REPUBLIC OF KENYA

IN THE ELC COURT

AT MOMBASA

ELC. MISC. APPLICATION NO. 89 OF 2020

MARINO HARDWARE LIMITED...APPLICANT

VERSUS

FRABHUDAS CHUNILAL..1ST RESPONDENT

SAVITAS FRAVHUDAS HIRA...2ND RESPONDENT

NAMIXA CHUNILAL HIRA...3RD RESPONDENT

MURPHY AUCTIONEERS..4TH RESPONDENT

RULING

1. Before the Honorable Court is the Applicant's Notice of Motion Application dated 3rd December, 2020 filed on the 4th December, 2020. The application was brought to court following the delivery of a judgment and decree of the Business Premises Rent Tribunal (Hereinafter referred to as "The BPRT") on 26th July, 2019 against the Applicant and in favour of the 1st, 2nd, and 3rd Respondents herein.

2. The said application was instituted under the provisions of Sections 1, 1A, 3A, 63 (e) and 79G of the Civil Procedure Act, Cap. 21, Order 9 Rules 9 and 10; Order 42 Rule 6(1) and (2) and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The Applicant herein sought for the following orders:-

a. Spend

b. That the Applicant be granted leave to change advocates by appointing M/s. Asige Keverenge & Anyanzwa Advocates in place of Messrs. Muthee Soni & Associates Advocates.

c. That this Honorable Court be pleased to grant leave to appeal out of time from the Judgement and Decree of the Business Premises Rent Tribunal delivered on 26th July, 2019.

d. That the Honorable Court be pleased to grant stay of execution and/or further execution of the Judgement and Decree dated 26th July, 2019 delivered by the Business Premises Rent Tribunal pending the hearing of this application inter parte on a date to be ordered by the court.

e. That upon the inter parte hearing, this be pleased to grant stay of execution and/or further execution of the Judgement and Decree dated 26th July, 2019 delivered by the Business Premises Rent Tribunal pending the hearing and determination of the Appeal.

f. That the Costs of this Application be provided for.

3. The afore said application is based on the grounds and the 14 Paragraphed supporting affidavit of PRAVICHUDRA BHAULABHAI PATEL the Applicant's Director sworn and dated on 13th December, 2020 (Hereinafter referred to as "The Supporting Affidavit') . He deposed that the Applicant had been a tenant on the Respondents' suit premises on Plot Number Mombasa/Block XVIII/256 (Hereinafter referred to as "The Suit Property") from the year July, 1981 and had been remitting the monthly premises rent faithfully and regularly. He stated that the Respondents sought to terminate the contractual tenancy agreement with him through the issuance of a notice dated 31st August, 2018. Pursuant to that, the Applicant challenged the said notice before the BPRT. Subsequently, to his surprise he stated that, the

BPRT allowed the Respondents notice to vacate. Instead, he held that it disallowed the reference without considering the legality and validity of the notice via the afore stated Judgment. As a result, on 19th November, 2019 the entire application together with the rest of the other prayers were all dismissed. In its Judgement, BPRT directed that the Applicant to have handed over the suit premises upon the lapse of a six (6) months' notice and in default an eviction order to issue. Hence, he deposed that there was need to prefer the appeal against the said decision.

4. Immediately after the judgement by BPRT, the Applicant decided to replace their previous Advocates, the law firm of Messrs. Muthee Soni & Associates Advocates, with another Advocate, the law firm of Messrs. Lawrence Obonyo Legal Advocates who prepared a Memorandum of appeal attached to this application. He deposed that, the afore said in coming Advocates made an application dated 17th October, 2019 seeking for orders of stay of execution. Nonetheless, in the process the said incoming Advocates genuinely but by mistake failed to have sought for leave of court or obtaining a consent from the previous outgoing Advocates to come on record after the Judgment and/or ruling by the BPRT had been delivered as required by law.

5. He deposed that unless the stay of execution orders were granted, the Applicant stood to suffer irreparable substantial loss in terms of the goodwill and the stock that had been in the premises for over 38 years estimated and valued in excess of Kenya Shillings Twenty Million (Kshs. 20, 000, 000.00) would all go to waste. It was his deposition that the application was brought to court at the earliest opportunity possible time and without unreasonable delay after the ruling of the BPRT.

6. The Applicant argued that, from the time the ruling was delivered by the BPRT the premises remained closed as each of them had placed their padlocks on it and there were even hired violent goons outside it preventing any meaningful activities from taking place. He stated that on his part he had locked the premises to protect his consignment goods of trade in the tune of the above stated amount from being destroyed. He asserted that their business board was still erected outside the business premises. He further held that in the meantime, the Respondents had continued to trade and carry out their businesses from other different premises and therefore, an award of costs would adequately compensate them if any inconveniences was caused as a result of the mistake and lapse committed by the previous advocates for the Applicant.

7. On 18th February, 2021, the Applicant was granted leave by Court to file a further affidavit responding to the issues raised by the Respondents from their filed Replying Affidavit. On 12th March, 2021, it filed a 16 Paragraphed Further Affidavit of the Applicant (Hereinafter referred to as The Further Affidavit"). From it, he made an effort to counter the allegation that it had failed to file an appeal at all by holding that his Advocates had filed an application dated on 18th October, 2019 to be allowed to extend time for filing the appeal out of time, but the same was dismissed by court.

8. The upshot of all this, he held that unless leave to come on record after Judgement, orders sought for the enlargement of time to file an appeal out of time and stay of execution orders were granted, the intended Appeal would be rendered nugatory yet he emphasized it had high chances of succeeding. In the long run he prayed for the orders sought in the application to be allowed with costs.

II. The 1st, 2nd3rd & 4th Respondents' Case

9. The application by the Applicant was opposed by the 1st, 2nd, 3rd and 4th Respondents. Upon being served, On 12th February, 2021, the said Respondents prepared and filed a 10 Paragraphed Replying Affidavit sworn by the 1st Respondent – PRABDUDAS CHUNILAL HIRA and dated 12th February, 2021 (Hereinafter referred to as "The Replying Affidavit"). By opposing it and the said the prayers sought. He deposed that the said Judgement by the BPRT had been delivered way back on 26th July, 2019 and to date there had been no appeal preferred by the Applicant as required in law. He queried on what basis the Applicant was seeking for leave to file an appeal out of such a long duration of time, almost two (2) years after the delivery of the Judgment which according to him was inordinate delay.

10. It was his contention that the move by the Applicant had been a waste of the substratum in filing both the application and the intended appeal taking that the Applicant had already been evicted from the premises and that the Respondents had already caused renovation, and painting of the shop premises. They deposed that they were actually in occupation of the suit premises and were carrying out business activities from there and not at a different premises as alleged.

11. The 1st Respondent opined that taking that the Applicant was already being represented by Advocates, should never be used as an excuse for the delay and/or failure to have filed the appeal on time. It was his contention that the Applicant had failed to demonstrate nor show reasonable cause for failing to have preferred the appeal against the BPRT decision on time.

12. In the long run, the 1st Respondent, urged court to find the application as lacking merit and should have it dismissed with costs.

III THE SUBMISSIONS

On 19th May, 2021 while in the presence of all the parties, court directed that the application be disposed off by way of written submission.

A. THE SUBMISSIONS BY THE APPLICANT

On 29th June, 2021, the Applicant's Advocates – the law firm of Messrs. Asige Keverenge & Anyanzwa Advocates filed their written submissions dated 25th June, 2021. The Learned Counsels submitted that the application was premised on the prayers numbers 2, 3, 4, 5 and 6 of the said application for consideration by this court. They urged court to consider granting the Advocates on record to leave to enable them regularize their representation under the provision of Order 9 Rule 9 of the Civil Procedure Rules, 2010 after the Judgement of the BPRT had been delivered on 26th July, 2019 as the same was unopposed.

13. The Learned Counsel submitted that the then Advocate had made an effort to seek leave to file the appeal out of time vide an application dated 27th November, 2020. But they mistakenly overlooked to have priorly sought leave to do so after the Judgment had been delivered as required by law under the provisions of law – Order 9 Rule 9 of the Civil Procedure Rules, 2010. They opined the mistake had been an omission, technical blunder and inadvertent on the part of the Counsel. It should not be visited upon the innocent litigant – the Applicant.

14. He prayed to be granted stay of execution of the Judgement and decree of the BPRT apportioning the delay in prosecuting it to the Corona/Covid/ - 19 Pandemic, a global phenomenon. It had taken a toll on all resources – human, time and monies. They contended that the Applicant had been in occupation of the suit premises and carried business there for over 40 years. As a result, he was likely to suffer substantial loss in terms of the stock in trade locked up in the premises in excess of over Kenya Shillings Twenty Million (Kshs. 20, 000,000.00). They submitted that the premises remained locked up since 26th July, 2019 the time of the delivery of the Judgement.

To buttress their case, they relied on the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules. The upshot of all this they prayed to be granted the orders as sought with costs.

B. THE SUBMISSION BY THE RESPONDENT.

15. On 13th September, 2021, the Advocates for the Respondent the law firm of Messrs. N. A Ali & Company Advocates filed their written submissions dated the same date. The Learned Counsels provided brief facts of the matter. With regards to the enlargement of time to file the appeal out of time, the Learned Advocates invoked the provision of Section 79G of the Civil Procedure Act, Cap. 21, of the Laws of Kenya which stipulated that the timeframe and other requirements for filing the appeal from a sub ordinate court. He argued that the onus was on the Applicant to show good and sufficient cause for failing to have filed the appeal on time as required by law.

16. He held that the Applicant had failed to fulfil the requirements for filing the appeal out of time. The only reason that there were inexistence two applications filed by their advocates and which all got dismissed by this court based on certain irregularities, were not sufficient reasons at all to be granted the orders sought. Furthermore, they stressed that the first application still had been filed late by two months. The stipulated period for the filing was within 30 days. Worse still, they argued that the current application had been filed and heard in such an inordinate delay. Besides, they failed to even attach proof for the delay such as a Certificate of delay.

17. The Advocates submitted that from the attached draft Memorandum of Appeal, it never brought out any arguable issues nor explained which points they intended to argue out during the intended appeal. They held that there were no cogent reasons which were tendered to impugn the Judgement of the BPRT. They stressed that the Respondent had already taken over the premises after the Applicant was evicted. The Respondent had renovated, painted the premises and were carrying out business from there. Therefore, it would overly be prejudicial to the Respondents as it would compel them to incur unnecessary costs in defending an appeal whose substratum had already been spend and lost as taking that execution had already taken. To buttress their case, they relied on the provisions of Section 79G of CPA and the two decisions of ***HCCC (Eldoret) Misc. Civil Appl. No. 4 of 2021 Evans Kiptoo – Versus – Reinhard Omwoyo Omwoyo 2019 and HCCC (Kerugoya) ELC Misc. No. 34 of 2015 Moses Ndegwa Gatimu – Versus – Wanjiru Kithumu & The County Government of Kirinyaga.***

For these reasons, they urged court to dismiss the application with costs.

IV. Analysis and determination.

18. I have carefully read and put into account all the filed pleadings, the submissions, authorities relied on and the relevant provisions of the appropriate and enabling laws. In order to arrive at an informed decision, this honourable court has framed the following issues for its determination. These are:-

> **a. Whether the Advocates on record for the Applicant are properly and/or entitled to be granted leave to be on record as representing their clients as provided for under Order 9 Rule 9 of the CPR after Judgement as been delivered?**
>
> **b. Whether the Applicant has fulfilled the fundamental requirements of being granted stay of execution as set out under Order 42 rule 6 (1) & (6))of the Civil Procedure Rules?**
>
> **c. Whether the Applicant should be granted leave for enlargement to file the Appeal out of time?**
>
> **d. Who will bear the Costs of the application.**

ISSUE No. 1 – Whether the Advocates on record for the Applicant are properly and/or entitled to be granted leave to be on record as representing their client as provided for under Order 9 Rule 9 of the CPR after Judgement as been delivered?

19. Under this Sub – heading, the issues of representation of clients by Advocates is solely an issue of Advocate – client relationship as guide by the relevant provisions of law the main one being The Advocates Act. Courts have very minimal role to play here. However, the moment courts are seize of the case to appoint of delivery of Judgement, Courts permission is required when it comes to change of Advocates. This is what the provision of Order 9 Rule 9 envisages. The Order provides:-

> **" When there is a change of Advocate, or when a party decides to act in person having engaged an Advocate, after Judgement 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 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.

I guess the mischief that the law intended to arrest here is mainly the failure by clients to pay the Advocates after rendering them professional services. Later on after the delivery of Judgement by the BPRT, the Applicant sort and changed the services of Advocates. They engaged a new advocate - Lawrence Advocates. In all these situations, the Applicant never obtained the consent of the previous Advocates the law firm of Messers. Muthee Soni & Associates as envisaged by law.

20. Vide a letter dated 27th November, 2020, the incoming Advocates wrote to the out – going advocates seeking to be allowed by consent take over the matter. But the letter never elicited any response. In fact as things stand now, the current Advocates then do not have the legal capacity to even have approached this court purporting to be representing the Applicant in this matter. They have no audience at all in the given circumstances. Instead, they ought to have made an miscellaneous application seeking solely for this order and the court would have granted it without any reservation. Nonetheless, in the interest of justice, equity and conscience, the court has considered the prayer made in this formal application and taken cognizance to the notice issued to the previous advocates and hereby using its discretion proceed to grant the order as prayed for the Advocates to now formally appear for and provide the Applicant representation after the Judgement of the BPRT.

ISSUE No. 2 - Whether the Applicant has fulfilled the `fundamental requirements of being granted stay of execution as set out under Order 42 rule 6 (1) & (6) of the Civil Procedure Rules?

21. Ideally, the purpose of an application for stay of execution by any applicant is with an aim to preserve the subject matter in dispute so that the right of the Applicant is safeguarded. See the case of ***Consolidated Marine – Versus - Namprijad & Ano. 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.**

In saying so, it is imperative to critically assess the legal spectrum of this aspect. The legal substratum for granting stay of execution is anchored in these provisions of law. These are:-

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 provisions of Order 42 rule (6)(6) of the CPR which 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**.

22. Regarding the granting of stay of execution pending appeal, there are plethora of decided cases and hence a well set out principles based on precedents. For instance, below are the leading ones. In the 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:- <u>Sufficient Cause, substantial loss</u> would ensue from a refusal to grant stay the Applicant must <u>furnish security, the application may be made without unreasonable delay</u>. 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,**

And in the ***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.

23. 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. In exercising its discretion, court should therefore always opt for the lower rather than the highest risk of injustice. The court is to weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that the successful party is not impeded from enjoying the fruits of judgement. Always, there is need for equal level footing or playing ground.

24. Despite of these principles, courts have also argued that the four (4) principles above are not binding on this court in view of the overriding principles (or what has been termed as the Oxygen rule) being the courts inherent powers as founded under the provisions of Sections 1, 1A, 3, 3A of the CPA and Section 3 of the Environment and Land Court Act No. 19 of 2012. These inherent powers emphasise on having land dispute being justly, expeditiously, proportionately and assessible determination of dispute without impending on to undue technicalities. While considering whether to grant the orders for stay court has to weigh all these considerations without taking the risk of leading to undesirable or absurd outcome.

25. Furthermore, based on the above clear four (4) principles, this court will then proceed to determine whether the Applicant herein has satisfied the required standard for granting of stay orders pending appeal as follows:-

Firstly, the Applicant must show that they will suffer substantial loss. Apparently, this seem to be the main issue out of the four set out principles. There must be empirical or documentary evidence of the substantial loss to support the contention and not just in face value.

26. On matters pertaining to this case, while making a determination of the Applicant application dated 3rd December, 2020, I reiterate that it has taken into account that it is not the practice of the courts to deprive the 1st, 2nd, 3rd & 4th Respondents, being the successful litigant of the fruits of their litigation from the judgment entered in their favour.

As indicated, on 26th July, 2019, the BRPT entered its Judgement against the Applicant. Through his Learned Advocates, he held that the filed Appeal ran the risk of being rendered nugatory and otiose unless the stay of execution orders were granted as prayed in the application. At this juncture, court has noted with great misgivings that all the parties have been uneconomical with the truth on the empirical position on the ground. While the Applicant has emphatically argued that the premises has been closed and padlocks placed on the door of the premises by both of them, The Respondent has insisted is already in the premises and carrying out business from there. There is a letter dated 15th February, 2021 authored by the Applicant's Manager addressed to the Respondent's Advocates requesting for a court order to assist them collect their documents and goods from the closed shop. The court has assessed from the documents on record and found out that these items are worth approximately a sum of Kenya Shillings Fourteen Million (Kshs. 14, 000, 000.00). On the other hand, the Respondent has asserted that they already evicted the Applicant from the premises, renovated and painted it and indeed carrying out business activities from there. Apart from a warrant of giving vacant possession of the premises issued by the Auctioneers, 4th Respondent given on 20th November, 2019, there is really nothing tangible to demonstrate the current status on the ground. The Court has noted from the overleaf of the said warrant, that the 4th Respondent has indicated that on 22nd November, 2010 the decree from the Judgment was executed by way of eviction of the Applicant and putting in possession the Respondent into the suit premises. But all said and done, for the benefit of doubt and on preponderous of probability in this limb, the court is not fully satisfied and convinced that the Applicant may suffer any substantial loss if the orders sought are not granted.

27. Secondly, the Applicant must satisfy court that the notice of motion application was made without ***undue and unreasonable delay.*** This court has noted from the time the of delivery of Judgement on 26th July, 2019, the Applicant never took any steps until on 17th October, 2019 when their Advocates made an effort to file an application for stay of execution but which was dismissed for not failing to be in compliance with the requirements made under Order 9 rule 9 of the Civil Procedure Rules after Judgement. The current application has also exceedingly delayed from being presented and prosecuted though the Advocates apportion it to the global Corona/Covid – 19 Pandemic. Clearly, as the facts stand out, this court finds out that there has been unreasonable and inordinate delay as envisaged in law in filing this application by the Applicants.

28. Thirdly, on the issue of security for costs, it is noted that the bone of contention is rental arrears from a tenancy agreement. Nothing has been placed before court on the details pertaining to the rental outstanding rent arrears. Suffice it say, this Hon. Court finds it unprecedented that despite being in rental arrears, the Applicant has not even found it wise to make an offer as a sign of good gesture to deposit some reasonable amount to act as security for costs at least to persuade the court in granting it the orders sought. Its explanation it needs to be reinstated to the premises is really unfounded, baseless and unreasonable.

ISSUE No. 3 Whether the Applicant should be granted leave for enlargement to file the Appeal out of time?

This has been a very challenging part of this ruling. The legal provision on enlargement of time is mainly based on the following provisions with clear time bound framework.

Section 79G of the Civil Procedure Act Cap. 21 holds that:

“Every appeal from the Sub – ordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order’

29. Under the provision of Order 50 Rule 6 of the Civil Procedure Rules a party is accorded time to seek leave to enlarge this time but with sufficient reason. There are many decisions citing out the fundamental requirements for the enlargement of time. In ***“Attorney General Versus – Sylvanus Otieno Odiaga (2017) eKLR Otieno Vitalis Omondi Othuon - Versus – Nairobi Conservation & Pipeline Corporation; Nicholas Kiptoo Arap Salat Versus – IEBC & 7 Others, SC Appl. No 15 of 2014.***

Traditionally, the threshold for the extension time used to include:-

a. Whether there is a good and reasonable explanation for the delay;

b. Whether the application has been brought without undue delay;

c. Whether the proposed appeal is arguable; and

d. Whether any prejudice will be suffered by Respondent.

But suffice it to say, taking that law is extremely organic, in the recent times, the jurisprudence in this area has assumed some changes. It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary to extend time. The said discretion is unfettered; that an applicant no longer required to present a “Sufficient reason’ for the extension of time should be liberally granted. In general terms, court takes into account the following aspects: First the length of the delay; secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly the degree of prejudice to the Respondent if the application is granted. These legal authorities demonstrate that it is indeed a balancing exercise between the need for there to be a good reason for the delay and the prejudice that may be caused to the other party if the extension were granted.

30. Nonetheless, the Applicant has to give cogent reason and place before court material upon which it can exercise discretion in his favour for the delay and whether the application has been made timeously and the prejudice the Respondent is likely to suffer. The material should not be fanciful or contrived. This discretion must be exercised judiciously and on the basis of reason rather than capriciously or arbitrarily.

From the time when the BPRT delivered the judgement, it is close to three months period before as the Applicant simply went to slumber. It was until the 17th October,2019 when the Advocates filed an application. The delay has been squarely blamed on the Advocates inadvertent and genuine mistake. Certainly, the series of statements of the Advocate handling the matter as a reason is not a cogent basis of not having filed an appeal on time or better still seeking to be granted leave to enlarge time. To date, it will be cumulative delay period of over twenty four (24) months from the statutory time of thirty (30) days as stipulated under the provision of Section 79G of the Civil Procedure Act, Cap. 21.

31. The 4th Respondent held that they on 20th November, 2020 already issued warrants to have the premises vacated. Indeed, according to them, they executed them by evicting the Applicant and took occupation of the suit premises. Despite all this, the Applicant still insists the premises has been closed down with both of them having placed padlocks on the door and there are hired goons manning it. Indeed, his sign posts is still placed at the door. Unfortunately, there were no documentary evidence placed before court to this effect. In the given circumstance, one wonders of what value would the orders sought serve as the substratum of the appeal has already been lost apart from occasioning and/or prejudicing the Respondent to be deprived of the fruits of the Judgement by the BPRT over twenty four (24) months and also being made to incur more expenses in defending itself in an appeal. In the given circumstances, I am unable to exercise my discretion in favour of the Applicant and extend time. From the foregoing, therefore, and for avoidance of any doubts, I order:-

1. THAT the notice of motion application dated 3rd December, 2020 by the Intended Appellant/Applicant is bereft of any merit and the same is and hereby dismissed;

2. THAT the Applicant be and is hereby granted leave to change Advocates by appointing the law firm of Messrs. Asige, Keverenge & Anyanzwa Company Advocates in place of Messrs. Muthee Soni & Associates Advocates.

3. THAT the Respondents herein are hereby directed to have unconditionally released all the moveable properties belonging to the Applicant and in their possession in form of goods, documents and/or consignments to the Applicant within the next Seven (7) days from todate without failure.

4. THAT the costs of the application to be borne by the Applicant.

IT IS SO ORDERED.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 10TH DAY OF NOVEMBER, 2021

HON. JUSTICE L.L. NAIKUNI

JUDGE

(ELC- MOMBASA)

In the presence of:-

M/s. Yumna – the Court Assistant.

Mr. Asige Advocate for the Applicant.

Mr. Hassan Advocate for the 1st, 2nd, 3rd & 4th Respondents