



**Little Hills Flora Limited & 2 others v Industrial and Commercial Development Corporation
& 2 others (Civil Case 50 of 2018) [2025] KEHC 6659 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6659 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE 50 OF 2018
JRA WANANDA, J
MAY 23, 2025**

BETWEEN

**LITTLE HILLS FLORA LIMITED 1ST PLAINTIFF
STEPHEN KIPKERING SUGUT 2ND PLAINTIFF
LEAH CHEPCHUMBA SUGUT 3RD PLAINTIFF**

AND

**INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION 1ST
DEFENDANT
WAKARIMA INVESTMENTS COMPANY LIMITED 2ND DEFENDANT
JOYLAND AUCTIONEERS 3RD DEFENDANT**

RULING

1. This Ruling was to be delivered on an earlier date but before I could so, it was brought to my attention that an urgent Application had been filed in the intervening period by the Plaintiffs seeking to arrest the Ruling for the reason that the 2nd Plaintiff had unfortunately passed away and he needed to be first substituted by his Legal Representative. I did therefore arrest the Ruling upon which the said Application was settled by the consent recorded on 9/05/2025 whereof one Stanley Kipkemboi Kosgei was substituted in place of the deceased 2nd Plaintiff.
2. Back to this Ruling, I delivered a Judgment herein on 24/05/2024.
3. The Plaintiffs' claim was contained in the Amended Plaintiff filed through Messrs Birech, Ruto & Co., the Advocates who took over the conduct of the Plaintiffs' case from the earlier Advocates, Messrs Machio & Co. Judgment had been sought in the following terms:



- a. A permanent injunction against the Defendants from dealing in any way with the Plaintiff's parcel of land L.R. No. Uasin Gishu/El-Lahre/40.
 - b. A declaration that the charge registered against land parcel L.R. No. Uasin Gishu/El-Lahre/40 and its purported sale are both null and void.
 - c.[deleted]
 - d. Costs of this suit.
 - e. That there be a cancellation of transfer of L.R. No. Uasin Gishu/El-Lahre/40 in favour of the 2nd Defendant.
 - f. That the purported sale of L.R. No. Uasin Gishu/El-Lahre/40 be set aside.
 - g. A declaration that the purported sale is a nullity.
4. In my said Judgment, I ruled as follows:
- a. The Plaintiffs' suit is dismissed in its entirety.
 - b. The 2nd Defendant's Counterclaim is partially allowed and only to the extent that a permanent injunction is hereby issued restraining the Plaintiffs by themselves and/or their servants, agents from trespassing, occupying, alienating, disposing or in any way dealing with the parcel of land known as L.R. No. Uasin Gishu/El-Lahre/40 now transferred to and registered in the name of the 2nd Defendant as lawful owner having purchased the same pursuant to the public auction the subject of this suit.
 - c. For reason of the omissions committed by the 1st and 3rd Defendants in the course of conducting the public auction, I decline to award any costs to the 1st and 3rd Defendants.
 - d. I however award costs to the 2nd Defendant and which, for the same reasons stated in (c) above, I order to be borne by the 1st Defendant.
5. As a consequence of the Judgment, the Plaintiffs have now returned with the Application the subject hereof, namely, the Notice of Motion dated 22/08/2024, this time filed through Messrs K&A Advocates LLP, apparently the Plaintiffs' latest Advocates. It seeks orders as follows:
- i. [.....] spent.
 - ii. [.....] spent.
 - iii. That there be stay of execution against the Judgment issued by this Court and all consequential orders and/or proceedings arising therefrom pending the hearing and determination of the Appeal filed by the 1st, 3rd and 3rd Plaintiffs/Applicants before the Court of Appeal.
 - iv. Costs of this Application be provided for.
6. The Application is supported by the Affidavit sworn by the 2nd Plaintiff, Stephen Kipkering Sugut (now reported to be deceased as aforesaid). He deponed that he had filed an Application for stay of execution at the Court of Appeal but which he has since withdrawn, that he filed the Notice of Appeal dated 3/06/2024, he is apprehensive that the Defendants will proceed to execute the Judgment as he has been in occupation of the suit property since 1983 when it was allocated to him and he lives there together with his family to date.



7. He also deponed that he is a Senior citizen having been diagnosed with heart failure and rheumatoid arthritis and he is therefore confined to a wheelchair and if evicted, he will have nowhere to go. He recited the case against the Defendants as pleaded in the Plaint apparently to demonstrate the strength of the Appeal and submitted that by the 2nd Defendant executing the Judgment, he will suffer substantial loss and damage. He then deponed that the Application is brought without delay and the Defendants will not be prejudiced if the stay is granted.
8. The 2nd Plaintiff then filed the Further Affidavit indicated to have been sworn on 23/06/2024 which date is clearly erroneous. He deponed that he had filed a similar Application herein seeking stay but later learnt that their previous Advocates had filed a similar Application before the Court of Appeal, and that what prompted him to return to this Court with the current Application was the apprehension that the Defendants would try to evict him from the suit property. He deponed that true to his apprehension, the Defendants hired goons who stormed his home breaking the gate on 29/06/2024 armed with crude weapons and tried to forcefully evict him and his family, that he recorded a complaint at the police but despite this, no criminal case has been instituted against the goons or their masters and that instead, the Defendants initiated a criminal case against the Plaintiff and he was arraigned in Court and charged with the offence of forcible detainer and that he is now more than ever at risk of being evicted.
9. Only the 2nd Defendant filed a response to the Application. The same is in terms of the Replying Affidavit sworn on 6/09/2024 and filed through Messrs Tom Mutei Advocates. The Affidavit is sworn by one Jackson Ruiru who described himself as a director of the 2nd Defendant. He deponed that the Application offends the mandatory provisions of Order 9 of the Civil Procedure Rules having been preferred by an Advocate who is a stranger to these proceedings as no notice of change of Advocates has been filed and served upon the Defendants. He also deponed that subject to the order for costs, which costs were, in any case, to be borne by the 1st Defendant, these are orders which are negative in nature and thus orders of stay cannot be granted. According to him therefore, the only orders capable of execution is the order for costs. He deponed further that the grounds upon which the Plaintiffs are alleging substantial harm are res judicata having been adjudicated upon by this Court in its Judgment herein. He also deponed that the Plaintiffs have failed to demonstrate that they have met the criteria to warrant stay of execution as they have failed to demonstrate that they will suffer harm since, as already argued, there are no orders capable of execution, the Plaintiffs lack proprietary rights in the suit property as the 2nd Defendant has been the registered proprietor thereof for close to 17 years, that the costs are to be borne by the 1st Defendant only, the Application has been filed too late in the day and also, no security for costs has been deposited.
10. He deponed further that the 2nd Defendant stands to be greatly prejudiced should stay be granted since although it purchased the property sometime in 2004, it has never occupied it despite having title thereto, that the property was acquired for purposes of farming but the 2nd Defendant has not been able to invest in it for 20 years. It was his contention that “he who comes to equity must come with clean hands” and in this case, the Plaintiffs are undeserving of this Court’s discretion as they are in contempt of Court for not only being in occupation of the property despite the permanent injunctive reliefs issued in the Judgment but have also leased out part of the property to 3rd parties vide the Agreement dated 29/05/2024, that the 2nd Defendant has filed a complaint against the Plaintiffs to the police for forcible detainer and the Plaintiffs have since been arrested and charged in Court and that it is not therefore true that it is goons who were hired as alleged.
11. The Application was canvassed by way of written Submissions. Pursuant thereto, the Plaintiffs filed their Submissions on 17/10/2024 while the 2nd Defendant filed his dated 9/12/2024.



Plaintiffs'-Applicants Submissions

12. Mr. Oduor, Counsel for the Plaintiffs submitted that it is common ground that the agents/employees of the 2nd Defendant invaded the suit property armed with crude weapons and vandalized property belonging to the Plaintiffs, that in the Further Affidavit, the 2nd Plaintiff has attached copies of photographs of the goons in the property and Occurrence Book (OB) extract confirming reporting of the incident at the Moi's Bridge Police Station. He then recounted the provisions of Order 42 Rule 6 of the Civil Procedure Rules and also the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR and urged that in satisfying the condition on whether "substantial loss" will be suffered, the Plaintiffs have been in occupation of the suit property since 1980 and have built their home and interred the bodies of their parents therein, that the 2nd Plaintiff, in his Affidavit, attached photographs of his home and medical records and that he shall be rendered destitute if execution of the Judgement is not stayed. Counsel submitted further that the Plaintiff's have an arguable case and the Court has unfettered discretion to issue the orders of stay. He cited the case of Marriot Africa International Ltd vs. Margaret Nyakinyua Marigu & 4 Others, CA No. Nai. E152 of 2022, the case of Githunguri v Jimba Credit Corporation Ltd (No 2) [1988] KLR 838, the case of Rahab Waithira Nderu & 6 Others v Josephine Mukami Nderu [2007] eKLR and also the case of Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR. He contended that in all of them, stay of execution and injunction were granted to protect the subject matter of the appeal on the principle that the alienation or encumbering of a property the subject of an appeal will defeat the appeal.
13. In conclusion, he submitted that the contest on whether the auction conducted by the 3rd Defendant was legal and whether the transfer of the property to the 2nd Defendant was indeed lawful shall be determined in the intended Appeal but that in the meantime, the attempt by the 2nd Defendant, in conjunction with their hired goons to dispossess the Plaintiffs of possession of the property necessitates the grant of the order for stay of execution pending the hearing and determination of the Appeal.

2nd Defendant's Submissions

14. Counsel for the 2nd Defendant, Ms. Moraa, submitted that the law firm of K&A Advocates has not sought leave to come on record after Judgment to replace the law firm of Birech & Co. Advocates which has hitherto been on record for the Plaintiffs, and neither is the Court privy to any consent, or request to endorse any such consent, between the incoming and outgoing Advocates. According to her therefore, it is not in issue that Order 9 Rule 9 of the Civil Procedure Rules has not been complied with and that therefore the firm of K&A Advocates has no locus standi to agitate the Application. She cited the case of M Dalmar Trading Co. Ltd v Gakibe & 2 Others [2024] eKLR and also the case of Lutta v Wafula & Another [2024] eKLR. In her view, the Court cannot even invoke the so-called "oxygen (O²) rule" under the provisions of Article 159 of *the Constitution* and Section 1A and 1B of the *Civil Procedure Act*, to "breathe life" into K&A Advocates' participation in this matter as the omission to comply with Order Rule 9 goes to the root of the matter and cannot be overlooked. She cited several cases.
15. In regard to the prayer for stay, she reiterated that the same cannot be issued as the order of dismissal of the suit is negative in nature, that in the absence of an eviction order, the injunctive relief granted by the Court is simply restraining actions on the part of the Plaintiffs and which orders are therefore incapable of being stayed. She cited the case of Anyang Nyongo & 2 Others v The Minister for Finance & Another, Civil Application No. Nai 273 of 2007.
16. She urged that in the event that the Court opts to entertain the Application, then still, the Plaintiffs have not met the criteria to warrant issuance of the stay orders. She cited the case of Selestica Limited



vs Gold Rock Development Ltd [2015] eKLR. In respect to “substantial loss, she, too, cited the case of James Wangalwa (supra) and submitted that the Plaintiffs have failed to demonstrate “substantial loss”. She reiterated that although the Plaintiffs allege that they have been in occupation of the suit property for a long time, after the Judgment herein, the Plaintiffs unlawfully and illegally entered into a Lease Agreement with a 3rd party for a term of 5 years over 20 acres comprised in the suit property, that not only did that action violate the Judgment herein restraining the Plaintiffs from dealing with the property, but the 2nd Plaintiff also lacked capacity to enter such contract in light of the 2nd Defendant’s ownership thereof and that the matter has been reported to the police, and the 2nd Plaintiff arrested and charged with the offence of forcible detainer.

17. Counsel pointed out that it is the above illegal actions that the Plaintiffs claim to constitute the status quo which they seek to preserve and have this Court sanction in the name of “substantial loss” in order to prevent them from being held in contempt of Court. According to Counsel therefore, the Application is founded on an illegality and to this extent, no “substantial loss” has been demonstrated. She reminded the Court that the 2nd Defendant purchased the suit property at a public auction in 2004 and that pursuant thereto, was registered as proprietor thereof and that this Court has found no fault with the sale process. She urged that in the event that the Appeal succeeds, Section 77(3) of the Registered Land Act dictates that the only recourse available to the Plaintiffs would be that of damages against the 1st Defendant and that therefore, there can be no “substantial loss”. She also observed that the Application has been preferred too late in the day as it was filed 3 months after delivery of the Judgment and no explanation has been made for the delay. She also pointed out that the Plaintiffs have failed to express willingness to furnish security as a condition for stay of execution. She however urged that should the Court see it fit to order security for costs then it should order the Plaintiffs to deposit the sum of Kshs 223,900/- being the value of the suit property as shown in the Valuation Report that the Plaintiffs produced in Court.

Determination

18. The issues that arise herein for determination herein can be summarised as follows:
- a. Whether the law firm of K&A Advocates is properly on record herein.
 - b. whether an order of stay of execution of the Judgment herein pending Appeal should be issued”.
19. On the first issue, the Plaintiffs’ Advocates, in their presumed wisdom, seem to have elected not to respond to it at all. The issue of their not being properly on record was raised early enough in the 2nd Defendant’s Replying Affidavit and then also extensively addressed in the 2nd Defendant’s Submissions. The Plaintiffs, despite filing a Further Affidavit, and also Submissions, said nothing about it at all. This is why I say that the election to remain silent about the issue must have been a result of a considered decision, thus the Plaintiffs’ presumed wisdom.
20. Order 9 Rule 9 of the Civil Procedure Rules, 2010 stipulates that change of Advocates after entry of Judgment is to be effected through an order made by the Court, or by consent of the parties. It is premised as follows:
- “When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court —
- a. upon an application with notice to all the parties; or



- b. upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be”

- 21. It is evident from the foregoing that Order 9 Rule 9 is crafted in mandatory terms. It is generally accepted that the rationale behind the said requirement is to protect Advocates from mischievous clients who will wait until a Judgment is delivered and then “sack” the Advocate and either replace him with another, most probably, before settling the former Advocate’s fees, or opt to henceforth conduct the matter in person. Besides, it also ensures an orderly manner of transitioning from one Advocate to another after a case has been concluded, at which point the client, before settling the Advocates fees, may deem that the Advocate is no longer of use.
- 22. In this matter, the law firm that was on record for the Plaintiffs up to the date of the Judgment was Messrs Birech Ruto & Co. I have not come across any order of the Court or any consent with the Messrs Birech Ruto & Co. (alleged outgoing Advocates), allowing or authorizing any change of Advocates and none has even been alleged. Even worse is that not even any Notice of Change of Advocates seems to have been filed or served.
- 23. The Court of Appeal in the case of Stephen Mbogo Karuiki v K- Rep Bank Ltd [2018] eKLR rendered itself on the import of Order 9 Rule 9 as follows:

“ 11. Our understanding, of the learned Judge’s order dated 15th March, 2017 is that he not only marked the appellant’s suit as adjusted but also held that there was nothing left for determination. This to us was tantamount to the learned Judge disposing the entire suit. As such, when the appellant instructed M/s Joseph Gathuku & Company Advocates to come on record, the suit had been fully determined. Therefore, the said firm was required to comply with order 9 rule 9 of the Civil Procedure Rules which sets out the procedure to be followed upon change of an advocate after delivery of judgment. It stipulates:

.....

12. It is not in dispute that M/s Joseph Gathuku & Company Advocates neither filed the application nor obtained the consent envisioned in the aforementioned provision. Equally, such change had not been sanctioned by an order of the Court. Therefore, we concur with the learned Judge that the review application filed by the said advocates was not properly before the court.”

- 24. I note that the Plaintiffs had earlier filed an Application dated 21/06/2024 which however was either abandoned or generally not pursued for lack of jurisdiction for the reason that the substantive order sought therein was, as herein, also stay of execution of the Judgment herein pending Appeal, and it turned out that the same Plaintiffs had also, at the same time, through their “former” Advocates, filed a similar and parallel Application before the Court of Appeal, a higher Court. I note that in prayer (2) thereof, the Plaintiffs had indeed sought leave for K&A Advocates to come on record for them after Judgment. As aforesaid however, and although there is no evidence that the Application was withdrawn, I would presume that it was, for all intents and purposes, “abandoned” as the instant fresh one, also seeking stay of execution, was subsequently filed herein, the Court of Appeal one having been later withdrawn.
- 25. However, since that Application was never argued or prosecuted, and the Plaintiffs having opted not to respond to the effect of Order 9 Rule 9 on their post-Judgment participation in this suit, I am left with



no option but to accept the 2nd Defendant's contention that the firm of K&A Advocates is improperly on record in this matter.

26. The above finding is by itself, sufficient to dispose of the instant Application by way of dismissal thereof. I will however still proceed to interrogate the second issue, the prayer for stay of execution pending Appeal.

27. On the issue, the Court's power to grant stay of execution pending Appeal is provided under Order 42 Rule 6(2) of the Civil Procedure Rules as follows:

“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 Defendant 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 Defendant.”

28. Therefore, an Applicant for stay of execution of a decree or order pending Appeal is required to satisfy the conditions set out above. The first one is whether the Application has been made “without unreasonable delay”, the second is to demonstrate that “substantial loss” may result to the Applicant unless the order is granted, and the third is the Applicant's willingness or readiness to “deposit security” for due performance of the decree or order.

29. Regarding the merits of the Application, the first condition to be considered is whether the Application has been made “without unreasonable delay”. In this case, the Judgment was delivered on 24/05/2024. As aforesaid, I am told that the Plaintiffs' “former” Advocates, after filing the Notice of Appeal, also filed an earlier Application for stay of execution before the Court of Appeal. It appears that when the current Advocates took over, they withdrew the said Court of Appeal Application and filed the instant one before this Court on or about 23/08/2024, a period of about 3 months after delivery of the Judgment. As further observed, I also note that the Plaintiffs had earlier also filed a similar Application herein, dated 21/06/2024, and also seeking stay of execution but which Application could not proceed because of the pendency of the similar Application before the Court of Appeal. It is not clear whether that Application dated 21/06/2024 is still “alive” as there was no formal withdrawal thereof or even any attempt to consolidate it with the instant Application. In the circumstances, and although neither of the parties argued this point, I wonder how the instant Application can be heard when the previous one, seeking basically the same orders, is also still pending for determination.

30. Be that as it may, in view of the above chronology of events, I am satisfied that the period in issue does not amount to “inordinate” or “unreasonable delay” in the filing of the instant Application.

31. The second condition is whether the application would suffer “substantial loss” should the order not be granted. As to what constitutes “substantial loss”, F. Gikonyo J in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, stated as follows:

- “ 11. 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. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“... 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.”

With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion under order 42 Rule 6 of the CPR only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above.”

32. Further, Platt, Ag. JA (as he then was) in *Kenya Shell Limited vs. Kibiru* [1986] KLR, expressed himself as follows:

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

33. On his part, Gachuhi, Ag. JA (as he then was) in the same case, stated as follows:

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

34. From the foregoing, it is clear that in respect to the limb of “substantial loss”, an Applicant for an order of stay of execution has the obligation to first demonstrate that refusal by the Court to “preserve the status quo” will result into such loss that would “render the appeal nugatory”, which in turn means that such Applicant must demonstrate that “the appeal is not frivolous” and that it possesses some “reasonable belief that it may succeed”.

35. On satisfaction that the Appeal “is not frivolous”, in my understanding, the Plaintiffs basically wish to challenge this Court’s findings in respect to whether the 1st Defendant, as a lender, lawfully exercised its statutory power of sale resulting into the sale of the security (the suit property herein) by public auction, to the 2nd Defendant and subsequent registration of the 2nd Defendant as proprietor thereof.



The Plaintiffs have however not attached a draft Memorandum of Appeal for this Court to peruse and satisfy itself that the intended Appeal “is not frivolous”. Nonetheless, the Plaintiffs have at length, in the Supporting Affidavit, sought to demonstrate the strength of the intended Appeal and upon studying the same, I am satisfied that the same “is not frivolous”.

36. However, on the nature of the Judgment sought to be stayed herein, I am constrained to agree with the 2nd Defendant’s Counsel that “there is nothing to stay”. This is because all the Judgment dated 24/05/2024 did was to dismiss the Plaintiffs’ suit. The Plaintiffs do not seem to therefore appreciate that the same was simply a negative order. I draw the Plaintiffs’ attention to, for instance, the Court of Appeal cases of Anyang Nyong’o & 2 Others v Minister for Finance & Another [2007] eKLR, Kaushik Panchamatia & 3 Others v Prime Bank Limited & Another [2020] eKLR, and also Western College Farts and Applied Sciences vs. Oranga & Others [1976] KLR 63. All the Judgment herein did was to refuse the prayers made in the Plaint. What then would be there to be stayed in the Judgment? How does a dismissal of a suit get stayed and to what end? As a result of the dismissal of the suit, the Court simply then granted the consequential prayers sought by the 2nd Defendant in its Counterclaim, namely, injunction restraining the Plaintiffs from interfering with the 2nd Defendant’s ownership of the suit property. Again, what is there in that portion of the Judgment to be stayed under those circumstances? This perhaps explains why, despite the 2nd Defendant consistently raising this issue, the Plaintiff’s Counsel has, again, maintained a studious silence thereon. Indeed, the Plaintiffs’ Counsel has not made any attempt to explain what exactly or which part of the Judgment he wants to be stayed. This not being a money decree, there was need to clearly offer an explanation thereon, particularly since the 2nd Defendant’s Counsel strenuously argued that point.
37. A look at the Application and the Supporting Affidavit reveals that what the Plaintiffs, in reality, seek to protect themselves from is their eviction from the suit property pursuant to the dismissal of their suit. It is therefore evident that the instant Application is a disguise to obtain an order of injunction against eviction. To grant such prayer would be an ultra vires act by this Court since it would amount to issuing substantive orders post-Judgment. This Court having already fully and finally pronounced itself by a Judgment, is now functus officio and has no jurisdiction to issue interim orders amounting to an injunction. Orders of interlocutory injunction can only be issued pending hearing and determination of a suit. Once a final Judgment has been rendered, the trial Court cannot again purport to issue orders akin to interim orders of injunction. Grant of injunctions post-Judgment is a preserve of the Court of Appeal and that is the reason for the existence of Rule 5(2) of the Court of Appeal Rules.
38. There is also an issue raised regarding the Plaintiffs’ bona fides. It should not be forgotten that the 2nd Defendant purchased the suit property at a public auction in 2004, 21 years ago, and pursuant thereto, was duly registered as the proprietor thereof. The title document is therefore in the 2nd Defendant’s name. The 2nd Defendant has submitted that although the Plaintiffs allege that they have been in occupation of the suit property for a long time, after the Judgment herein was delivered, the Plaintiffs went ahead to unlawfully and illegally enter into a Lease Agreement with a 3rd party for a term of 5 years over 20 acres comprised in the suit property. According to the 2nd Defendant, not only did that action violate the Judgment herein restraining the Plaintiffs from dealing with the property, but the 2nd Plaintiff also lacked the capacity to enter such contract in light of the 2nd Defendant’s ownership thereof and that the matter has been reported to the police, and the 2nd Plaintiff arrested and charged with the offence of forcible detainer. A copy of the Lease Agreement has indeed been exhibited and it is dated 29/05/2024, just 5 days after the Judgment! Despite all this, the Plaintiffs, yet again, maintained a conspicuous silence over the issue and never denied or bothered to even respond to that allegation. Being uncontroverted therefore, I have no reason not to believe that the allegation is true.



39. I therefore agree that the Plaintiffs' act of leasing out the suit property to a 3rd party post-Judgment, after the Court dismissing their suit and restraining them, by injunction, from dealing with the property in that manner, was not only illegal and unlawful, but also grossly contemptuous of this Court. As correctly pointed out by Ms. Moraa, the 2nd Defendant's Counsel, it is clear that it is these illegal actions that the Plaintiffs, in disguise, and without even making any disclosures to the Court, wish, once they obtain stay orders, to later argue as having constituted the "status quo" prevailing and thus preserved through the orders of stay of execution. The Plaintiffs therefore seem to intend, by disguise, to use this Court to unknowingly sanction the said unlawful acts in the name of "substantial loss". This is nothing but gross abuse of the judicial process which this Court cannot at all countenance whatsoever. The instant Application is clearly founded on an illegality and to this extent, I agree with Ms. Moraa that no "substantial loss" can arise from such an act of impunity. In any event, it is a basic tenet of law that "he who comes to equity must come with clean hands".
40. In any event, my honest view is that, even putting aside the law and much legalese for a moment, granting a stay of execution pending Appeal under the circumstances of this case will clearly harm the 2nd Defendant's interests much more than refusing to grant the stay will harm the Plaintiffs. I say so noting that the 2nd Defendant is and has undisputably been the registered owner of the suit property since the year 2004, more than 21 years now, after it purchased the property in a public auction. Having been kept out of the property by virtue of the Plaintiffs continuing occupation thereof, would it really, on the face of justice, be fair to continue keeping the 2nd Defendant away from its property. Granted, the Court of Appeal may as well overturn this Court's verdict, that possibility is constitutional and cannot be wished away. But until then, what kind of "fairness" will this Court be demonstrating to the "officious bystander" watching these proceedings out there from afar by issuing an order of stay of execution whose only effect is for use, in disguise, as a shield against possible eviction?
41. On the third condition, deposit of "security", the Plaintiffs have also not bothered to offer any security for this Court to assess its suitability. They have not even, at least, state whether they are willing or ready to do so. They have also not alleged that the circumstances of this case is such that depositing of security is not viable or practical. How then is the Court to come to their aid? It is not for the Court to suggest or craft the nature or extent of security that may be ordered to be deposited. Order 42 Rule 6(2) of the Civil Procedure Rules imposes that duty upon an Applicant for an order of stay of execution pending Appeal. It is only once a security is proposed, that the Court can then assess its suitability and give orders. Where depositing of security is not practical, perhaps due to the nature of the case before Court, again, it is for the Applicant for say so. In this case, the Plaintiffs have not made any representations on security. That omission also weakens the Application.
42. In view of the foregoing, I believe I have said enough to demonstrate that the instant Application cannot succeed.

Final Orders

43. The upshot of the above is that I rule and order as follows:
- i. The law firm of K&A Advocates is found to have improperly purported to have come on record in this suit after Judgment for the reason of non-compliance with the mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules.
 - ii. The Plaintiffs' Notice of Motion dated 22/08/2024 is hereby dismissed, both for the reason set out in (i) above, and also on substantive merits.



- iii. As costs follow the event, I grant costs of this Application to only the 2nd Defendant, being the only party that participated in the Application by opposing it.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 23RD DAY OF MAY 2025

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WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Ms. Odwa for the Plaintiffs

Ms. Moraa for the 2nd Defendant

N/A for other Defendants

Court Assistant: Brian Kimathi

