**Hassan & another v Makacy & 2 others (Sued as the Chairman, Secretary and Treasurer Respectively of East Sidaz Self Help Youth Group) (Environment and Land Appeal E224 of 2024) [2025] KEELC 3821 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3821 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT AND LAND APPEAL E224 OF 2024**

**OA ANGOTE, J**

**MAY 15, 2025**

**BETWEEN**

**MUSA SAID HASSAN ..... 1ST APPELLANT**

**FARAH MUSA SAID ..... 2ND APPELLANT**

**AND**

**BRIAN CEDRIC OLOO MAKACY ..... 1ST RESPONDENT**

**KEVIN OTIENO ODONGO ..... 2ND RESPONDENT**

**LUCY NJERI KAMAU ..... 3RD RESPONDENT**

**SUED AS THE CHAIRMAN, SECRETARY AND TREASURER RESPECTIVELY OF EAST SIDAZ SELF HELP YOUTH GROUP**

## RULING

1. Before this Court for determination is the Appellants'/Applicants' Motion dated 19th December, 2024 brought pursuant to the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 22 Rule 22(1), Order 42 Rule 6, and Order 51 Rule 1 of the Civil Procedure Rules seeking the following reliefs:

    i. That this Honourable Court be pleased to grant an order of stay of execution of the ruling and consequential orders of the Hon A. Mukenga, PM, of Chief Magistrate's Court at Nairobi, Environment and Land delivered on 11th December, 2024, in Milimani Court Environment and Land Case No E431 of 2024 pending hearing and determination of the Appellants Appeal.

ii. That this Honourable Court be pleased to grant an order of stay of the proceedings in Chief Magistrate's Milimani Court Environment and Land Case No E431 of 2024, pending hearing and determination of the Appellants Appeal.

iii. That the costs of this application be provided for.

2. The Motion is based on the grounds on the face thereof and supported by the Affidavit of Musa Said Hassan, the 1st Appellant with due authority from the 2nd Appellant of an even date. He deponed that his company, Tanad Transporters Limited, is the registered owner of the parcel of land known as L.R No X6/IV/1X7 located in Eastleigh having been issued with a letter of allotment by the City Council and subsequently, a certificate of title.

3. According to the 1st Appellant, in exercise of his proprietorship rights, he obtained a renovation permit to carry out works and iron sheet fencing of the suit property.

4. According to Mr. Hassan, vide MCELC No E431 of 2024, the Respondents moved to court, seeking, inter-alia, permanent injunctive orders restraining them from trespassing onto the land known as L.R No X6/IV/R and that vide a Motion sought temporary injunctive orders.

5. In response to the Motion, he stated, he argued that he had a title deed for the suit property and the value thereof exceeded the Magistrate court's pecuniary jurisdiction and that despite not being in possession and only holding a letter of allotment issued in 1999, the lower court in its ruling of 11th December, 2024 granted the Respondent a temporary injunction.

6. Mr. Hassan deponed that aggrieved by the foregoing, they have filed an appeal before this court which appeal raises serious issues of law as can be gleamed from the Memorandum of Appeal; that unless there is stay of execution and further proceedings, the appeal will be rendered nugatory and that unless the stay of execution and further proceedings is granted, they run the risk of being evicted from the suit property which they are in actual possession. He urged that they are ready, able and willing to give security for the due performance of the decree.

7. In response to the Motion, the Respondents filed Grounds of Opposition dated 27th January, 2025 in which they averred that:

i. The Application is incompetent, misadvised and bad in law.

ii. The Application is scandalous, frivolous, vexatious and an abuse of court process.

iii. The Application is incompetent and an abuse of court process.

iv. The Application presents a ripe, plain and obvious case for dismissal.

v. The Application is incurably defective, incompetent, a non-starter and the same does not lie in law.

vi. The grounds relied upon the Appellants do not warrant the issuance of the Orders sought.

vii. The Notice of Motion is a grave abuse of the process of this Honourable Court.

8. The Respondents also filed a Replying Affidavit sworn by Brian Cedric Oloo Malacky, its Chairman on the 4th February, 2025. He deponed that the Motion is misadvised, frivolous, vexatious and an abuse of the process of the court and that as advised by Counsel, a party seeking stay of execution must meet the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules to wit, establishment of sufficient cause through demonstrating that substantial loss will result unless the orders sought are

granted, and provision of security. Similarly, he deposed, the Motion should not have been brought after inordinate delay.

9. The 1st Respondent deponed that in the circumstances, the Appellants have not pleaded that they stand to suffer substantial loss should the orders not be granted; that it is clear that the Motion is an attempt to delay the administration of justice and that that the Appellants having not demonstrated the substantial loss they stand to suffer, or that the execution will create a state of affairs that will irreparably affect or negate the core of the appeal, the Motion is bound to fail.

10. He stated that in any event, the Respondent's deponent, vide his Affidavit sworn on 20th September, 2024 before the Trial Court, evinced being in possession and occupation of the suit property by annexing rent receipt payments and that the renovation permit alluded to by the Appellants was cancelled on account of the ownership dispute, a fact that was brought to the Trial Court's attention.

11. Further, he deponed, the Appellants have not demonstrated that their intended appeal is arguable and/or has high chances of success; that there is similarly no demonstration of any threat of eviction as alleged and in any event it is the Respondents in possession of the suit property and that the ruling of the trial court merely preserved the suit property. He stated that a stay of proceedings will prevent the Trial Court from determining the dispute.

12. It was deposed by the 1st Respondent that a stay of proceedings is a grave judicial action which will interfere with the Respondents' rights to conduct litigation before the Trial Court and that as the question of ownership of the suit property has yet to be determined, the Appellants have an opportunity to challenge the issue in the main suit. None of the parties filed submissions [As at 16th April, 2025]

**Analysis and Determination.**

13. Having carefully considered the Motion, and responses, the issues that arise for determination are:

    i. Whether the Appellants have established a case for the stay of proceedings pending appeal?

    ii. Whether the Appellants have satisfactorily discharged the conditions warranting the grant of stay of execution pending appeal?

14. Black's Law Dictionary, 9th Edition, defines a proceeding as:

> "(1) The regular and orderly progression of a law suit, including all acts and events between the time of commencement and the entry of judgment; (2) any procedural means of seeking redress from a tribunal or agency; (3) an act or step that is part of a larger action; (4) the business conducted by a Court or other official body, a hearing."

15. The general principles which guides the courts whenever they are invited to exercise the jurisdiction to stay proceedings were best summarized in Halsbury's Law of England, 4th Edition, Vol 37 at pages 330 and 332 as follows:

> "The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue."

16. This was affirmed by the court in Ferdinard Ndung'u Waititu vs Independent Electoral & Boundaries Commission (IEBC) & 8 others [2013] eKLR which persuasively stated thus:

> " A stay of proceedings involves arresting or stopping proceedings. It is a tool used to suspend proceedings to await the action of one of the parties in regard to some step or some act (see Black's Law Dictionary). This implies that the rationale for stay is the pendency of an act or step either required by the court or sought by a party. It may be grounded on a statutory provision or on the need of a party and based on a plea for the plenary exercise of the court's discretion."

17. The powers of this court to stay proceedings pending appeal and its jurisdiction in this regard is derived from Order 42 Rule 6 of the Civil Procedure Rules as well as the inherent jurisdiction reserved in Section 3A of the *Civil Procedure Act*.

18. Order 42, Rule 6(1) of the Civil Procedure Rules under the head Stay Pending Appeal provides:

> " (1)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."

19. In the case of Global Tours & Travels Limited, Nairobi HC Winding Up Cause No.43 of 2000, the court laid down the factors that ought to be considered on whether or not to stay proceedings as follows:

> " As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously" (emphasis added)."

20. In William Odhiambo Ramogi & 2 Others vs the Honourable Attorney General & 3 Others [2020] eKLR, a 5-judge Bench of the High Court, authoritatively laid out the principles established for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher court. They laid down the following six principles:

> " First, there must be an appeal pending before the higher Court;
>
> Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been

sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;

Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;

Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;

Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and

Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay."

21. It is apparent from the foregoing that the grant of a stay of proceedings pending the hearing of an appeal in civil matters is a rare and exceptional remedy. The court in making this determination must remain alive to the general rule that once a suit is filed, proceedings ought to continue without interruption until the suit is determined.

22. This position a has constitutional backing in Article 50 of *the Constitution* which guarantees every person the right to a fair trial, which includes the right to have the trial begin and conclude without unreasonable delay as well as the principle that justice delayed is justice denied.

23. Whereas it is difficult to determine with mathematical precision when the court will use this power, it is only to be used sparingly, and especially in circumstances where, as stated by the South African authors, Gardiner and Lansdown (6t Ed. Vol. 1 p. 750), grave injustice might otherwise result or where justice might not by other means be attained.

24. By way of brief background, the Respondents, as Plaintiffs, instituted MCELC No E431 of 2024 against the Appellants herein as Defendants seeking inter-alia permanent injunctive orders restraining the Appellants from trespassing on land comprised in L.R-X6/IV/R and general damages for trespass.

25. Simultaneously with the suit, the Respondent filed a Motion seeking temporary injunctive orders restraining the Appellants from any dealings with the parcel L.R-X6/IV/R pending the determination of the suit. It was their case in this respect that the Self Help Group is the registered proprietor of the aforesaid parcel of land having been in occupation and possession thereof until the Appellants trespassed thereon.

26. In response to the Motion, the Appellants vide a Replying Affidavit stated that Tanad Transporters is the registered owner of L.R X6/IV/1X7 which the Respondents lay claim to on account of an allotment letter dated the 5th October, 1999 referencing L.R X6/IV/R.

27. They asserted that the property was allotted to Tanad Transporters and a lease in that respect issued on the 27th January, 2009. It was stated that the ownership of the property has been the subject of litigation from the ELC Court, Court of Appeal to the Supreme Court and that it was adjudged to belong to Tanad Transporters. It was stated that the fencing was done pursuant to approval by the County Government issued on the 24th May, 2024.

28. The Appellants also contended that the property's value is approximately Kshs 40 million and as such, the trial court had no jurisdiction to entertain the matter.

29. Vide a Supplementary Affidavit, the Respondents reiterated their claim of ownership of L.R X6/V/R and stated that they had been in possession of the parcel of land and running a garbage disposal thereon from the time the letter of allotment was issued to them. It was contended that the Appellants are laying claim to a separate parcel of land with different measurements and located in a separate location.

30. Vide her determination dated 11th December, 2024, the Magistrate noted that she was unable to ascertain, at the preliminary stage whether L.R X6/IV/R as sought by the Respondent and L.R X6/IV/1X7 claimed by the Appellants was the same property noting that the same could only be determined at the substantive hearing of the suit. She noted however that it was clear that the Respondents were in occupation of the disputed parcel and that it was the Appellants attempts to take over the same that led to the present dispute.

31. The learned Magistrate further noted that an enforcement had been issued cancelling the permission granted to the Appellants to construct the fence. Ultimately, she found that a prima facie case had been established warranting the grant of the temporary injunctive orders.

32. The Appellants aggrieved by the foregoing ruling have appealed to this court against the same and seek a stay of proceedings pending the intended appeal.

33. Beginning with the issue of timelines, the impugned ruling was delivered on the 11th December, 2024 whereas the present Motion was filed on the 19th December, 2024. This constitutes a period of approximately 8 days. In the circumstances, there was no delay in filing the application.

34. Regarding arguability, the court has considered the Memorandum of Appeal on record. The Appeal is premised on several grounds, including that the trial court erred in finding that the Respondent had established a prima facie case warranting the grant of temporary injunctive orders based solely on an allotment letter. It is also contended that the trial court erred in concluding that the Respondent, rather than the Appellants, was in possession of the suit property.

35. The Appellants further allege that the trial court erred in holding that their permission to take possession of the suit property had been revoked, and in finding that the Respondent had raised a bona fide question concerning the ownership of the property. The trial court is also faulted for failing to consider that the balance of convenience tilted in favour of the Appellants, who were holders of a registered title, as opposed to the Respondent, who only possessed a letter of allotment.

X6. It is additionally urged that the trial court lacked the requisite jurisdiction to entertain the Motion, given the value of the property. Moreover, the Appellants assert, the issue of ownership had already been conclusively determined by the Environment and Land Court, the Court of Appeal, and the Supreme Court, and could therefore not be re-litigated.

37. Considering the foregoing, and without making any pre-determination on the matter, the court harbors no doubts that the appeal is arguable. It is trite that 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.

38. As stated by the Court of Appeal in Masai & Another vs Masai & another (Civil Application 148 of 2020) [2021] KECA 170 (KLR) (Civ) (November 19, 2021) (Ruling) (Neutral citation number: [2021] KECA 170 (KLR) citing its own decision in Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR:

> " 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."

39. Moving to whether the appeal will be rendered nugatory, the court finds guidance in the exposition by the Court of Appeal in Stanley Kangethe Kinyanjui vs Tony Ketter, Salim Suleiman, Mawji Patel, Innocent Maisiba Toyo, Deputy Registrar High Court of Kenya at Eldoret, Paul Gicheru Of Gicheru & Co. Advs & Commissioner of Land [2013] KECA 378 (KLR) thus:

> " In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001.The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.
>
> Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved"

40. It is noted that apart from the contentions as to whether the Respondent had met the threshold for the grant of temporary injunctive orders, another pertinent issue which the Appellants seek to highlight before this court on appeal relates to whether or not the trial court had the requisite jurisdiction.

41. It is well settled that jurisdiction is a fundamental issue that must be addressed and determined at the earliest opportunity. Put simply, jurisdiction is a threshold question. Once it is raised, it must be resolved forthwith. The importance of jurisdiction, and the necessity of dealing with it promptly has been emphasized time and again by the courts. A classic pronouncement on this principle is found in the decision of the Court of Appeal in the case of Owners of Motor Vessel Lilian S vs Caltex Oil (K) Ltd (1989)eKLR, where the court stated:

> " By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist."

42. Similarly, the Supreme Court of Kenya in the case of Samuel Kamau Macharia vs Kenya Commercial Bank Ltd [2012]eKLR, noted:

> " A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings."

43. In the circumstances, the court considers that the failure to stay proceedings will render the appeal nugatory. In the event this court finds that the Trial Court does not have jurisdiction, then the entire proceedings of the court will be rendered a nullity because without jurisdiction, the court acts in vain. Allowing the trial court to proceed under the cloud of a jurisdictional uncertainty undermines the integrity of the process.

44. In the end, the court finds the plea for stay of proceedings to be merited.

45. As aforesaid, the law with respect to stay of execution pending appeal is found in Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, 2010 set out hereinabove. Courts have substantially discussed this issue resulting in a plethora of decisions that guide this court. One such guiding decision is the case of Vishram Ravji Halai vs Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR X65, where the Court of Appeal, discussing the High Court's [read ELC's] jurisdiction under this provision stated:

> " The Superior Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay."

46. As is clear from the foregoing, the court's power to stay execution pending appeal is a discretionary power which must of course be exercised judiciously, within the bounds of the law and not arbitrarily.

47. Moreover, this discretion is guided by the framework set out under Order 42 Rule 6(1) of the Civil Procedure Rules. Speaking to this, the Court of Appeal in Butt vs Rent Restriction Tribunal [1982] KLR 417 stated thus:

> " 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. It has also been held that sufficient cause must be demonstrated. As to what constitutes sufficient cause in this regard, the decision by the court in Antoine Ndiaye vs African Virtual University [2015] eKLR, is instructive. Gikonyo J. persuasively opined as follows;

> " The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, 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 Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:
>
> a) The application is brought without undue delay;
>
> b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and
>
> c) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant."

49. Further to the above, this court is now enjoined to give effect to the overriding objectives in the exercise of its powers as expressed in Section 3 of the *Environment and Land Court Act* and Section 1A of the *Civil Procedure Act*, to wit, the just, expeditious, proportionate and affordable resolution of disputes.

50. Beginning with the aspect of delay, the question of what constitutes unreasonable delay was discussed in the case of Jaber Mohsen Ali & another vs Priscillah Boit & Another [2014] eKLR where Munyao J stated as follows:

> " The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land."

51. The court in Utalii Transport Company Limited & 3 Others vs NIC Bank Limited & Another [2014] eKLR further stated:

> " Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court's mind on the delay, caution is advised for courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality."

52. The ruling sought to be appealed against was delivered on the 11th December, 2024, the Memorandum of Appeal filed on the 17th December, 2024 and the present Motion filed on the 19th December, 2024. There was no delay in the circumstances.

53. Moving to the aspect of substantial loss, the court in Rhoda Mukuma vs John Abuoga [1988] eKLR, discussed the same thus:

> " Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security. The discretion under rule 5(2)(b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory..."

54. Similarly, the court in Century Oil Trading Company Ltd vs Kenya Shell Limited as cited in Muri Mwaniki & Wamiti Advocates vs Wings Engineering Services Limited [2020] eKLR, held:

> " The word 'substantial' cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words 'substantial loss' must mean something in addition to all different from that."

55. The courts have also held that substantial loss must be demonstrated. This position was articulated by the Court of Appeal in Kenya Shell Limited vs Benjamin Karuga Kibiru & Another [1986] eKLR thus:

> " It is usually a good rule to see if Order 41 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 cornerstone of both jurisdictions for granting stay."

56. The court in James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR similarly opined that the process of execution alone does not amount to substantial loss. It stated as follows:

> " 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..."

57. The court is also alive to its duty to balance the interests of an Applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory, and the interests of a Respondent who is seeking to enjoy the fruits of his judgment or indeed success at any

stage of the proceedings. As expressed by Kuloba, J in Machira T/A Machira & Co Advocates vs East African Standard [2002] eKLR:

> " To be obsessed with the protection of an Appellant or intending Appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. 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 and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way Applications for stay of further proceedings or execution, pending Appeal are handled. In the Application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court."

58. The Appellants opine that should the stay not be granted, they will suffer substantial loss since they are at risk of being evicted from the suit property. Further, it was argued, their appeal raises serious triable issues and unless the stay is granted, the appeal will be rendered nugatory.

59. In response, the Respondent asserts that the Appellants have not demonstrated any substantial loss, neither have they established that in the absence of a stay of execution, their appeal will be rendered nugatory.

60. Vide the ruling of the trial court, the Respondent was granted interim injunctive orders restraining the Appellants from entering upon, remaining upon, trespassing, excavating, dumping on, constructing on, offering security, putting up public notices, interfering with the quiet possession of, or otherwise dealing with the parcel of land known as LR-X6/IV/R.

61. Whereas the orders granted by the trial court were in the nature of injunctive relief and not eviction orders, the Appellants contend that, being in possession of the suit property, the practical effect of these orders is to dispossess them. Notably, the question of actual possession remains hotly contested and is one of the central issues on appeal.

62. Indeed, the trial court itself acknowledged the lack of clarity as to whether the parcels of land claimed by the respective parties refer to the same piece of land on the ground. Crucially, the injunctive orders granted did not serve to preserve the status quo but instead restrained the Appellants from accessing or dealing with the property in any way. As a result, the Respondent retains undisturbed access and possession. In the circumstances, and given the potential dispossession of the Appellants, the court finds that substantial loss has been sufficiently demonstrated.

63. As regards provision of security, its purpose was discussed by the court in Arun C Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others [2014] eKLR, thus:

> " 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."

64. While in Focin Motorcycle C. Ltd vs Ann Wambui Wangui [2018] eKLR, it was stated that:

> " Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground of stay."

65. From the above persuasive decisions, it is clear that the issue of security is discretionary and it is upon the court to determine the same. Considering that what is being appealed is an interlocutory application, the court does not consider that security is necessary.

66. In the end, the court finds the Motion to be merited and proceeds to grant the following reliefs:

    i. An order does hereby issue staying the proceedings in MCELC E431 of 2024 pending the hearing the determination of the Appeal.

    ii. An order does hereby issue staying the execution of the ruling and consequential orders of the Hon A. Mukenga PM, of Chief Magistrates Court at Nairobi, Environment and Land delivered on 11th December, 2024 in Milimani Court Environment and Land Case No E431 of 2024.

    iii. Pending the hearing and determination of the Appeal, and in the interest of justice, both the Appellants and the Respondent, their agents, servants or any other persons acting on their behalf, are restrained from any and all dealings with the parcel of land known as L.R No. X6/IV/R and or L.R X6/IV/1X7.

    iv. The above orders are granted on condition that the Record of Appeal is filed and served within 60 days of the date of this Ruling.

    v. Costs of this Application to abide the outcome of the Appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 15TH DAY OF MAY, 2025.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Ms Shiunda for Respondents

No appearance for Applicant