Waitiki v Kenya Power & Lighting Co. Ltd (Environment & Land Case 87 of 2012) [2023] KEELC 20977 (KLR) (12 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20977 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 87 OF 2012

LL NAIKUNI, J

OCTOBER 12, 2023

BETWEEN

EVANSON JIDRAPH KAMAU WAITIKI ..... PLAINTIFF

AND

THE KENYA POWER & LIGHTING CO.LTD ..... DEFENDANT

RULING

I. Introduction

1. The ruling of this Honorable Court pertains the Notice of Motion application dated 17th May, 2023 filed under a Certificate of urgency by the Defendant/Applicant, "the Kenya Power & Lighting Company Limited. The application was brought under the dint of the provision of Sections 1, 1A, 3 & 3A of the *Civil Procedure Act*, Cap. 21 and Order 42 Rule 6 of the Civil Procedure Rules, 2010.

2. Upon effecting service, by way of its opposition, the Plaintiff/Respondent filed replies in form of a Replying Affidavit dated 6th June, 2023.

II. The Defendant/Applicant's case

3. The Defendant/Applicant sought for the following orders:-

    a. Spent.

    b. Spent.

    c. That there be a stay of further execution of the Judgement/decree herein pending the hearing and determination of the proposed appeal to the Court of Appeal.

    d. That costs of this application be provided for.

4. The application by the Plaintiff/ Applicant is premised on the grounds, facts and testimony on the face of the application and further supported and supplementary affidavit of Justus Ododa.

III. The Plaintiff/Respondent's Response

5. The Plaintiff/Respondent filed 28 paragraphed Replying Affidavit sworn on 6th June, 2023 by the Evanson Jidraph Kamau Waitiki, the Plaintiff/Respondent herein in opposition of the application: -

   a. Thesaid Justus Odonda had not stated his position in the company and does not state whether he had the authority of the Defendant/Applicant to swear the said affidavit. Consequently, the said affidavit and the entire application should be stuck out.

   b. He also noted from the Court record that all the pleadings and affidavits in this matter had hitherto been sworn by Legal Officer of the company save for the current application.

   c. This court was "functus officio" since it granted the Defendant/Applicant a stay pending appeal for 30 days on 12th October, 2022 on Defendant/Applicant's oral application. The said application was a gross abuse of court process as the Defendant/Applicant had filed a similar application in the Court of Appeal being "Court of Appeal at Mombasa Civil Application No. E042 of 2023 where directions on its hearing had already been given. Annexed in the application and marked as "EJW – 1" was a true copy of those directions. The Defendant/Applicant was not merited of this court's discretion since it had disobeyed the court orders made on 23rd May, 2023 that the application be served within 3 days. To date, this application had not been served and the Plaintiff/Respondent's Counsel only saw it in the e-filing portal. Annexed in the application and marked as "EJW – 2" is a true copy of the orders of the court which the Defendant/Applicant was benefitting from.

   d. The said application had also been brought after inordinate delay and which had not been explained satisfactorily.

   e. The Judgment sought to be stayed was delivered on 12th October, 2022 and this application was filed on 17th May, 2023, about 7 months or over 210 days later.

   f. Immediately after the Judgment was delivered, the Defendant/Applicant applied for and was granted a stay of execution pending appeal as stated above.Two days later on 14th October,2022, the Defendant/Applicant filed a Notice of Appeal.

   g. It was therefore very clear that at least from 14th October, 2022, the Defendant/Applicant had already made a decision to appeal and was obviously aware that it needed to apply for a stay pending appeal, if it so wished, to avoid the time and costs spent by the Plaintiff/Respondent on the execution process.

   h. On 19th October, 2022, the Plaintiff/Respondent wrote to the Defendant/Applicant demanding payment of the decretal sum and interest which then stood at a sum of Kenya Shillings Twenty One Million Two Hundred and Fourty Five Thousand (Kshs. 21,245,000/=). The Defendant/Applicant did not respond to that letter which threatened execution upon lapse of 30 days. Annexed in the application and marked as "EJW – 3" is a true copy of the letter.

   i. Again on 6th February,2023, the Plaintiff/Respondent wrote another letter demanding payment of decretal sum then standing at a sum of Kenya Shillings Twenty One Million Nine Hundred and Eighty Thousand (Kshs. 21,980,000/=). Again, the Respondent never

responded to that letter. Annexed in the application and marked as "EJK – 4" is a true copy of the letter.

j. After the Defendant/Applicant failed to respond to those requests, he then proceeded to tax the bill of costs and to apply for execution. He had subsequently incurred costs on execution. The Auctioneer had also incurred costs on the execution which had been stayed and he verily believe that he was also entitled to his fees.

k. Due to the matters aforesaid, this application had been filed after inordinate delay contrary to the provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010 which delay the Defendant/Applicant had not even attempted to explain in the said affidavit. Ground (f) supporting the application was just but a lame excuse.

l. The Defendant/Applicant had not shown substantial loss it would suffer in the event that it paid the Plaintiff/Respondent the decretal sum and in the event it succeeded in the appeal as alleged at Paragraph 10 of the said affidavit.

m. He was a man of means and vast wealth and he would be able to refund the decretal sum if the Defendant succeeded in the appeal.

n. In the trial of this suit, and in the course of proceedings, the Defendant/Applicant maintained that he was adequately compensated by the Government on the sale of his land, which was a true copy of the sale agreement.

o. Therefore he was capable of refunding the said decretal sum of Kenya Shillings Twenty Five Million One Ninety One Thousand Three Hundred and Seven (Kshs. 25,191,307/=).

p. On the contrary, it was the Defendant/Applicant whose financial standing was weak and the Plaintiff/Respondent was apprehensive that it may not satisfy the decree and the interest that continued to accrue once the appeal was dismissed. Annexed in the application and marked as "EJK – 7" was a true copy of evidence that the Defendant/Applicant had progressively been making huge losses.

q. He also noted that the Defendant/Applicant had not offered security as required by the provision of Order 42 (6) (1) of the Civil Procedure Rules, 2010 hence it's not merited for the stay.

r. Order 42 Rule 6 of the Civil Procedure Rules, 2010 never exempted the Defendant/Applicant from offering security as alluded to at Paragraph 21 of the said Affidavit.

s. He was entitled to the fruits of his judgment.

t. He contended that he was now 80 years old and of failing health; further delay in bringing finality to this cases would definitely prejudice him.

u. This was an old matter being 11 years in Court; it had gone to the Court of Appeal vide "Civil Appeal No.73 of 2016" and brought back to the superior court for hearing on its merit. Further, it had been the subject matter of other appeals and applications in the Court of Appeal to wit:- "Civil Appeal No. 149 of 2019,Civil Appeal (Application) No.149 of 2019 and Civil Application No.7 of 2019, all of which had been concluded.

v. The affidavit was in opposition of the said application.

IV. Submissions

6. On 14th June, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 17th May, 2023, be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and on 19th July, 2023 a ruling date was reserved on Notice by Court accordingly on notice.

A. The Defendant/ Applicant's written submissions

7. The Learned Counsel for the Defendant/Applicant through the Law firm of Messrs. Munyithya Mutugi Umara & Muzna Co. Advocates filed their written submissions dated 27th June, 2023. Mr. Munyithya Advocate commenced by stating that that the submissions were in respect with the Notice of Motion application dated 17th May, 2023 whereby the Defendant/Applicant sought for the following orders for:

    i. Spent

    ii. Spent

    iii. That there be a stay of further execution of the judgement/decree herein pending the hearing and determination of the proposed appeal to the Court of Appeal.

    iv. That costs of this application be provided for.

8. The Learned Counsel submitted that theApplication which he fully relied on was grounded on the reasons stated in the Notice of Motion Application as well as the supporting Affidavit and supplementary affidavit of Justus Ododa. It was uncontroverted that the Petitioner/Applicant had a Notice of Appeal within time and was pursuing the same. He stated that as per the provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010 this Honourable Court has discretion to grant orders sought in the Notice of Motion Application pending the Applicant's appeal.

9. The Defendant/Applicant averred that it would suffer substantial loss in settling these costs if further execution of the Judgment/Decree issued by this Honourable Court was not stayed preemptively before its appeal was heard. The Appellant was a government agency offering critical services to the people of Kenya. If the execution was allowed, the possibility of suffering substantial loss was higher considering some of theattached goods were motor vehicles which was used in the daily operations by the Defendant/Applicant herein.

10. To buttress on the point, the Learned Counsel referred to the case of: "Charles Kariuki Njuri – Versus - Francis Kimaru Rwara (suing as Administrator of Estate of Rwara Kimaru alias Benson Rwara Kimaru(Deceased) [2020] eKLR" the Court stated the three (3) issues to be satisfied for stay of execution to be granted;

    " 16. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which:

        i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;

ii. The application is brought without undue delay and decree or order as may ultimately be binding on him has been given by the Applicant."

11. They also relied on the case of "Martin Kamakya – Versus - Resolution Insurance Company Ltd; Peter Ngumbi (Interested Party) [2021] eKLR" where the Court affirmed the decision in the case of "Niazons (Kenya) Limited – Versus - China Road & Bridge Corporation (Kenya) Ltd. Nairobi (Milimani) HCCC No.126 of 1999" Onyango-Otieno, J (as he then was) where it was stated that:-

> " Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile,stay...should be granted."

12. The Learned Counsel submitted that on 15th May 2023, the Plaintiff/Respondent instructed his agent-Equillibriam Concept Agencies (Subsidiary of Mbeki Auctioneers) to attach and did proclaim several movable assets of the Defendant/Applicant. The proclaimed goods were due for removal after seven (7) days with effect from 15th May 2023. If this process was allowed to proceed to its conclusion, the Defendant/Applicant shall suffer irreparable harm and losses due to the nature of its business. He further submitted that if the court never granted stay against the Respondent herein, and he proceeded with the execution against the Applicants before the appeal was heard then and the whole appeal shall be rendered nugatory.

13. The Defendant/Applicant had in its affidavit explained the reasons for delay in filing this application. The typed Judgment was only available on 14th November 2022 to which the Defendant/Applicant's management had to discuss the next cause of action regarding the matter. It was in no doubt that there had been substantial changes in the Defendant/Applicant's board of management which contributed to the delay of the decision delivered, it was fair to state that this application had been filed expeditiously and without undue delay.

14. Thirdly, security for the due performance of the decree or order as may ultimately be binding on the Defendant/Applicant had to be given or avoided as the court found it fit. The Defendant/Applicant submitted that should the application be allowed, the Defendant/Applicant was ready, willing and able to settle the decretal amount if this court found it fit. It was public knowledge that the Defendant/Applicant was a government agency capable of paying its fees. The Plaintiff/Respondent admitted having been paid a sum of Kenya Shillings One Billion Two Fifty Million (Kshs. 1,250,000,000/=) by the Government of Kenya. The Defendant/Applicant believed it was unnecessary to attach security due to the public nature of finances and assets at the disposal of the Defendant/Applicant. The order for security of cost is discretionary. The Court in the case of "Aggrey Shivona – Versus - Standard Group PLC [2020] eKLR" while quoting two cases stated that:-

> " The same principles were espoused in the case of Jayesh Hasmukh Shah – Versus - Narin Haira & another (2015) eKLR in which the court held;
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> "It is now settled Law the order for security for costs is a discretionary one as long as that discretion is exercised reasonably, and having regard to the circumstances of each case. Such factors as absence of known assets in the Country, absence of an office within the jurisdiction of the court, inability to pay costs; the general financial standing or wellness of the Plaintiff; the bona fides of the Plaintiff's claim, or any other relevant circumstances or conduct of the Plaintiff or Defendant may be taken into account".

> In an application for security for costs, the applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful. The same must be proven. This was the holding in the case of Kenya Education Trust – Versus -Katherine S.M. Whitton Civil Appeal No 310 of 2009."

15. Further the Learned Counsel argued that the intended appeal was arguable and the Defendant/Applicant should be granted the orders sought in the Notice of Motion Application dated 17th May 2023. The Learned Counsel relied on the case:- "Kiu & another – Versus - Khaemba & 3 others (Civil Appeal (Application) E270 of 2021) [2021] KECA 318 (KLR)" on the issue of what constituted an arguable appeal stated that:-

> "In law, an arguable appeal/intended appeal is one that need not succeed but one that warrants the court's interrogation on the one hand and the courts invitation to the opposite party to respond thereto."

16. The Counsel further cited in the case of: "Stanley Kangethe Kinyanjui – Versus - Tony Ketter & 5 others[2013]eKLR" the Honorable court held:-

> "On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. Damji Pragji Mandavia – Versus - Sara Lee Household & Body Care(K) Ltd, Civil Application No. Nai 345 of 2004.
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> vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. Joseph Gitahi Gachau & Another – Versus - Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.
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> viii) In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. Damji Pragji (supra)."

17. In conclusion, the Learned Counsel submitted that the Defendant/Applicant had proved the requirements for grant of the orders sought herein and he prayed that the application be granted as prayed.

B. The written submissions of Plaintiff/Respondent

18. The Plaintiff through the Law firm of Messrs. Gacheru Ng'ang'a & Company Advocates filed his written submissions dated 11th July, 2023. Mr. Gacheru Advocate stated that through the Motion dated 17th May, 2023 the Defendant/Applicant seeks stay of execution pending appeal. It sought for the stay execution of the Judgment and decree of the Superior Court made on 12th October, 2022. The Plaintiff/Respondent opposed the application through his Replying Affidavit sworn on 6th June, 2023 and its annextures. The Plaintiff/Respondent also relied on the bundle of authorities filed together with these submissions.

19. The Learned Counsel indicated that before proceeding to deal with the merits of this application under Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010, he raised two preliminary and jurisdictional issues as to why the court should dismiss the application in limine.The First issue was that this Court was "functus officio" as far as stay pending appeal was concerned. It is not in dispute that on 12th October, 2022, when the Court delivered its judgment, the Defendant/Applicant applied for and was

granted a stay of execution pending appeal for 30 days. He argued that the oral application by the Defendant/Applicant on 12th October,2022 was made pursuant to and the said stay was granted under Order 42 Rule 5 Of the Civil Procedure Rules which provides as follows:

> An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

20. The Learned Counsel submitted therefore that the Defendant/Applicant having made an application for stay of execution after delivery of Judgment and the court having granted the same, the court became "functus officio' as far as the stay was concerned. According to the Counsel, the Court thus lacks jurisdiction to entertain a second and similar application for stay like the one dated 17th May, 2023. As a matter of fact, the provision of Order 42 Rule 6 relied upon by the Defendant/Applicant dealt with injunctions pending appealand was not applicable in this case.

21. The Court of Appeal dealt with the doctrine of "functus officio' in the case of:- "John Gilbert Ouma – Versus - Kenya Ferry Services Limited [2021] eKLR" where whilst citing the Supreme Court in case:- "Raila Odinga – Versus - IEBC [2013] eKLR", it stated the following at paragraph 20:

> " The Supreme Court of Kenya in the case of Raila Odinga & 2 Others – Versus - Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR, cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, "The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law"(2005)122 SALJ 832 which reads:-
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> "The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

22. Secondly, if, which was denied, that the court has jurisdiction to entertain the application for stay, the Defendant/Applicant was not merited of this court's discretion since it had disobeyed the court orders made on 23rd May, 2023 that the instant application be served within 3 days. To date, this application had not been served and the Plaintiff/Respondent's Counsel only saw it and uploaded it from the e-filing portal. The Plaintiff/Respondent had annexed as exhibit marked as "EJW – 2" a true copy of the orders of the court which the Defendant/Applicant was benefitting from and some of which it disobeyed. In its Supplementary Affidavit sworn on 12th June, 2023, the Defendant/Applicant never denied that it did not comply with the said court orders.

23. The above notwithstanding, the Learned Counsel averred that he would now proceed to consider the merits of the application before the Court. Its trite law that for an application for stay pending appeal, the applicant must satisfy the court on three requirements under Order 42 Rule 2; that is;

    (i) Substantial loss unless the order is made;

    (ii) The application has been made without undue delay;

    (iii) The applicant has given sufficient security.

    He cited the case: "Amoke Otieno Pascal – Versus - Melvin Anyango Owuor [2022] eKLR" at Paragraph 21.

24. According to the Learned Counsel, the Defendant/Applicant had not demonstrated substantial loss. First and foremost, the Defendant/Applicant had not even annexed a draft Memorandum of Appeal or stated grounds or issues that it intended to raise in the appeal. The allegation of the Judgment of the superior court setting a "bad precedent" in coast region, and the alleged public interest set out at Paragraphs 8 - 11 of the Supporting affidavit was not a ground for appeal. This Honorable court in pronouncing itself on the law could not be termed as being to set a bad precedent.

25. Secondly, the superior court case was based on the tort of trespass which had been codified under the provision of Section 46 of the *Energy Act* and which required the Defendant/Applicant to obtain a written authority/consent/ permission from the Plaintiff/Respondent as the legal and registered owner of the land before entering into the land to lay cables and equipment. The Learned Counsel urged the Court to refer to the Amended Plaint and defence on record.At the hearing of the case, and as it was clear from the Judgment, the Defendant/Applicant indeed admitted that it did not obtain the Plaintiff/Respondent's permission to enter into the land and hence it committed the tort of trespass. Clearly therefore the intended appeal was just but frivolous.

26. In any event, the Learned Counsel submitted that even if the stay was refused, the intended appeal would not be rendered nugatory. Further the applicant had not demonstrated substantial loss as required under Order 42 of the Civil Procedure Rules. On this this issue, he cited the case of "Machira t/a Machira & Co. Advocates – Versus - East African Standard [2002] eKLR", where the Court held that for an Applicant for stay to succeed, he must satisfy the court on an affidavit or on some other proper evidential material that substantial loss may result to him out of all proportions in relation to the interests of justice and fairness, unless suspension or stay is ordered. With all due respect, he held that the Defendant/Applicant had failed on this.

27. As the Plaintiff/Respondent had stated in the Replying Affidavit, he was a man of means and vast wealth and he would be able to refund the decretal sum of Kenya Shillings Twenty Five Million One Ninety One Thousand Three Hundred and Seven (Kshs.25,191,307.00/=) contained in the warrants of attachment and due in the event that the Defendant/Applicant succeeded in the appeal. He had shown that he sold and was paid a sum of Kenya Shillings One Billion Two Hundred and Fifty Million (Kshs. 1, 250,000,000/-). He was therefore easily capable of refunding the said sum of Kenya Shillings Twenty Five Million One Ninety One Thousand Three Hundred and Seven (Kshs. 25, 191, 307.00/=). As a matter of fact, during the trial of this suit, the Defendant/Applicant would paint the Plaintiff/Respondent as being a rich man who was adequately compensated by the Government on the sale of his land, which he indeed sold and was paid the afore stated amount. Again at Paragraph 10 of its submissions in support of the current application, the Defendant/Applicant admitted that the Plaintiff/Respondent was indeed that rich.

28. As the High Court held in "Machira t/a Machira (supra)",the applicant for stay had to show that the Respondent was so impecunious that he may not refund the decretal sum. The Defendant/Applicant had not shown this in this case. In the case of "Caneland Ltd Malkit Singhpandhal & Anor – Versus - Delphis Bank Ltd [2000] eKLR", this court declined to grant a stay where the Respondent had means to refund the decretal sum, like in this case, in that case, the court stated:

> "We now turn to apply these principles to the facts of the present case. Let us say at once that it was nowhere alleged by the applicants in the supporting affidavits orotherwise that the respondent will be unable to refund to the defendants any sums of money paid in satisfaction of the decree. The onus was on the applicants to satisfy the court on this issue. Upon a careful consideration of all the material available to us we are unfortunately not satisfied that this onus has been discharged. There is nothing to show that the appeal will

be rendered nugatory if a stay is not granted. On the contrary, it appears to us that the respondent is not a bank of straw and can meet or refund any sums of money paid to it. That being the case and our view of the matter, we are satisfied, on a balance of probabilities, that if a stay is not granted the appeal will not be rendered nugatory."

29. The Learned Counsel therefore submitted that like in 'the Caneland case (supra), the Defendant/Applicant had not asserted in the application that the Respondent will be unable to refund the decretal sum. On the contrary, the Plaintiff/Respondent had shown in the Replying Affidavit that he was capable of refunding the paltry decretal sum in issue and that it was the Defendant/Applicant whose financial standing which was weak and it may not satisfy the decree and the interest that continued to accrue once the appeal was dismissed. The Plaintiff/Respondent had attached evidence that the Defendant/Applicant had progressively been making huge losses - (see Exhibit "EWJ – 7".

30. At Paragraph 4 of its submissions, the Defendant/Applicant submitted that it would suffer substantial loss since it's a government agency offering critical services to the people of Kenya and if execution proceeded, the sale of attached goods would hamper its operations. With all due respect, the Defendant/Applicant had missed the point. It never state how paying the decretal sum herein will make it suffer substantial loss. At paragraph 10 of the submissions, it stated that it was a government agency capable of paying its fees. By this admission, the Defendant/Applicant confirmed that it would not suffer any substantial loss financially if it settled the decretal sum herein.

31. At Paragraph 13 of the Supporting Affidavit, the Defendant/Applicant stated that this being a money decree, it was apprehensive that paying the decretal amount would render the proposed appeal nugatory. However, the Defendant/Applicant never stated what loss it would suffer if it paid the decretal sum.

32. On this point, the Learned Counsel cited the case of:- "Awale Transporters Ltd – Versus - Kelvin Perminus Kimanzi [2020] eKLR", where the Court stated as follows at paragraph 18 concerning the same issue of appeal being rendered nugatory:

> "In this case it was the applicant's case that unless the stay is granted, the appeal will be rendered nugatory.It was not explained in what manner the said appeal would be rendered nugatory. The Applicant has not explained what loss, if any, it stands to suffer if the stay is not granted. That the Respondent intends to proceed with execution is not reason enough to grant stay since being the successful litigant, he is lawfully entitled to enjoy the fruits of his judgement. Therefore, in proceeding with the execution process the Respondent is simply exercising a right which has been bestowed upon him by the law and such an exercise cannot be stayed unless god reasons are given by the Applicant.

33. He further cited the case of "Machira case (Supra)", where the Court stated as follows concerning delay:

> "As a further consideration of the principle of justice and fairness, the court abhors inexcusable delay in seeking an order for a stay. Such delay is an aspect of injustice and abuse of judicial process. The other party may take further steps in reliance on the belated applicant's inactivity prolonged without good reason. Costs might be incurred in the meantime. There might be a change of position to the prejudice of the other party."

34. The Learned Counsel submitted that the said application, had not only been made in bad faith but had also been made after inordinate delay which had not been explained. At pages 8 to 10 (Exhibits 3 and 4), the Plaintiff/Respondent had annexed letters that showed intention to execute but the Defendant/Applicant was unmoved. The Plaintiff/Respondent then taxed its party and party bill of costs, a

process in which the Defendant/Applicant participated without bothering to apply for stay. It waited until the auctioneer moved in.

35. The Learned Counsel averred that the Defendant/Applicant had not sufficiently explained this delay. The excuse stated at ground f) of the application that the Management had to discuss the Judgment before deciding to appeal was just but a lame excuse since the Defendant/Applicant had filed the Notice of Appeal on 14th October, 2022, only 2 days after the Judgment and hence had long made the decision to appeal. Moreover, the Defendant/Applicant had not bothered to pursue the proceedings to lodge the Record of Appeal, nine (9) months later.

36. On the issue security, the Learned Counsel submitted that the Defendant/ Applicant had not offered any security other than the arrogant statement that as a public entity, it never offered any security. The case of "Aggrey Shivona (Supra)' cited in its submissions was irrelevant as it dealt with security costs which was completely different from security as a condition for stay pending appeal. The Learned Counsel addressed the issue of sufficient security.

37. On the issue of Court to balance the interests of the Parties, the Learned Counsel invited the Court to consider the following matters. Firstly, the Defendant/Applicant had not even offered security as required by the law and as submitted above. The court obviously had power to devise appropriate and sufficient security. Secondly, this was the last of the matters pending in court concerning the famous Waitiki land. All the other matters had been settled. The Plaintiff/Applicant was entitled to the fruits of his Judgment. When dealing with this issue, the court in the Machira case stated as follows:

> " The ordinary principle is that a successful party is entitled to the fruits of his Judgment or of any decision of the court giving him success at any stage. That is trite knowledge. This is one of the fundamental procedural values which is acknowledgedand normally must be put in effect by the way we handle applications for stay of further proceedings or execution, pending appeal."

38. Thirdly, the Plaintiff/Respondent was now 80 years old and of failing health; further delay in bringing finality to these cases would definitely prejudice him. Fourthly, the superior court matter was an old matter, now 11 years old; it had gone to the court of appeal vide the said Civil Appeal No.73 of 2016 and was brought back to the superior court for hearing on merits. Further, the Counsel informed Court that this issue had been the subject matter of other appeals and applications in this court to wit, Civil Appeal No. 149 of 2019, Civil Appeal (Application) No. 149 of 2019 and Civil Application No.7 of 2019, all of which had been concluded. Therefore, there was a great need for finality in litigation.

39. The Learned Counsel submitted that in the event that the court granted a stay of the execution, which had already commenced, in order to balance the interests of both parties, the Defendant/ Applicant should be ordered to pay at least half of the decretal sum amounting to a sum of Kenya Shillings Twelve Million One Ninety One Thousand Three and Seven Hundred (Kshs. 12,191,307.00/ =) together with the auctioneer's fees of a sum of One Million Two Seventy Four Thousand Three Ninety One Hundred (Kshs.1,274,391.00/=) as per the fee note at page 11 (annex as "EJW – 5") and the balance to be deposited in an interest earning account in the joint names of the advocates. The Defendant/Applicant should thus pay a total sum of Kenya Shillings Thirteen Million Four Sixty six Thousand Six Ninety Eight Hundred (Kshs.13, 466, 698.00/=) and deposit a sum of Kenya Shillings Twelve Million One Ninety One Thousand Three and Seven Hundred (Kshs. 12,191,307.00) in a joint interest earning account. The time frame for complying should also be fixed. The Learned Counsel suggested that the Defendant/Applicant complies within 14 days of the ruling; failure to which the stay would lapse automatically.

40. He added that the stay condition that the Defendant/Applicant do pay part of the decretal sum was not new to both this Court and the Court of Appeal. To support that point, the Learned Counsel referred Court to the cases of:- "African Safari Club Limited – Versus - Safe Rentals Limited [2010] eKLR" where Court ordered part payment of a sum of Kenya Shillings Seven Million Two Eighteen Thousand Six Sixty Four Hundred (Kshs.7, 218,664.00/=) and "New Nairobi United Services Ltd & Anor – Versus - Simon Mburu Kiiru [2021] eKLR", where the Court ordered half decretal sum to be released to the decree-holder and the other half to be secured by a bank guarantee. While in the case of "Amoke Otieno Pascal – Versus - Melvin Anyango Owuor (supra)" the court ordered 30% of decretal sum be released to the respondent and the balance be secured by a bank guarantee. In "Clement Wakari Njoroge – Versus - Daniel Mwangi Wahome (Suing as the legal representative of the estate of Julia Wamaitha Mwangi) [2022] eKLR", the court ordered the applicant to pay 50% of the decretal sum and the balance to be deposited in a joint account.

41. Finally, the Learned Counsel submitted that the order for stay should also be conditional upon the Defendant/Applicant filing the record of appeal within 30 days so that it does not go back to slumber like it had done for the last nine (9) months. In the case of "Equity Bank Ltd – Versus - West Link MBO Limited", the court recognized the need to limit stay orders in a similar manner. The Learned Counsel urged the Court to see the dicta by Kathurima JA at paragraph 20.

V. Analysis and Determination

42. I have carefully read and considered the pleadings herein being the Notice of Motion application dated 17th May, 2023 by the Defendant/Applicant herein, the responses by the Plaintiff/Respondent, the written submission, the myriad of authorities cited by both parties, the relevant and appropriate provisions of *the Constitution* of Kenya, 2010 and statures.

43. For the Honourable Court to reach an informed, just, fair, reasonable and Equitable decision, it has crystallized the subject matter into the following three (3) salient issues for its determination. These are:-

    a). Whether the Notice of Motion application dated 17th May, 2023 by the Defendant/Applicant seeking to be granted Stay of Execution against the Judgement of this Court delivered on 12th October, 2022 pending the hearing and determination of the filed appeal before the Court of Appeal has meet and/or meets the required thresholds of law.

    b). Whether the parties herein are entitled to the reliefs sought.

    c). Who will bear the costs of the application.

ISSUE No. a). Whether the Notice of Motion application dated 17th May, 2023 by the Defendant/Applicant seeking to be granted Stay of Execution against the Judgement of this Court delivered on 12th October, 2022 pending the hearing and determination of the filed appeal before the Court of Appeal has meet and/or meets the required thresholds of law.

44. Under this Sub – heading, the main substratum of the filed application by the Defendant/Applicant dated 17th May, 2023 is whether or not to grant the orders for stay of execution to the Judgement and subsequent Decree of this Court delivered on 12th October, 2022 thereof. To begin with, the Honourable Court will lay down the fundamental legal principles pertaining to the subject matter of Stay of Execution.

45. As properly referred to by all parties herein, the law governing the stay of execution pending Appeal is found under the provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010. The provision of the law 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.

46. A number of principles are set out from this provision of the law. Firstly, I need to state that Stay of execution pending appeal is a discretionary power bestowed upon this court by the law. Secondly, there ought to be an appeal preferred at the appellate court emanating from a party being aggrieved from a Judgement delivered by the Superior Court. My understanding of an appeal is as envisaged under Rule 82 of the Appellate Jurisdiction Court Act. Clearly and as stated in the case cited by the Learned Counsel for the Respondent of OGM (Suing as the father of:- "KGW - Versus - FG (Supra) where the Court held that:-

> " The mere filing of Notice of Appeal is not enough to establish sufficient cause envisaged under Order 42 Rule 6 Civil Procedure Rules, a Memorandum of Appeal would in my view provide cogent evidence of existence of sufficient cause."

That is to say, an appeal is not a mere filing of a Notice of Appeal. In the case of "James Wangalwa & another – Versus - Agnes Naliaka Cheseto [2012] eKLR where the court held this:-

> " The right of appeal is a constitutional right that actualizes the right to access to justice, protection and benefit of the law, whose essential substance, encapsulates that the appeal should not be rendered nugatory, for anything that renders the appeal nugatory impinges on the very right of appeal."

47. At the very initial stages of building jurisprudence on this issue at hand, the Court of Appeal in the case of "Butt –Versus - Rent Restriction Tribunal {1982} KLR 417" 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."

48. Additionally, from the above provision of the law – Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010, a number of ingredients ought to be in existence for the granting of orders of stay of execution to be considered. These are:

a. Substantial loss may result to him unless the order is made;

b. That the application has been made without unreasonable delay; and

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

49. The purpose of stay of execution is to preserve the substratum of the case. In the case of "Consolidated Marine. vs. Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)", 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".

50. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.

51. Essentially, for the applicants having to suffer substantial loss, in the case of "Kenya Shell Limited – Versus - Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988)KAR 1018" the Court of Appeal pronounced itself to the effect 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 rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay."

52. The Court of Appeal in the case of "Mukuma – Versus - Abuoga (1988) KLR 645" where their Lordships stated that;

> " Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory."

53. The Applicant has 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 Applicant to the 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. The Court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. {See the case of "Absalom Dora –Versus - Turbo Transporters (2013) (eKLR)"}.

54. As F. Gikonyo J stated in "Geoffery Muriungi & another – Versus - John Rukunga M'imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (Deceased) [2016] eKLR" and which wisdom I am persuaded with: -

> " ...the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as ''reducing the successful appellant into a pious explorer in the judicial process''. The said state of affairs is what is referred to as ''substantial loss'' within the jurisprudence in the High Court, or ''rendering the appeal nugatory'' within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal..."

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

55. Under this Sub – heading and from the instant application, I find issues for determination arising therein namely:

    i. Whether the Defendant/Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.

    ii. What orders this Court should make

56. The Defendant/Applicant has elaborately submitted that it will suffer substantial loss in settling these costs if further execution of the Judgment/ decree issued by this Honourable Court is not stayed preemptively before its appeal is heard. I take judicial notice to the fact that the Defendant/Applicant is a State Corporation under the Government of Kenya offering such critical and essential services of supplying and selling electricity to the people of Kenya who are the consumers. There is no doubt that the consumption and dependency on electricity on a twenty four (24) basis in this Country like any other developed and industrial nation is extremely high. These are by the hospitals, security agencies, hospitality entities, industries, education institutions, Courts of law, residentials among others in their daily operations. Generally, the economy of this Country largely depends on the constant supply of electricity by the Defendant/Applicant who have the monopoly rights. Right now, there is an intensive and volatile debate doing the rounds that the Defendant/Applicant should be privatized to discourage them from continuing being the monopolistic suppliers and distributors of electricity for commercial basis or allow the other Independent Power Producers (IPPs) to supply power at a lower prices. Instead, other Independent Power Providers should be encouraged to be suppliers. The electricity generation is essentially hydro and through renewable energy sources such as wind and solar.

57. Therefore, with this brief expose, the Honourable Court takes cognizance that should the execution against the Defendant/Applicant be allowed, the possibility of the Defendant/Applicant suffering substantial loss cannot be gainsaid. It will be extremely enormous. This is normally evident whenever there is electricity black out in the Country. According to the Defendant/Applicant on 15th May, 2023, the Plaintiff/Respondent instructed his agent- Equillibriam Concept Agencies (Subsidiary of Mbeki Auctioneers) to attach and did proclaim several movable assets of the Defendant. The proclaimed goods were due for removal after seven (7) days with effect from 15th May 2023. If this process is allowed to proceed to its conclusion, the Defendant/Applicant shall suffer irreparable harm and losses due to the nature of its business.

58. The Defendant/Applicant submitted that if the court does not grant stay against the Plaintiff/Respondent herein, and he proceeds with the execution against the Defendant/Applicant before the appeal is heard then and the whole appeal shall be rendered nugatory.As already stated, 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. I reiterate that 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 Appellant. In my view, undoubtedly, the Defendant/Applicant will suffer substantial loss if orders are not granted.

59. Secondly, in determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under Order 42 Rule 6 as already stated above. The Plaintiff/Respondent submitted that the Plaintiff is ailing at 80 years old and that the matter is an old matter, now 11 years old; it has gone to the court of appeal vide the said Civil Appeal No.73 of 2016 and was brought back to the superior court for hearing on merits. Further it has been the subject matter of other appeals and applications in this court to wit, Civil Appeal No. 149 of 2019, Civil Appeal (Application) No. 149 of 2019 and Civil Application No.7of 2019,all of which have been concluded. There is a need for finality in litigation. To me, despite of these other related intricacies, there exists sufficient case to grant the orders.

60. Thirdly, on whether the application was brought to court timeously and without undue or inordinate delay. From the record, the judgment being appealed against was made on 12th October, 2022 and the application herein was filed on 17th May, 2023. This was after about 7 months and five days. From the face value, apparently in the ordinary circumstances, the application has been marred with extended unreasonable and inexcusable delay. However, in all fairness, and in this Honourable Court's opinion, the application was not made timeously. I say so based on the facts that the Defendant/Applicant has in its affidavit explained the reasons for delay in filing this application. Due to internal reasons within the Court registry, the typed Judgment was only available on 14th November 2022 to which the Defendant/Applicant's management had to discuss the next cause of action regarding the matter. It is in no doubt that there have been substantial changes inthe Defendant/Applicant's board of management which contributed to the delay of the decision delivered. Therefore, it is just fair to state that this application has been filed expeditiously and without undue delay.

61. On the last condition as to provision of security, 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 Defendant/Applicant has pledged his willingness to deposit the Certificate of title deed for the suit land with the Court as security for due performance of any decree that may be binding on him. According to the Defendant/Applicant, security for the due performance of the decree or order as

may ultimately be binding on the applicant has to be given or avoided as the court finds it fit. The Defendant/Applicant submitted that should the application be allowed, the Applicant is ready, willing and able to settle the decretal amount if this court finds it fit. I wish to refer to 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."

62. The grant of stay remains a discretionary order that must also take into account the fact that the Court ought not to make a practice of denying a successful litigant, in this case the Plaintiff/Respondent, the fruits of their Judgment. The Court of Appeal in "Butt – Versus - Rent Restriction Tribunal (Supra) gave guidance on how discretion should be exercised. As already indicated, it is public knowledge that the Defendant/Applicant is a blue chip State Corporation capable of paying its fees and meeting all its basic financial obligations including litigation and legal expenses such as this one. The Plaintiff/Respondent admits having been paid a colossal sum of Kenya Shillings One Billion Two Hundred and Fifty Thousand (Kshs. 1,250,000,000) by the Government of Kenya from the sale of the suit land. In other words, and on a right assumption, the Plaintiff/Respondent is not entirely depending on the decretal amount for his basic needs such as medication. The Defendant/Applicant believes it is unnecessary to attach security due to the public nature of finances and assets at the disposal of the Defendant/Applicant. The order for security of cost is discretionary.

63. According to the Plaintiff/Respondent, the Defendant/Applicant has not offered any security other than the arrogant statement that as a public entity, it does not need to offer any security. And that the Respondent was now 80 years old and of failing health; further delay in bringing finality to these cases will definitely prejudice him.

64. Thus, be that as it may and on a balance of scale, this court shall exercise its discretion regarding the security of costs to be offered by the Defendant/Applicant and direct that they do so within the time to be stipulated in this ruling if he intends to proceed with the Appeal.

ISSUE No c). Who will bear the Costs of Notice of Motion application dated 17th May, 2023.

65. It is now well established that the issue of Costs is at the discretion of the Court. I have well stated in my previous precedents and especially in the case of:- "Sagalla Lodge Limited – Versus - Samwuel Mazera Mwamunga & another (Suing as the Executors of Eliud Timothy Mwamunga – Deceased) [2022] eKLR", that:

> "
>
> " 58. The Black Law Dictionary defines "Cost" to means, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other".
>
> The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. The

events in this case is that the Notice of Motion application dated 7th December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and that of the Defendants dated 21st December, 2021."

66. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events.

67. In the case, although the application by the Defendant/Applicant dated 17th May, 2023 has been successful, it is just fair, reasonable and equitable that there shall be no orders as to costs.

VI. Conclusion & disposition

68. In long analysis, the Honorable Court having caused such an elaborate analysis and carefully considered and weighed the conflicting parties' interest as regards the principles of preponderance of probabilities and to balance of convenience, it will proceed to Order:

    a. That the Notice of Motion application dated 17th May, 2023 be and is hereby found to have merit and hence allowed only for the purpose of preserving the suit property.

    b. That stay of the execution of the Judgment/Decree herein be and is granted pending hearing and determination of the Applicants' intended Appeal before the Court of Appeal.

    c. That an order be and is hereby made for the Defendant/ Applicant to deposit security of a sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs. 5,500,000/=) in a fixed Joint Escrow interest earning bank account, in a reputable Commercial bank in the names of Messers. Munyithya, Mutungi, Umara & Muzna Advocates and Gacheru & Company Advocates both being the Counsels for the parties within the next (21) days from the date of delivery of this ruling. In default, the stay orders shall automatically lapse.

    d. That there shall be no orders as to costs.

It Is So Ordered Accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 12TH DAY OF OCTOBER 2023.

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HON. JUSTICE L. L. NAIKUNI (MR.)

ENVIRONMENT AND LAND COURT AT MOMBASA