



**Sunyai & another v Nguru (Environment and Land Appeal
E002 of 2023) [2023] KEELC 20627 (KLR) (4 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20627 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E002 OF 2023
LL NAIKUNI, J
OCTOBER 4, 2023**

BETWEEN

RACHAEL CHERONO SUNYAI 1ST APPELLANT

ELEGANT INVESTMENTS LTD 2ND APPELLANT

AND

SOPHIA WANJIKU NGURU RESPONDENT

RULING

I. Introduction

1. The Appellants/Applicants herein – Rachael Cheron Sunyai and Elegant Investment Ltd, moved this Honorable Court for its determination through filing a Notice of Motion application dated 27th January, 2023 against the Respondent, Sophia Wanjiku Nguru herein. It was brought under the dint of Sections 1A,1B,3A of the [Civil Procedure Act](#), Cap 21 Laws of Kenya Order 42 Rule 6(1) and (2), Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules, 2010.
2. Pursuant to that, the Respondent filed their response through a replying affidavit on 20th February, 2023 dated the same date. At the same time, the Respondent also filed a Preliminary objection dated 10th February, 2023.

II. The Appellants/Applicants' case

3. The Appellants/Applicants seeks the following orders:-
 - a. Spent.
 - b. Spent.



- c. That this Honourable Court be pleased to grant an order of stay of execution of the ruling of the Chief Magistrate’s Court in Mombasa Chief Magistrate Civil Case No. 1847 of 2021 issued on 6th December, 2022 pending the hearing and determination of the Appeal herein.
 - d. That this Honourable court be pleased to grant orders of stay of proceedings in Mombasa Chief Magistrate’s Court Civil Case No.1847 of 2021 pending the hearing and determination of this Application, in the first instance, and the Appeal: and
 - e. That costs of this application be in the cause.
4. The Application is based on the grounds, testimonial facts and the averments made out under a 22 Paragraphed Supporting Affidavit sworn by Rachael Cheron Sunyai and dated 27th January, 2023 with five (6) annexures thereto and marked as “RCS – 1 to 6” annexed thereto. The 1st Appellant/ Applicant averred:
- a. Vide the Application dated 10th November, 2021, the Respondent sought orders against the Applicants being, inter alia, an order of injunction restraining the Applicants by themselves, their agents, servants, and/or employees from collecting the rental income, selling, leasing and/ or in any other way interfering with the property known as Plot No. 61 Mikindani (“the Suit Property”) pending the hearing and determination of the Suit, marked as RCS 5 is a copy of the application.
 - b. Although the Learned Magistrate had initially directed that the file be placed before the Chief Magistrate for directions on the court with the requisite jurisdiction, he later called for the file stating that his court had been duly gazetted to determine environment and land court cases and that he had jurisdiction, which, in the Applicants’ view, is a mischaracterization of the Respondent’s cause of action.
 - c. The Respondent’s claim before the Subordinate Court is based on the allegation that the Respondent cohabited with the Deceased proprietor, bore him a child and that she is therefore entitled not only to the rental income but also to the Suit Property.
 - d. The Respondent is not claiming any proprietary interest in the Suit Property and neither is she denying that the same belongs to the Estate of the Deceased, but only alleges that she is entitled because of her alleged relationship with the Deceased proprietor.
 - e. The Applicants challenged the jurisdiction of the Subordinate Court to hear and determine the matter primarily on the ground that the property formed part of the assets of the Estate of the late Andrew Sunyai which estate was undergoing administration by the 1st Applicant whose grants had been confirmed by the High Court in Bomet High Court Succession Cause No.033 of 2021-In the Matter of the Estate of Andrew Kipkemei Sunyai and if there was any claim of entitlement to whole or part of the estate, then any party claiming could lodge the necessary application in the said succession cause.
 - f. On 6th December, 2022, the Court (Hon. Nyariki) allowed the Respondent’s Application dated 10th November, 2021 effectively restraining the Applicants from collecting the rent from the Suit Property. A copy of the replying affidavit which was annexed and marked as RCS 6.
 - g. Owing to the nature of the Respondent’s foregoing claim, the orders granted to the Respondent by the Learned Magistrate were issued in excess of the Court’s jurisdiction and are tantamount to the subordinate court countermanding the High Court in Bomet which is currently seized of the succession cause in respect of the Estate of the Deceased in Bomet



High Court Succession Cause No.033 of 2021 in the Matter of the Estate of Andrew Kipkemei Sunyai.

- h. Section 13 of the *Environment and Land Court Act* circumscribes the jurisdiction of the Environment and Land Court to disputes relating to the environment and land, and not succession matters as the subordinate court purported to determine.
- i. In any event, the Respondent did not satisfy the grounds for grant of the order of injunction to wit; that she has any legal and/or beneficial interest in the suit property, any irreparable injury and the balance of convenience did not tilt in the Respondent's favour, or that the balance of convenience was in favour of grant of the order of injunction.
- j. The Applicants, being dissatisfied with the said ruling of the subordinate court, have filed a memorandum of appeal dated 6th January, 2023 against the said ruling.
- k. There is real and legitimate apprehension on the part of the Applicants that the Suit Property and the rental income therefrom will continue being lost, wasted and/or misemployed to the detriment of the Estate of the Deceased and the legitimate beneficiaries unless, in the interim, an order of stay of execution of the orders of the subordinate court is granted as prayed.
- l. The Applicants have an arguable and meritorious application and appeal which raise serious triable issues and it is just and equitable that the orders sought in the application herein are granted.
- m. The Respondent has no ascertainable assets that can be realized to recover the rent in case the appeal is successful.
- n. It is only fair and just that the stay of execution is granted until the application is heard inter-partes and the appeal herein is determined.

I. The Respondent's case

- 5. The Respondent responded the Application dated 27th January, 2023 through Replying Affidavit dated 20th February, 2023 and filed on the same day sworn by Sophia Wanjiru Nguru who deposed that:
 - a. She was the wife of Andrew Kipekemei Sunyai (deceased), who died on 9th June 2021, and their marriage was blessed with a daughter, Faith Chebet Sunyai, who was born 1st January 2005. (Annexed and marked 'SW - 1' a copy of the birth certificate).
 - b. During his lifetime, she had been collecting rental income from the houses situated on the suit property known as Plot no. 261 Mikindani since the year 2012 up to the unfortunate demise of her husband.
 - c. The Learned Magistrate, Hon. Nyariki indeed has jurisdiction to hear both succession matters and land disputes subject to gazette notice No.9777 of 19th August 2022. (Annexed and marked 'SW-2' a copy of the gazette notice).
 - d. The Appellant/applicant be estopped from denying the Court's jurisdiction on grounds that they willingly, and consensually agreed that the Learned Magistrate indeed had jurisdiction to hear the matter (see the court proceedings of 15th November 2022), subject to the gazette notice no. 9777 of 19th August 2022.
 - e. During his lifetime and immediately prior to his demise, the deceased took care of their daughter and her by maintaining them and providing for them, to the extent he granted them



two rental houses from the suit property to collect rent from the year 2012 up to his demise, the same has never been disputed by the 1st Appellant. (Annexed and marked 'SW-3' a copy of the Mpesa Statements).

- f. The intention of the learned Magistrate in his Ruling dated 6th December 2022 is to preserve the property from being wasted, damaged and/or alienated by any party to the suit, pending the hearing and determination of the suit.
- g. The main object of granting the injunction is to protect the suit property from being sold in execution of a decree and/or from the threat of disposing the property before the suit is determined, thus balancing the scales of justice.
- h. The Appellant has failed to demonstrate any prejudice that they have suffered by the orders of injunction being granted, which orders merely seek to preserve the suit property pending the determination of the issues in dispute between the parties.
- i. The Appellant has failed to demonstrate that this suit property forms part of the assets itemized in Bomet High Court Succession Cause No.033 of 2021-in the Estate of Andrew Kipkemei Sunyai, furthermore there is no indication on the confirmation of grants, in respect to the letters of administration intestate.
- j. The Respondent on the other hand shall suffer grave prejudice if the application 27th January 2023 is allowed, consequently granting stay orders against the ruling dated 6th December 2022, which seeks to preserve the suit property and further subjecting the suit property at risk of alienation, disposal and damage therefore rendering the primary suit and the issues in dispute in CMCC NO.1847 of 2021 Sophia Wanjiku Nguru -vs- Rachael Cherono an academic process, before determination of the issues in dispute.
- k. In the circumstances considered, the respondent prays that the application dated 27th January 2023 be dismissed with costs.

I. The Preliminary Objection by the Respondent

- 7. The Respondent raised an objection on the jurisdiction of the Court. This was done through a preliminary objection dated 10th February, 2023 mainly on the ground that the court has no jurisdiction to hear this matter on grounds that the issue in dispute concerns succession/collection of rent in respect of property known as Plot No.261 Mikindani which is registered in the name of Andrew Kipkemei Sunyai (deceased).

I. Submissions

- 8. On 19th April, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 27th January, 2023 be disposed of by way of written submissions. Pursuant to that none of the parties obliged and on 29th May, 2023 a ruling date was reserved on Notice by the Honourable Court accordingly with the Honourable Court instructing parties to file physical copies of their submissions.

I. Analysis and Determination

- 9. I have considered all the pleadings filed in this matter, being the Notice of Motion application dated 24th March, 2023 by the 1st and 2nd Appellants/Applicants 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.



10. For the Honorable Court to reach an informed, reasonable, a just and fair decision on the subject matter, it has framed the following salient two (2) issues for its determination before this court:-
 - a. Whether the Preliminary objection dated 10th February, 2022 by the Respondent herein meets the threshold for an objection and is merited?
 - b. Whether the Appellants/Applicants is entitled for stay of execution of the ruling of the Chief Magistrate's Court in Mombasa Chief Magistrate Civil Case No. 1847 of 2021 issued on 6th December, 2022?
 - c. Who will bear the costs?

Issue No. a). Whether the Preliminary objection dated 10th February, 2022 by the Respondent herein meets the threshold for an objection and is merited?

12. Under this sub – heading, it is the starting point of defining what a preliminary objection is. The case of “Mukisa Biscuits – Versus - West End Distributors Ltd (1969) E.A 696” held as follows:

“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ...

Justice Newbold in the said suit argues that

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

11. In this instant suit, the Defendant has based her Preliminary objection on the ground that this court lacks jurisdiction to hear and determine the Plaintiffs' suit. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. It will not matter whether the facts of the Plaintiff's case as outlined are true not because without Jurisdiction this court will not have any powers to determine the case. This is because in any litigation, jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The moment a party in a suit successfully challenges the jurisdiction of the court, the said court must down its tools. The Supreme Court in the “Matter of Interim Independent Electoral Commission [2011] eKLR” held as follows:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to



discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.”

12. The question that strikes my mind is whether this court can proceed to entertain a matter in which it has no jurisdiction for reasons that the Defendant did not raise it at the inception of this court. Without any doubt the answer to this question is in the negative. The issue of jurisdiction is key since without jurisdiction a court has no powers to proceed to entertain the matter and it has to down its tools. The court cannot assume it has jurisdiction in a matter just because the Defendant did not challenge its jurisdiction in his Defense as this would be absurd. It is therefore my finding that the Preliminary Objection raised by Defendant is one on pure points of law that that this court needs to determine.
13. Since an issue going to the jurisdiction of this Court has been raised that issue must be dealt with first, in “Owners of the Motor Vessel “Lilian S” – Versus - Caltex Oil (Kenya) Limited [1989] KLR 1 Nyarangi, JA” expressed himself as follows:

“Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.
14. The provision of the Article 162(2)(b) of *the Constitution* states that this Court shall have jurisdiction over disputes relating to the environment, the use and occupation of, and title to land. In addition, the provision of Section 13 of the *Environment and Land Court Act*, No. 19 of 2011 expounds on the jurisdiction of this Court as follows:-
 - “(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 - (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.”
15. From a careful examination of the pleadings herein, the appeal relates to an application for seeking an injunction against the Appellants/Applicants being, inter alia, restraining the Appellants/Applicants by themselves, their agents, servants, and/or employees from collecting the rental income, selling,



leasing and/or in any other way interfering with the property known as Plot No. 61 Mikindani (“the Suit Property”) pending the hearing and determination of the Suit. Although the Learned Magistrate had initially directed that the file be placed before the Chief Magistrate for directions on the court with the requisite jurisdiction, he later called for the file stating that his court had been duly gazetted to determine environment and land court cases and that he had jurisdiction, which, in the Applicants’ view, is a mischaracterization of the Respondent’s cause of action.

16. The 1st and 2nd Appellants herein contended that the Respondent’s claim before the Subordinate Court is based on the allegation that the Respondent cohabited with the Deceased proprietor, bore him a child and that she was therefore entitled not only to the rental income but also to the Suit Property. In the Subordinate court the Respondent’s claim was to recover rental income from the suit property. The ELC Court in this regard granted appellate jurisdiction in land matters by *the Constitution* under Articles 162 (2) (b) of *the Constitution* and the provision of Section 13 of the ELC Act. The matter before the lower court related to the process through which the Respondent sought to collect rent on a property that belonged to the 1st Appellant/Applicant’s deceased husband.
17. For this reason, I find that this Honourable Court has the requisite jurisdiction to handle this appeal. Subsequently, I proceed to dismiss the Preliminary objection by the Respondent for lack of merit whatsoever.

Issue No. b). Whether the Appellants/Applicants has made for stay of execution of the ruling of the Chief Magistrate’s Court in Mombasa Chief Magistrate Civil Case No. 1847 of 2021 issued on 6th December, 2022

18. Under this sub heading, the Court wishes to address itself on the issue of stay of execution as pleaded by the Appellants/Applicants herein. It is now well established legal position that Stay of execution pending appeal is a discretionary power bestowed upon this court by the law. These legal rationale was at the very initial stages is graphically set out in the Court of Appeal in the case of “Butt – Versus - Rent Restriction Tribunal {1982} KLR 417” Madan JA, gave guidance on how a court should exercise the said discretion and held that:

- “ 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the Judge’s discretion.
3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its



own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

19. Additionally, the principles upon which stay of execution pending appeal can be allowed are now well settled from the authorities from this court and from the superior courts. Generally, stay of execution is provided for under provision of Order 42 Rule 6 of the Civil Procedure Rules. Sub-rule 1 gives the court discretionary powers to stay execution and provides as follow:-

“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.

20. 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 Sections 1A and 1B of the *Civil Procedure Act*, 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* or in the interpretation of any of its provisions.

21. 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 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.”

22. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out under the provision of 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 “Antoine Ndiaye – Versus - African Virtual University [2015] eKLR”.



23. As to what substantial loss is, it was observed in “James Wangalwa & Another – Versus - 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.”
24. As already stated, the provision of Order 42 Rule 6 lays out the Law on stay of execution pending appeal, by giving court the discretion to order stay for sufficient cause. Sub-rule 2 outlines the mandatory conditions that have to be met for the court to grant stay pending appeal. The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Appellants.
25. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under Order 42 Rule 6. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Appellants/Applicants unless stay of execution is granted; and thirdly such security as the court orders for the due performance of such decree or order as may ultimately be binding on them has been given by the Applicants.
26. From the record, the ruling appealed against was made on 6th December, 2022 and the application was filed on 30th January, 2023 and the memorandum of appeal filed on the 16th January, 2023. This was about one month and 10 days. In my view, the application was made timeously made.
27. Regarding the second pre-requisite in the provision of Order 42 Rule 6, that is substantial loss occurring to the Appellants/Applicants. The Honorable Court has already referred the consideration to be made in the case of “Kenya Shell Limited –Versus -- Benjamin Karuga Kigibu & Ruth Wairimu (Supra)”.
28. The Applicants/Appellants have a burden to show the substantial loss they are likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the 1st & 2nd Appellants/Applicants to their Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree.
29. In the instant case, the 1st and 2nd Appellants/Applicant averred that they stood to suffer substantial loss if stay of execution is not granted. The Respondent has since obtained certificate of costs and have threatened execution. On 6th December, 2022, the Court (Hon. Nyariki) allowed the Respondent's Application dated 10th November, 2021 effectively restraining the Applicants from collecting the rent from the Suit Property.
30. Owing to the nature of the Respondent's foregoing claim, the orders granted to the Respondent by the Learned Magistrate were issued in excess of the Court's jurisdiction and are tantamount to the subordinate court countermanding the High Court in Bomet which is currently seized of the succession cause in respect of the Estate of the Deceased in Bomet High Court Succession Cause No.033 of 2021-in the Matter of the Estate of Andrew Kipkemei Sunyai.



31. The 1st Appellants/Applicants herein have argued that the Respondent has no ascertainable assets that can be realized to recover the rent in case the appeal is successful. The Respondent on the other hand argued that the main object of granting the injunction is to protect the suit property from being sold in execution of a decree and/or from the threat of disposing of the property before the suit is determined, thus balancing the scales of justice. The Appellants/Applicants herein have failed to demonstrate any prejudice that they have suffered by the orders of injunction being granted, which orders merely seek to preserve the suit property pending the determination of the issues in dispute between the parties. The Respondent further contended that the Appellant has failed to demonstrate that this suit property forms part of the assets itemized in Bomet High Court Succession Cause No.033 of 2021-in the Estate of Andrew Kipkemei Sunyai, furthermore there is no indication on the confirmation of grants, in respect to the letters of administration intestate. Accordingly, I am persuaded that substantial loss has been proved.
32. As to security of costs, I find that the provision of Order 42 Rule 6 (2) (b) of the Civil Procedure Rules, 2010 stipulates in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. The Appellants/Applicants have not made a pledge to their willingness to deposit the title deed for the suit property with the Court as security for due performance. In the case of “Aron C. Sharma – Versus - Ashana Raikundalia T/A Rairundalia & Co. Advocates” the court held that:
- “The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”
33. The grant of stay remains a discretionary order that must also consider the fact that the Court ought not to make a practice of denying a successful litigant the fruits of their ruling/ judgment.

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

34. 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.
35. In this case the Honourable Court, out of the surrounding facts and circumstances of the case, in the interest of Justice, Equity and Conscience that it has used its discretion to direct that the Costs will be in the cause.

VII. Conclusion & Disposition

36. 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 1st and 2nd Appellants/Applicants herein have 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 Preliminary Objection dated 10th February, 2023 by the Respondent herein be and is hereby found to lack merit and hence is dismissed entirely.
- b. That the Notice of Motion application dated 27th January, 2023 by the 1st & 2nd Appellants/Applicants herein be and is hereby found to have merit and is hereby allowed in its entirety.
- c. That this Honourable Court order that there be a stay of execution of the ruling of the Chief Magistrate's Court in Mombasa Chief Magistrate Civil Case No. 1847 of 2021 issued on 6th December, 2022 pending the hearing and final determination of this the appeal filed herein.
- d. That this Honourable Court order that there be a stay of proceedings in Mombasa Chief Magistrate's Court Civil Case No.1847 of 2021, pending the hearing and final determination of the appeal herein.
- e. That an order made herein that the 1st & 2nd Appellants/Applicants herein shall deposit the Original Certificate of title Deed for the suit land to this Honourable Court, within 21 days of this ruling.
- f. That the Appellant to file and serve a record of appeal against the ruling of the Lower Court within the next thirty (30) days of the delivery this ruling.
- g. That the appeal shall be mentioned on 29th January, 2024 for directions on the mode of disposal of the appeal.
- h. That costs shall be in the cause.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS4TH DAY OFOCTOBER. 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 by the Appellants/Applicants.
- c. M/s Mwakizozo Advocate for the Respondent

