



REPUBLIC OF KENYA

IN THE ELC COURT AT MOMBASA

ELC. CIVIL APPEAL NO. 74 OF 2019

JOHN KIVURE & 7 OTHERS

(Suing on their behalf and on behalf of 4,201 members

of Kishamba B. Group Ranch.....PLAINTIFFS/APPLICANTS

VERSUS

1. BENSON MULAMBO MWAKINA, ANTONY KISHANGA MWASI &

FLORENCE MALANDI (Sues as defunct Chairman, Secretary and Treasurer respectively of the

Executive Committee of Kishamba B. Group Ranch

2. CABINET SECRETARY MINISTRY OF LANDS, HOUSING AND PHYSICAL PLANNING

3. DIRECTOR OF LAND ADJUDICATION/SETTLEMENT

4. COUNTY LAND REGISTRAR – TAITA TAVETA COUNTY

5. ATTORNEY GENERAL.....DEFENDANTS/RESPONDENT

AND

1. COUNTY GOVERNMENT OF TAITA –TAVETA

**2. DUNG TUN KIMBO & 13 OTHERS.....INTERESTED PARTIES
RESPONDENTS**

RULING

1. The Notice of Motion application filed on 9th April, 2020 which is dated 31st March 2020 is what is before this honorable court for hearing and determination. It is instituted by the Plaintiffs/Applicants hereof. The same is brought under the Provisions of Sections 3, 13 (7) and 19 of The Environment and Land Court Act, (Hereinafter referred to as “The Act”), Sections 1A, 1B, 3, 3A, 63 and 94 of the Civil Procedure Act Cap. 21 (Hereinafter referred to as “The CPA”), Order 22 Rule 22(1), Order 42 Rule 6 (1) (2) & (6) and Order 50 Rule 5 of the Civil Procedure Rules, 2010 (Hereinafter referred to as “The CPR”).

2. Essentially, the Plaintiffs/Applicants it is important to appreciate the history pertaining this matter. Initially, the Plaintiffs/Applicants had filed an application seeking temporary injunction to restrain the Defendants/Respondents from dealing with all that parcel of land known from any dealing on the suit property known as Sagalla/Kishamba B/1 measuring 10,684 Ha. (approximately 26, 400.164 acres) (Hereinafter referred to as “The Suit land”) pending the hearing and determination of the suit.

3. In the pendency of this interlocutory application, the 1st Defendant/Respondent herein raised a Preliminary objection to the effect that the Plaintiffs/Applicants both lacked proper legal capacity (“*locus standi*”) and also failed to meet the mandatory threshold required to institute a representative suit pursuant to the provision of Order 1 rules 13 and 18 of the Civil Procedure Rules of 2010. As a result, the urged court to strike off the application and the entire suit. Indeed, on 26th February, 2020 this court having heard the objection, it upheld it and proceeded to grant the orders as prayed. It is from this decision that the Plaintiffs/Applicants being aggrieved on 27th February, 2020 filed a notice of appeal against the entire ruling at the court of appeal and an application to stay the execution of this orders. They also requested for typed

proceedings from court. This is the application before this court for determination. From the records, the Plaintiffs/Applicants got aggrieved by the afore stated decision.

4. Subsequently, on 7th August, 2020, the Plaintiffs/Applicants filed a Memorandum of Appeal dated 11th March, 2020 at the Court of Appeal at Mombasa being ***Court of Appeal Civil Appeal No. 52 of 2020 Mombasa filed*** awaiting hearing and final determination by the said court thereof.

Arising from the said application, the Plaintiffs/Applicants are seeking for the following orders, *inter alia*:-

(a) Spend

(b) That pending the hearing and determination of this application “inter partes” there be a stay of the said Ruling/Order of the said court delivered on 26th February, 2020 and consequential orders and proceedings arising therefrom including but not limited to taxation/assessment of costs awarded by the said ruling/order and execution arising therefrom on such terms.

(c) That pending “Inter-partes” hearing and determination of this suit, this Honorable court be pleased to grant a permanent order of injunction restraining the Defendants and interested parties either by themselves and/or through their servants whomsoever from demarcating, surveying, alienating, leasing, charging, mortgaging, encumbering, sub-dividing, disposing off, transferring, selling, leasing, charging, alienating and dealing with and/or interfering in any manner with the title to and/or consenting to transferring, registering and transfers or issuing any titles in respect of any sub-divisions arising from the property known as Sagalla/Kishamba B/1 situate at Voi, Taita Taveta County without the consent of the County Government of Taita Taveta, the Plaintiffs and/or contrary to the provisions of the Community Land Act.

(d) Spend.

(e) That pending the hearing and determination of the intended Appeal Against the Ruling/Order of the Court delivered on 26th February, 2020, there be a stay of the said Ruling/Order and consequential order and proceedings arising therefrom.

(f) That pending hearing and determination of the intended Appeal this Honorable Court be pleased to grant a temporary order of injunction restraining the Defendants and the interested parties either by themselves and/or through their servants whomsoever from demarcating, surveying, alienating, leasing, charging, mortgaging, encumbering, sub-dividing, disposing off, transferring, selling, leasing, charging, alienating and dealing with and/or interfering in any manner with the title to and/or consenting to transferring, registering and transfers or issuing any titles in respect of any sub-divisions arising from the property known as Sagalla/Kishamba B/1 situate at Voi, Taita Taveta County without the consent of the County Government of Taita Taveta, the Plaintiffs and/or contrary to the provisions of the Community Land Act.

5. The said application is supported by the grounds and averments contained in the 14 paragraphed supporting affidavit of JOHN KIVURE sworn and dated on 31st March, 2020 at Mombasa (hereinafter referred to as “The Supporting Affidavit”). From the contents of the said supporting affidavit, the deponent has stated that on 26th February, 2020 this Court delivered a ruling and/or order striking out the entire suit and awarding costs to the 1st Defendant/Respondent. The order was granted pursuant to a Preliminary objection raised by the 1st Defendant/Respondent against an earlier application and the suit filed by the Plaintiffs/Applicants which then sought for temporary and permanent injunction orders to restrain from any dealing on the suit property pending the hearing and determination of the suit.

6. He deposed that on 27th February, 2020, the Plaintiffs/Applicants being aggrieved by the aforesaid ruling/orders of 26th February, 2020 filed a Notice of Appeal and requested to be supplied with true and certified copies of typed proceedings and the said ruling/order. Thereafter, he held that on 7th March, 2020, they filed a memorandum of Appeal dated 11th March, 2020 which he stressed had an arguable case as it raised several questions and/or issues of law and facts against the said ruling/order.

7. It was the deposition of the Plaintiffs/Applicants that they would suffer substantial and/or irreparable loss if the reliefs sought in this application were not granted as the ruling and particularly the award of Costs was executable any time by the 1st Defendant/Respondent whom they felt would proceed for assessment and taxation of costs as the ruling summarily determined the suit on undue technicalities.

8. Further on the same issue, he emphasized that in the event the relief sought herein were not granted pending the hearing and determination of the intended appeal even if their appeal became successful it would be rendered nugatory. To demonstrate the imminent danger they were exposed to, he referred to several correspondences between them by the Defendants/Respondents and had been filed in court and a letter of the consent from the land control Board authorizing or sanctioning dealings in the suit contrary to the provisions of the Community Land Act and which he felt with said authorization the Defendants/Respondents would execute at any time the orders they were granted. Thus, he held that in the absence of any orders to restrain impugned action it would be rendering the appeal and the suit nugatory.

9. The Plaintiffs/Applicants held that the claim made out from the suit which had been struck out was on a public interest and representative suit raising prima facie case particularly any dealing in the suit land as per the provision of the Community Land Act which could not be compensated by an award of damages in the event the Plaintiffs/Applicants would be successful.

10. On 24th May, 2021, the Plaintiffs/Applicants sought and were granted leave to file and serve a supplementary affidavit to respond to their issues raised by the 1st Defendant/Respondent in the filed replying affidavit (Hereinafter referred to as “The Supplementary affidavit”). On 2nd June, 2021 the Plaintiffs/Applicants filed the said 31 paragraphed supplementary affidavit together with annexures sworn and dated 29th May, 2021 by one JOHN KIVURE.

11 . He held that the affidavit in support of the notice of motion application was sworn pursuant to authority of the Plaintiffs/Applicants specifically listed in the suit and application and hence he not be in need of any authority of the Respondent to swear any affidavit.

12 . He asserted that the Plaintiffs/Applicants' appeal had already been filed on 7.8.2020 at the Court of Appeal and eventually records of Appeal served upon the Respondents on 11.3.2021 and so far no objection to it had been raised. He deponed that the Plaintiffs/Applicants would suffer substantial loss if they would be compelled to pay costs awarded as the Defendants/Respondents attachable assets and means were unknown. Hence, he stated that any costs paid would not be recoverable in the event the appeal was to be successful. Further, the Plaintiff/Applicants deposed that no execution could issue against the Government or Government agencies and therefore the Applicants stood to suffer a substantial loss as they could not execute against the 2nd to the 4th Defendants/ Respondents. Besides, they opined that even if there were costs recoverable from the said agencies, it could not be obtained without unreasonable delay or expense as the said Government and its agencies drew finances from the Consolidated fund to be vetoed by Parliament.

13 . The Plaintiffs/Applicants reiterated that the subject matter of the appeal was community land as provided for under Article 63 of the Constitution of Kenya and the provisions of the Community Land Act. Thus, he asserted that it could only be dealt with in the manner authorized by the law and not otherwise and not as had been refuted and depicted by the 1st Defendant/Respondent and insinuated by the 3rd Defendant/Respondent through their pleadings and correspondences. In any case, on this aspect they failed to demonstrate it otherwise through provable evidence.

14 . The Plaintiffs/Applicants deposed that the 1st Defendant/ Respondent held the suit property in trust for the members under the Community Land Act and therefore any dealings with the said land required the consent of the County Government to deal. Additionally, he opined that the Defendants/Respondents were accountable to the Plaintiffs/Applicants and with a duty to act in accordance with the law.

15 . The Plaintiffs/Applicants asserted that on its own admission the 1st Defendant/Respondent were dealing with the suit land and of course which was illegal and thus they urged court to find that there would great need for it to grant the orders to preserve both the suit land for its members and the filed appeal as sought by the Plaintiffs/Applicants. Indeed the Plaintiffs/Applicants alleged to have discovered that the 1st Respondent had purported to allocate, apportion and/or demarcate five (5) acres out of the suit land allegedly to be transferred to their Advocates on record to be deemed as payment of legal fees for the professional legal services rendered to them in this suit without having sought nor obtained the pre - requisite authority or resolution from the community an act the Plaintiffs/Applicants felt was wrongful.

16 . The Plaintiffs/Applicants deponed that on diverse dates of March, 2021 the Respondents had jointly convened meetings intended to seek for authorization to proceed with the sub-division of the suit land as there had been any order stopping the same. They denied the allegations made by the Defendants/Respondents to the effect that the Plaintiffs/Applicants application for stay of execution of the court orders had been overtaken by events and that if the reliefs sought were not granted, the appeal would become successful. In the long run, he stressed that the Appellants were likely to suffer substantial loss and thereby becoming a miscarriage of justice thereof.

17 . The Plaintiffs/Applicants undertook to comply with the terms of the orders of this court attendant to the reliefs sought and held that the application had been made without delay. They underscored the fact that there would be no hardship that would be suffered in the orders being granted.

II. THE DEFENDANT'S/RESPONDENTS CASE

18. The application was opposed by the 1st Defendant/Respondent. On 24th May, 2021 upon being served, the 1st Defendant/ Respondent filed a 16 paragraphed Replying Affidavit dated 20th May, 2021 sworn by one BENSON MLAMBO MWAKINA together with annexures attached thereof. (Hereinafter referred to as "The 1st Defendant/Respondent Replying Affidavit"). He deponed that he was the Chairman of the Kishamba B. Group Ranch (Hereinafter referred to as "The Group Ranch") and which had been jointly sued in this suit with some of the Executive Committee members of the said Group ranch as the 1st Defendant.

19. The Chairman questioned the authority by JOHN KIVURE to swear the affidavit in support of the application on behalf of all members of the group ranch. He held that the entire notice of appeal and the appeal were incurably and fatally defective from the very onset and thus ought to be struck out.

18 . The Chairman stressed that the 1st Defendant/Respondent were entitled to be paid costs as ordered by court. According to him therefore, the failure by the Plaintiffs/Applicants to furnish the court with the security for costs as ordered in the event that their appeal was to be disallowed it would amount to a breach of the court order. Instead, he felt that the Plaintiffs/Applicants were only engaging the 1st Defendant/Respondent to unnecessary frivolous litigation without assurance of being paid their costs making the party to suffer more prejudice, loss and damages.

He contended that the Plaintiffs/Applicants application had been vitiated by material and deliberate falsehood and misrepresentation of facts.

19 . The Chairman held that the 1st Defendant/Respondent and the group ranch never fell under the legal purview of the Community land Act as alleged by the Plaintiffs/Applicants and they would risk to suffer irreparable loss and damage if it was not to be sub - divided and distributed to its registered members before 30th June, 2021, a policy deadline issued by the Government awhile ago. Suffice it to say, the 1st Defendant/Respondent opined that it never required the consent of the County Government of Taita Taveta to deal with its property as had been alleged by the Plaintiffs/Applicants and if anything, they had already acquired the required letters of Consent from the Land Control Board. Therefore, he stated that this had been the rightful time to cause its sub - division and distribution of the individual title deeds of the group ranch land to its registered members.

20 The Chairman deposed that the County Government of Taita Taveta were already parties to the suit and it would be better that they were

allowed to speak for themselves and as was ostensibly depicted by the Plaintiffs/Applicants. Additionally, he contented that the 1st Defendant/Respondent was duly bound to safeguard the interest of its registered members and the balance tilted towards the issuance of individual title deeds to its members and not converting private property to Community land. The upshot of this, he asserted that the entire application lacked merit as it was frivolous, vexatious driven by ulterior motive and bad faith. Besides, he deposed that the same had been overtaken by events taking that as on 6th May, 2021 the Court of Appeal had already given directions for the hearing of the main appeal within the next 90 days from that date. They urged court to dismiss the said application with costs.

21 **The 2nd Interested parties case:-** The application was also opposed by the 2nd Interested Parties who filed a replying affidavit sworn by GODIEL MWANJELE KILOGHAI on 26th August, 2019 in which he deposed that the Plaintiffs/Applicants were ex-officials of the group ranch and therefore lacked capacity to file the suit on behalf of the group ranch and its members. They further held that the provisions of the community land act had not applied as members had resolved to cause the suit land to be sub-divided and members to be granted individual title deeds and the group ranch dissolved. **III. The Submissions.**

On 24th May, 2021, in the presence of all the parties, court directed that the application be canvassed by way of written submissions and thereafter upon compliance a ruling date to be reserved.

A. The Plaintiffs/Applicants submissions

22 . On 2nd June 2021, the Plaintiff/Applicant Advocates the Law firm of Messers. Litoro & Omwabu & Co. Advocate prepared and filed their written submission dated 31st May, 2021. The Learned Plaintiffs/Applicants' Advocates in their submission reiterated that their application was based on the provisions of Order 42 Rule 6 (1), (2) & (6) of the CPR among other relied on the provisions of the law and they sought for the orders of stay of execution and injunction pending the hearing and determination of an Appeal against the ruling/order of this court given on 26th February, 2020. They provided a detailed background of all the steps they took thereafter. The Learned Counsels argued that the appeal was meritorious, arguable and not frivolous as alleged and as it was illustrated in the Memorandum of Appeal. To support their argument on this issue they relied on several court decisions of "*Goerge Njiraine Karanja –VS- Godfrey Kariuki Njoroge (2019) eKLR, Kenya Commercial Bank Ltd. –VS- Nicholas Ombija (2009) eKLR; Stanley Kangethe Kunyanyui –VS- Tony Ketter & 5 Others [2012] eKLR Vishram Rurji Habai –VS- Thrornton & Turpour Civil Appeal No. Nai. 15 of 1990 [1990] KLR 365, and Jason Ngumba Kago & 2 Others –VS- Intra Africa Assurance Co. Ltd. [2014] eKLR* and also setting out the fundamental Principles to be considered while granting the orders of stay of execution and temporary injunction under the provisions of Order 42 Rule 6 (1), (2) & (6) of CPR which this court has put into keen account while making this ruling.

23 . The Plaintiffs/Applicants' learned Counsel reiterated the position that the filed appeal would be rendered nugatory if the reliefs sought were not granted. They held that the appeal was against the entire decision of this court and particularly challenging the award of costs granted to the 1st Defendant/Respondent. They pointed out that the subject matter of the appeal was all the suit land and the court order that struck out the entire suit by the Applicants to restrain the Respondents from dealing in the suit property which is community land. They felt that should the 1st Defendant/Respondent tax the costs and executed against the Plaintiffs/Applicants the appeal against the award of costs would be meaningless and they would suffer substantial loss as the costs would not be recovered in the event the appeal was successful.

They submitted that although the order was not for a liquidated amount, the Plaintiffs/Applicants were willing to comply by the directions and/or condition this court. They held the application was filed without unreasonable delay having been filed on 9.4.2020 as required by law. To buttress their point on this aspects, they relied on the well celebrated decision of *Butt –VS- Rent Restriction Tribunal [1979]eKLR*. They refuted the fact that the appeal had been set down for hearing as on 6th May, 2021 Court of Appeal only gave direction on its hearing. Otherwise, the learned Counsel submitted that the appeal was yet to be determined and therefore it could not said that it had overtaken by event as alleged by the 1st Defendant/ Respondent.

B. The submissions by the 1st Defendant/Respondent

24 . While opposing the afore mentioned application by the Plaintiffs/Applicants, on 24th May, 2021 the 1st Defendant/Respondent's advocates, the law firm of Messrs. M.S Shariff & Company filed a very brief written submission dated 20th May, 2021. The Learned Counsels submitted that the Plaintiffs/Applicants appeal was incurably and fatally defective. They argued the same could not be held to containing any arguable grounds of appeal.

25 . They stressed the facts that the Applicants were members of the group ranch. Hence, the planned sub-division of the suit land to its registered members and the issuance of the individual title deeds would be beneficial to them as well as opposed to the scheme they felt the Plaintiffs/Applicants harboured to have the land to convert it to Community Land which would only benefit invaders and non-members a total detriment to its registered members and the interest of justice they argued.

26 . The 1st Defendant/Respondent held that no evidence had been adduced to prove that afore stated process would disadvantage them or that they would suffer any loss or damage would be accrued to them. They submitted that the 1st Defendant/Respondent was entitled to the payment of the security for costs by the Plaintiffs/Applicants.

27 . They pointed out that now that the directions had already been taken by the court of appeal on 6th May, 2021 on the hearing on the Appeal which was to be within the next 90 days thereafter, thus making this application and the orders sought to have been overtaken by events. To them, it was merely an academic exercise, frivolous, vexatious and a gross abuse of court process. They urged this court to disallow it with costs to the 1st Defendant/Respondent.

IV. ANALYSIS AND DETERMINATION

28 . In order to arrive at an informed and just decision onto the said filed application dated 31st March, 2021 by the Plaintiffs/Applicants and prayers sought and which is vehemently opposed by the 1st Defendant/Respondent, this Honorable Court has keenly read and taken into consideration all the filed pleadings, the written submissions, several authorities and the relevant provisions of the law. The Honorable has framed the following issues as a guide, *inter alia*:-

a) Whether the Plaintiffs/Applicants notice of motion application dated 31st March, 2021 meets the fundamental threshold to warrant grant the orders of stay of execution or temporary injunction as envisaged under Order 42 Rule 6 (1), (2) & (6) of the CPR?

b) Whether the parties are entitled to the relief sought?

c) Who will bear the Costs.

Issue No. 1 - Whether the Plaintiffs/Applicants notice of motion application dated 31st March, 2021 meets the fundamental threshold to warrant grant the orders of stay of execution or temporary injunction as envisaged under Order 42 Rule 6 (1), (2) & (6) of the CPR?

29 . The application by the Plaintiffs/Applicants dated 31st March, 2021 emanates from an order of this court given on 26th February, 2020 striking out the entire suit and awarding costs to the 1st Defendant/Respondent pursuant to a preliminary objection filed against an earlier application which had initially been filed by the Plaintiffs/Applicants where they then sought for temporary injunction orders to restrain any dealings on the suit land. It was at that juncture that the 1st Defendant/Respondent filed the said Preliminary Objection and upon being heard court ruled by striking the entire suit on the grounds that it failed to adhere with the pre - requisite threshold set out under the provision Order 1 rule 18 of the CPR couched in mandatorily terms on institution of a representative suit.

The provisions of Order 42 Rule (6) (1) of the Civil Procedure Rules entitled **“Stay in Case of Appeal”** hold *inter alia*:

“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 an 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”.

While the provision of Order 42 rule (6), (6) of the CPR provides:-

“Notwithstanding anything contained in Sub-rule (1) of the rule the High Court shall have power in exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from the sub-ordinate Court or tribunal has been complied with.

Being aggrieved by the order of the court, on 27th February, 2020, the Plaintiffs/Applicants filed a Notice of appeal and on 7th August, 2020 filed a memorandum of appeal dated on 11th March, 2020 at the Court of Appeal – Mombasa. From the records, on 6th May, 2021, the Court of Appeal directed that the appeal to be heard and determined within the next 90 days thereafter.

Ideally, the purpose of an application for stay of execution is with an aim to preserve the subject matter in dispute so that the right of the Appellant is safeguarded.

In considering whether to grant the stay of execution and/or temporary injunction High Court lies on decision settled the principles under which court is to consider in determining this application. There are plethora of decided cases on the issue of grant of stay of execution pending appeal in Civil Appeal No. 107 of 2015 – *Masisi Mwita –VS_ Damaris Wanjiku Njeri [2016] eKLR* where the court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of *“Halal & Another –VS- Thornton & Turpin Ltd. where the Court of Appeal Gicheru J.A., Chesoni & Coker AG 1A) held that: “The High Courts discretion to order stay of execution of its order or Decree is fettered by three (3) conditions namely:- Sufficient Cause, substantial loss would ensue from a refusal to grant stay the Applicant must furnish security, the application may be made without unreasonable delay. In addition the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakolo –VS- Straman E.A. Ltd.[2013] as follows:-*

“In addition the Appellant must prove that if the orders sought are not granted and his Appeal eventually succeeded them the same shall have been rendered nugatory”. These twin principles go hand in hand and failure to prove one dislodges the other.

The court notes with great humility the Plaintiff/Applicant agrees with it by citing the case of *Vishram Rouji Halal –VS- Thrornton & Turpour Civil Appeal No. 15 of [1990] KLR 365,*

Based on the above graphically set out principles, this court will then proceed to determine whether the Plaintiffs/Applicants herein have satisfied the required standard for granting of stay orders pending appeal as follows:-

Firstly, the Plaintiffs/Applicants must show that they may suffer substantial loss. It is evident from the above provisions of law that the court has discretion to issue an order of stay of execution. However, the said discretion must be exercised judicially and not capriciously. See the case of *Canvass manufacturers Ltd. –VS- Stephen Reuben Korunditu Civil application No. 158 of 1994 [1994] LLR 4853* – where the court held that:-

“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised” Further in the case of **“Stephen Wanjiku –VS- Central Glass Industries Ltd. (Nbi) HCC No. 6726 of 1991** the court held that:-

For the court to order a stay of execution there MUST be:-

i. Sufficient cause;

ii. Substantial loss

iii. No unreasonable delay.

iv. Security and the grant of stay is discretionary.

As the court also embarks on determination of the Plaintiffs/Applicants application dated 31st March, 2020, it will take into account that it is not the practice of the courts to deprive a successful litigant of the fruits of their litigations from the judgment entered in their favour, further the court will take into consideration that the purpose of stay of execution pending appeal is to preserve the subject matter see the case of *Consolidated Marine – Versus - Namprijad An. Civil Appeal No. 93 of 1989* Nairobi where court held that:-

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.

From the ruling the Plaintiffs/Applicants had sought for temporary injunction to restrain the Defendants/Respondents from dealing with the suit. However pursuant to a preliminary objection and grounds of opposition dated 24th July, 2019 filed by the Defendants the Plaintiff/applicant application and the entire suit were dismissed. It was the 1st Defendants/Respondent’s contention that the entire suit was bad in law *ab-initio* fatally and incurably defective for want of leave to file a suit in representative capacity and for want of written authority contrary to the provisions of Order 1 Rule1, 8, 12, 23 (2) (b), (c), (d) and (e) of the CPR.

In order to proceed further under this sub-heading, the honorable is compelled to assess the issue of the *locus standi* to institute the suit as a representative suit. I have once again assessed the filed Plaint dated 15th April, 2019 and filed on 17th April 2019 as the basis of the suit filed and found it was by eight (8) Plaintiffs who are duly appointed as the representatives of the other registered members of the Group Ranch. From the pleadings the group ranch comprises of 4,209 registered members. Certainly, all these members ought to appoint their representatives to enable them institute a case on their behalf. Be that as it may, this court’s difficulty was that the Plaintiffs/Applicants lacked express notice to have instituted this case.

I wish to state from the onset that this court is not sitting as an appeal on its own order. Nay. Far from it. However, I have taken cognizance of the provisions of Order 1 Rule 18 of the CPR and the letter of authority to plead dated 15th April 2019, - with the words:- **to plead or to sign any document relating to this suit on our behalf by our signature hereof and the signatures of 4,209 members against their names in the list of members attached hereto and filed with this suit.**

I have also noted the filed list of members entitled “Kizumanji Village members petition list” - there is a high possibility that the Plaintiffs/Applicants would have had good intentions to represent the registered members of the group ranch and had their interest at heart only that they failed on publishing the notice to that effect. For that benefit of doubt and on preponderance of probability, this court is satisfied and do confirm that they will suffer substantial loss if the orders sought are not granted.

Secondly, the Plaintiffs/Applicants must satisfy court that the notice of motion application was made without **undue and unreasonable delay**. This court has noted that the Notice of appeal was filed on 27th February, 2020 a request for typed proceedings on 27.2.2020 record of appeal was filed on 7th August, 2020 and the notice of motion application dated 31st March, 2020 for stay was filed on 9th April, 2020. Therefore this court finds that there was no inordinate delay in filing this application by the Plaintiffs/Applicants.

In addition, the court has considered the principles enshrined under the decision of **“Butt –VS- Rent Restrictions Tribunal (1979) eKLR”** where the Court of Appeal considered a similar application as this case and held that this court has jurisdiction to grant an injunction pending appeal in order to preserve the appeal and the subject matter of appeal even after dismissing an application for injunction.

Thirdly, on the issue of security for costs, the Plaintiffs/Applicants had averred that although the orders were not for a liquidated amount, they had from the pleadings expressed willingness to comply by the direction and/or condition of this court attendant to grant of the application which included to provide security for costs. I have noted from the submissions by the 1st Defendant/Respondent the following expression:-

“The 1st Respondent is rightfully entitled to payment of Costs by Applicant although none has so far been taxed and demanded for wherefore the applicants ought not benefit from their misplaced apprehension of execution for costs by the 1st Respondent/

Defendant”

I fully concur with them, as from the above assertion, the 1st Defendant/Respondent seem to provide an affirmed assurance that from 26th February 2020 to date – close to over one and half (1 ½) years down the line there has been no execution of the orders at all. Therefore, there should be no need for the Plaintiffs/Applicants to be apprehensive to worry as the status quo which has been, should be maintained thereof. Ordinarily, and as a rule, the litigants are bound by their pleadings.

Be that as it may, based on the approximate size and thus the value of the suit land, this court orders that the Plaintiffs/Applicants do provide a security for costs being a sum of Kenya Shillings one Million (Kshs. 1,000,000/-) within the next 30 days from this date hereof to be held in an interest earning joint account by the Advocates of the parties herein being the law firms of Messrs. Litoro & Omwabu & Co. Advocate and Messrs. M.S Shariff & Company until the appeal is heard and determined.

In view of the afore going terms, that I direct that the notice of motion application dated 31st March, 2020 by the Plaintiffs/Applicants be and is hereby allowed. I further direct that, failure to comply with the said orders, execution to issue accordingly.

IT IS SO ORDERED.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 18TH DAY OF OCTOBER , 2021.

HON. JUSTICE L.L. NAIKUNI

JUDGE

(ELC- MOMBASA)

In the presence of:-

M/s. Yumna – the Court Assistant

Counsel Litoro for the Plaintiffs/Applicants.

Counsel Makuto for the 2nd, 3rd, & 5th Defendants/Respondents