed bill and in particular the manner the bill was assessed. It was the Appellants case that execution was about to issue any moment before he was heard on appeal challenging the illegal costs that were awarded. It was for these reasons that he was asking the court to allow the application as prayed.

20. In response to and in opposition to the aforesaid application, the Respondent filed a Replying Affidavit sworn on the 4th of April 2023 and filed on even date. The Learned Counsel submitted that it was the Respondent's argument that there was nothing to stay taking that the Voi Magistrates ELC No E39 of 2021 having been dismissed. That whereas the application herein sought to stay execution of the award of costs, no challenge had been lodged to date to contest the award of costs and the Memorandum of Appeal filed and later amended by the Appellant could not amount to an appeal against an award of costs. The Respondent further argued that the award of costs was payable to her legal counsel who was capable of refunding the same in the very unlikely event the appeal was to succeed. The appeal if at all it would thus not be rendered nugatory.

21. On the issue of whether the motion by the Appellant could be allowed, the Learned Counsel stated that whereas the court had directed on the 24th May 2023 that the Appellant do file and served their submissions within seven (7) days, there had never been compliance with these directions of the court. The Respondent had nevertheless proceeded to file her submissions.



22. The Learned Counsel submitted that the applicable legal principles in determine whether or not to grant stay was now settled. He cited the case of “Consolidated Marine v Namprijad & Ano. Civil Appeal No.93 of 1989” Nairobi where 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.”

23. According to the Counsel, in the instant case, there was nothing to stay taking that the suit by the Appellant as against the Defendant was dismissed. The court never granted any Orders that were capable of being stayed. Ideally, the Counsel contented was that what the Appellant seemed to be contesting was the award of costs which was a money award. For the Appellant to succeed however him must demonstrated that:

- a. He would suffer substantial loss.
- b. The Application had been brought without delays
- c. He was willing to deposit security

24. The Counsel referred Court to the provision of Order 42 (6) of the Civil Procedure Rules, 2010 provides that:

25. On the substantial loss, the Learned Counsel submitted that this never arose. It was for the Appellant to show with the aid of evidence that he stood to suffer loss. To buttress his argument, the Counsel refered Court to the case of:- “Samvir Trustee Limited v Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997”, Warsame J (as he then was), expressed himself as follows:

“for the Applicant to obtain a stay of execution, it must satisfy the Court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the Court will not consider assertions of substantial loss on the face value but the Court in exercising its discretion would be guided by adequate and proper evidence of substantial loss.”

26. It was the Learned Counsel’s contention that no loss would be suffered by the Appellant. He emphasized that the costs awarded was payable to the Legal Counsel of the Respondent who was capable of refunding the said amount in the unlikely event the appeal lodged succeeded. Further, it was the Respondent’s argument that to contest an award of costs one never lodged a Memorandum of Appeal. As it was, there was no appeal against the award of costs.

27. Where execution of a money decree was sought to be stayed, in considering whether the Applicant would suffer substantial loss, the financial position of the Applicant and that of the Respondent became a crucial issue. The court could not shut its eyes where it appeared the possibility of the Respondent refunding the decretal sum in the event that the Applicant was successful in his appeal was doubtful. The court had to balance the interest of the applicant who was seeking to preserve the status quo pending the hearing of the appeal to ensure that his appeal was not rendered nugatory and the interest of the Respondent who was seeking to enjoy the fruits of his Judgement. In other words, the court should not only consider the interest of the Applicant but has to also consider, in all fairness, the interest of the Respondent who had been denied the fruits of her Judgement.



28. In conclusion, the Learned Counsel submitted that the application by the Appellant was devoid of any merit. Thus, he urged the court to disallow it altogether. The Learned Counsel enclosed the following authorities which included this Honourable Court’s decision in opposition for ease of reference:

- a. “Michael Ntouthi Mitheu v Abraham Kivondo Musau.”
- b. “Khairrunissa Hussein Haji Ladha & Others v Suleiman Abdulrehman & Another.”

I. Analysis and Determination

29. I have considered all the pleadings filed in this matter, being the Notice of Motion application dated 24th March, 2023 by the Appellant/Applicant herein, the responses, the written submissions, the plethora of cited authorities by all the parties, the appropriate and relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

30. For the Honorable Court to reach an informed, reasonable, a just and fair decision on the subject matter, it has framed the following salient three (3) issues for its determination before this court:-

- a. Whether the Appellant/Applicant has made a case for stay of execution of Judgement delivered on the 4th December, 2021 in Voi Magistrates Court ELC Number E39 OF 2021 and / or all such other orders and/or decrees of the court?
- b. Whether the parties herein are entitled to the reliefs sought.
- c. Who will bear the costs of the application?

IssueNo. a). Whether the Appellant/Applicant has made out a case for stay of execution of judgement delivered on the 4th December, 2021 in Voi Magistrates Court ELC Number E39 OF 2021 and / or all such other orders and/or decrees of the court

31. Under this sub title, the main gist of the application is whether to grant orders for stay of execution of a Judgement delivered by the Lower Court pending the hearing and final determination of the preferred appeal. In this regard, as well captured by all the parties herein, the Court wishes to state that the law governing stay of execution pending Appeal is found under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 which stipulates 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.

- (2) No order for stay of execution shall be made under sub rule (1) unless—
 - (a) the Court is satisfied that substantial loss may result to the 1st Applicant unless the order is made and that the application has been made without unreasonable delay; and



- (b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the 1st Applicant.

32. Further to the above, it will be noted that stay of execution may only be granted for sufficient cause. Hence, the Court while deciding whether or not to grant the stay and that in light of the overriding objective stipulated in provisions of Sections 1A and 1B of the *Civil Procedure Act*, Cap. 21 the Court is no longer limited to the foregoing provisions. In simple terms, the courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act*, Cap. 21 or in the interpretation of any of its provisions.

33. The provision of Section 1A(2) of the *Civil Procedure Act*, Cap. 21 provides that:-

“the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under Section 1B some of the aims of the said objectives are:-

“the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”

34. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned namely:-

- (a) that substantial loss may result to the applicant unless the order is made;
- (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See the case of:- “Antoine Ndiaye v African Virtual University [2015] eKLR”.

35. As to what substantial loss was, it was observed in “James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR”, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

36. In the instant case, the Applicant averred that he stands to suffer substantial loss if stay of execution is not granted. The Respondent has since obtained certificate of costs and have threatened execution.

37. On her part, the Respondent submitted that no loss will be suffered by the Appellant. The Counsel argued that the costs awarded are payable to the Legal Counsel of the Respondent who was capable of refunding the said amount in the unlikely event the appeal lodged succeeds. Further it is the



Respondents argument that to contest an award of costs one does not lodge a Memorandum of Appeal. As such, there was no appeal against the award of costs.

38. The court, in the case of “RWW v EKW [2019] eKLR”, considered 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.

39. 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.”

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

39. Under this Sub heading, the Court wishes to consider the reliefs sought by the parties and their merits and whether the parties deserve to be granted by law. In the instant case, the Respondent has submitted that in considering whether the Applicant would suffer substantial loss, the financial position of the Applicant and that of the Respondent becomes a crucial issue. The court cannot shut its eyes where it appears the possibility of the Respondent refunding the decretal sum in the event that the Applicant is successful in his appeal is doubtful. Accordingly, in my own view, therefore, I am persuaded that substantial loss has been proved.
40. Equally, I am also satisfied that there has been no inordinate delay in bringing the instant appeal as the judgment was entered on 4th December, 2022 and ruling dated 22nd February, 2023 and the amended memorandum of Appeal filed 60 days after on 22nd March, 2023.
41. As to security of costs, the Appellant submitted that this Honourable Court can make appropriate orders which serve the interest of justice taking into account the Appellant/Applicant has appealed against the decision of the lower court and stands to succeed once the appealed is heard and determined. This Court can make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.
42. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the Civil Procedure Act, Cap. 21 I discern and hold that the Applicants have fulfilled the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules. Therefore, the application must succeed.

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

43. It is not well established 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.
44. In this case the Appellant/Applicant has succeeded in the Application. Therefore, it follows that they deserve the orders sought for costs to be borne by the 1st Respondent.



I. Conclusion & Disposition

45. In the long run, after conducting an in-depth and elaborate analysis of the framed issues hereof, the Honourable Court is of the strong view that the Appellant/Applicant herein has 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 24th March, 2022 by the Appellant/Applicant herein be and is hereby found to have merit and is hereby allowed in its entirety.
 - b. That this Honourable Court orders that a stay of execution of the Judgment and Orders Made on the 4th December 2022 in Voi Magistrates Court ELC Number E 39 of 2021 pending the hearing and final determination of this application and the appeal filed herein.
 - c. That this Honourable Court orders that a stay of execution of the the ruling of assessment of costs dated 22nd February, 2023, pending the hearing and final determination of the appeal herein.
 - d. That the Appellant/Applicant shall deposit the entire decretal sum into an interest earning Joint Escrow bank account in a reputable commercial Bank, to be held by both the law firm of Messrs. Bosire Nyariki & Company Advocates and Sharia Nyange & Njuguna Advocates being the advocates on record for the parties to this appeal, within the next 21 days of the delivery of this ruling.
 - e. That the Appellant to file and serve a record of appeal within thirty (30) days of this ruling. The matter to be mentioned on 30th January, 2024 for confirmation on compliance of these orders and taking further directions on the disposal of the Appeal under the provision of Order 42 Rules 11, 13 & 16 of the Civil Procedure Rules, 2010.
 - f. That costs of the application shall be in the cause.

It is so Ordered Accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 5TH DAY OF OCTOBER 2023.

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HON. JUSTICE L. L. NAIKUNI, (JUDGE)
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling delivered in the presence of:

- a. M/s. Yumna, Court Assistant;
- b. No appearance for the Appellant/Applicant.
- c. Mr. Nyange Advocate for the Respondent

