



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 143 OF 2019

JUSTUS GITUMA.....1ST APPELLANT/APPLICANT

SIMON KATHURIMA.....2ND APPELLANT/ APPLICANT

EMMANUEL MURIUNGI.....3RD APPELLANT/ APPLICANT

MERCY KAGENDO.....4TH APPELLANT/ APPLICANT

HENRY MURITHI.....5TH APPELLANT/ APPLICANT

REUBEN GITONGA.....6TH APPELLANT/ APPLICANT

VERSUS

DANIEL KIMATHI.....1ST RESPONDENT

WILSON KIMATHI.....2ND RESPONDENT

TABITHA KANUGU.....3RD RESPONDENT

K-REP BANK.....INTERESTED PARTY

RULING

1. Before the Court is an application by the Appellants/Applicants dated 11th November 2020 seeking the following orders: -

i) Spent

ii) THAT the Honourable Court be pleased to order stay of execution of the Ruling/Orders issued on 6th October 2020 by Hon. D. W. Nyambu CM in Meru CM ELC 306 of 2013 pending the hearing and determination of this application.

iii) THAT the Honourable Court be pleased to order stay of execution of the Ruling/Orders issued on 6th October 2020 by Hon. D. W. Nyambu CM in Meru CM ELC 306 of 2013 pending the hearing and determination of this Appeal.

iv) THAT the costs of this application be provided for.

Appellants/Applicants' Case

2. The Application is supported by the supporting affidavit of the 3rd Appellant/Applicant, Emmanuel Muriungi sworn on 11th November 2020 who avers that the Appeal herein emanates from the Judgement/Decree of the lower Court delivered on 28th November 2018 by Hon H. Ndungu CM in Meru CMCC 306 of 2013; He avers that they were seriously aggrieved by the said decision and they thus appealed to this Court against the whole Judgment on the grounds spelt out in the Memorandum of Appeal, which appeal he avers has high chances of success; He avers further that the Respondents have commenced execution of the said Judgment and Decree and have appointed Clear Real Auctioneers who commenced the auctioning of the Applicants' properties; That unless this Court intervenes, the Appeal will be rendered nugatory; That the lower Court's Ruling allowed the Respondents through Clear Real Auctioneers to conduct the auction of their properties

despite the pendency of the appeal herein; That the lower Court refused to grant them stay orders pending appeal; That the only properties they have and call home have been exposed by the due auctions which render them destitute and homeless; That the loan which is the subject matter in the case was to be repaid by all the 21 group members at a rate of Ksh 150,000/= each; That the loan was to be utilized to drill a borehole, construct a water tank and to pipe and distribute water to the member's farms; That it is only Ksh 735,000/= out of the members contribution that was utilized to drill 105m out of the projected 200m of the bore hole and that the loan funds of Ksh 3,000,000/= were never utilized and that there is no water, water tank and no piping; That when they questioned the misappropriation of the group funds and the said loan facility by the officials of the group, they were subjected to the case herein as a form of intimidation; That the proceedings were prematurely instituted to silence them and thus the discriminatory treatment of the Applicants from the other members who have not completed their payments to date but have not been sued; That this selective targeted intimidation, mistreatment and favouritism of group members is illegal and unfair; That the facility which was to be paid by all the 21 group members is now being serviced by the Applicants only at unclear, irregular and exorbitant interests rates; That each member of the group was to pay Ksh 150,000/= towards the service of the loan but now the Applicants are forced to pay more than Ksh 500,000/= which is more than 4 times the principle amount against the law that interest charged should not be more than double the principle amount; That the Respondents are demanding about Ksh 3,346,205/= from the Applicants and yet the bank loan is less than Ksh 2,685,725/=; That unless this Court intervenes, the Applicant shall suffer irreparable and substantial loss as the properties facing auction is the only land they have and call home and they have nowhere else to go; That in refusing to grant stay pending appeal, the lower Court acted against the provisions of the Constitution and case law.

3. The Applicants filed a supplementary affidavit similarly sworn by the 3rd Applicant on 6th January 2021. He avers that the Applicants' properties namely L.R NO. NGUSISHI/SETTLEMENT SCHEME/2407, 1929 and 698 belonging to the 3rd, 1st and 2nd Applicants respectively are not charged to the interested party; That the interested party can only exercise its statutory power of sale on the properties it is registered as a chargee and in this case, it is not on the said Applicants' properties; They reiterate that the loan advanced by the interested party was to be serviced by all the 21 members of the group at Ksh 150,000/= each and not only by the Applicants; That the 1st Respondent's affidavit sworn on 8th July 2020 is intended to make the Applicants only to service the loan, which act is discriminatory, illegal and wrong.

4. The Applicants filed a further supplementary affidavit sworn by the 3rd Applicant on 14th January 2021. Therein, he avers that the contents of the Respondent's replying affidavit confirms that they, the Respondents only want the Applicants to repay the money owed to the interested party; That the Respondents have clearly demonstrated that they are hell bent to ensure that only the Applicants repay the entire loan instead of the entire group members and this is therefore a matter that is pending determination in the appeal; They reiterate that the loan advanced by the interested party was to be serviced by all the 21 members of the group at Ksh 150,000/= each and not only by the Applicants; That paragraph 11 of the Respondents' replying affidavit is full of falsehood and the Applicants do not have such agreement with the interested party and that they would like to cross-examine the deponent on the same; That their application is not an afterthought and it is in the interest of justice that the status quo be maintained to enable the appeal be disposed without jeopardizing the Appellant and to avoid rendering the Appeal nugatory.

The Respondents' Case

5. The Application is opposed by both the Respondents and the interested party. The Respondents filed a replying affidavit sworn by Daniel Kimathi, the 1st Respondent on 17th December 2020. Therein, they aver that the application by the Applicants is an abuse of court process and it lacks merit; That the 4th Respondent (the interested party) K- Rep bank has been advertising their properties namely L.R NO. NGUSISHI/ SETTLEMENT SCHEME/ 884 and L.R NO. NGUSISHI/ SETTLEMENT SCHEME/ 1520 in order to recover the money loaned to them through two securities; That it is not in dispute that the 4th Respondent (interested party) K-Rep bank is owed money by the Appellants and the 1st-3rd Respondents; That Judgment was delivered in their favour and the 1st to 6th Appellants were ordered to proceed and pay all amounts that had fallen due as per the forms of the loan agreement; That the Judgment having been delivered on 28th November 2018, the Appellants appealed against the same by filing a Memorandum of Appeal dated 21st December 2018; That on the part of the other defaulters who had failed to pay up, they decided to execute on the strength of the Judgment and they thus instructed an auctioneer to proceed with execution and that it is for this reason that they filed their applications to give authority to the auctioneers to proceed to auction the Appellants' properties in fulfillment of the judgment of the lower Court; That through an application dated 25th February 2020, they successfully sought for approval of the attached condition of sale and that their auctioneer be authorized to conduct the auction; That through an application dated 3rd June 2020, they sought for stay of execution on the payment of the bank loans and realization of the security charged with the interested party but their application was dismissed thereby exposing them to execution by the bank; That while the bank and its auctioneers were seeking for buyers to sell their property, the 1st and 2nd Appellants had taken up the role of enabling the Bank and its Auctioneers in looking for buyers to come and view their land for purposes of selling in the auction and for this reason, the Applicants are not deserving of mercy from the Court; That when the Applicants realized that things were not good for them, they filed the application dated 23rd June 2020 seeking stay of execution but the same was dismissed and that upon this dismissal, they approached the High Court for stay of execution once more; That their application has been brought as an afterthought two (2) years after the delivery of Judgment in 2018; That the Applicants were hoping that their properties would be quickly sold off by the Bank so that they would indirectly benefit from such an auction; That if the Applicants are granted stay of execution, this means that their (the 1st-3rd Respondents') properties will be auctioned despite the fact that Judgment was in their favour; That the Court should not grant any orders as it means that they shall be greatly prejudiced by any order for stay.

Interested Party's Case

6. The Interested Party filed grounds of opposition. Therein it contends that the Application by the Applicants is bad in law, incompetent and an abuse of court process; That no cross-claim was filed by the Appellants herein in the lower Court against the Interested Party's interest as chargee in the suit properties TITLE NUMBER NGUSISHI (SETTLEMENT SCHEME/884 TIMAU and TITLE NUMBER NGUSISHI (SETTLEMENT SCHEME/1520 TIMAU; That there is in force the Ruling of the Court dated 5th May 2020 by Hon. Mr. Justice A. Mabeya affirming the Interested Party's statutory power of sale over the suit properties; That the application has no merits as the Applicants are guilty of inordinate delay and laches, the Judgment of the lower Court having been delivered on 28th November 2018.

Appellants'/Applicants' Submissions

7. The Application was canvassed by way of written submissions. The Appellants/Applicants filed their submissions on 7th January 2021. Therein, they give a brief background of the matter. That the Applicants, Respondents and 12 others came together and formed a self help group called Lucern Self Help Group which was duly registered and the Respondents were elected leaders of the group. The objective of the group is to pool together resources to help and improve the living standards of its members in the wisdom of the Swahili proverb '**Umoja ni nguvu, utengano ni udhaifu;**' That the 21 members are farmers and they started a project to drill a borehole to supply water to improve their farming activities through the year compared to seasonal and unreliable rainfall. They contributed Ksh 735,000/= where each member contributed Ksh 35,000/=. The cost of the project was Ksh 3,000,000/= out of which Ksh 1,400,000/= was for drilling a borehole of 200m, Ksh 800,000/= was for extending pipes and Ksh 800,000/= was for construction of a water tank; That the interested party offered a credit facility of Ksh 3,000,000 to finance the said project and the same was to be repaid by all the 21 members each of whom was to pay Ksh 150,000/=. The titles L.R NO. NGUSISHI/SETTLEMENT SCHEME/884 and 1520 TIMAU were used as securities and charged by the interested party; That during the implementation of the project, the Applicants questioned the misappropriation of funds by the Respondents when the contractor left site after drilling only 105m instead of 200m at a cost of Ksh 735,000/= only, equivalent to the members contribution but in order to silence and intimidate them, the Respondents sued them to recover their contribution towards the repayment of the loans before the expiry of the repayment timelines and that this was done selectively, and it was discriminatory, illegal and unfair; That the Respondents are determined to recover the entire credit facility from only the Applicants while the burden of repaying should be shouldered by all the 21 members.; That on 6th October 2020, the lower Court allowed the Respondents, through Clear Real Auctioneers to auction the Applicant's properties i.e L.R No. NGUSISHI/SETTLEMENT SCHEME/2407, 1929 and 698 and refused to grant stay pending appeal thus necessitating the instant application; The Applicants argue that the purpose of granting stay pending appeal is to preserve the subject matter so that the right of appeal can be exercised without prejudicing the Applicants as the appeal would be rendered nugatory if there is no stay and that their properties which have been exposed for sale by auction to purportedly recover the credit facility advanced to the group from the Applicants instead of the entire group of 21 members forms the subject matter of the appeal and ought to be preserved; They also argue that their properties were not charged to the interested party and the interested party can only exercise statutory power of sale over properties for which it is registered as a chargee and in this case, it is not in the Applicants' properties; That they stand to suffer substantial and irreparable loss if their Appeal succeeds and that land is unique and cannot be replaced in case the auction proceeds as scheduled; That damages alone cannot substantively compensate the Applicants in the case of loss of their land and that this is the only land they have and it is where they call home and they have nowhere else to go; They argue that their application has been brought without undue delay and that it is in the interests of justice that the same be allowed as prayed. They relied in the cases of **Amal Hauliers Limited v Abdulnasir Abukar Hassan (2017) eKLR** and **Victory Construction v BM (a minor suing through next friend one PMM) (2019) eKLR**.

Respondents' Submissions

8. The Respondents went straight to the issues for determination which they submit is on whether the Applicants have met the threshold for grant of stay of execution pending appeal. Relying on the case of **Antoine Ndiaye v African Virtual University (2015) eKLR** they submit that the relief under Order 42 Rule 6 of the Civil Procedure Rules is discretionary and this discretion must be exercised judiciously only where sufficient cause has been shown and the test for sufficient cause is whether substantial loss may result unless the order is made and whether the application has been made without unreasonable delay and that such security as the court may order for due performance of such decree as may ultimately be binding on him has been given by the applicant; On substantial loss, they submit that contrary to the averment by the Applicants that they stand to suffer substantial loss, it is in fact the Respondents who stand to suffer substantial loss; They argue that Judgment was delivered on 28th November 2018 in their favour and the Applicants were bound to continue paying their arrears to the Interested Party until full payment proceeded but they failed to adhere to the orders issued and failed to file an appeal on the matter; Relying on the case of **Kenya Shell Limited vs Benjamin Karuga Kiniru & Another, Civil Appeal No. 97 of 1986**, they argue that where substantial loss is not evinced, the application for stay should fail. They argue that should the Applicant's application be allowed, they would be the ones to suffer substantial loss due to the fact that the interested party wishes to auction their property whereas they have paid their dues towards the arrears owed to the interested party; That the Ruling and order of 6th October 2020 ensured that the Respondents attached and auctioned land belonging to the Applicants to ensure that arrears owed to the interested party are paid; On unreasonable delay, they argue that the Applicants' application is frivolous and may cause unreasonable delay in executing the judgment and ruling in the matter; That the Applicants filed an application dated 23rd June 2020 seeking stay of execution which was dismissed; They urge that this application be dismissed with costs.

Interested Party's Submissions

9. The interested party filed its submissions on 21st January 2021. They submit that going by the contents of the Applicants' supplementary affidavit sworn on 6th January 2021, the Applicants do not seek any orders restraining the interested party's statutory power of sale over its securities, TITLE NO. NGUSISHI/SETTLEMENT SCHEME/884 TIMAU and NGUSISHI/ SETTLEMENT SCHEME/1520 TIMAU; They further submit that out of abundance of caution, they bring to the attention of the Court the Ruling delivered on 5th May 2020 by Hon. Mr. Justice A. Mabeya, which affirmed the interested party's statutory power to realize its aforesaid securities; They submit that this caution is necessitated by the Respondent's claim that the interested party is executing the decree of the lower Court; They submit that the interested party was wrongly enjoined as the 7th Defendant in the lower Court and that the Respondent's suit against the interested party was dismissed with costs and that where a suit has been dismissed, there is nothing to stay and the aggrieved party's remedy lies in moving to the appellate court for an injunction pending appeal, which remedy was already pursued by the Respondents vide their application dated 4th November 2019 but was dismissed with costs vide a ruling delivered on 5th May 2020; They submit that no orders are sought against them, they urge the Court to give effect to the overriding objective under Section 1A & 1B of the Civil Procedure Rules for the just, expeditious and affordable resolution of disputes; They submit that for a stay of execution to be granted, the Applicant must demonstrate substantial injustice if stay is not granted and move to court without unreasonable delay and be ready to furnish security; They urge that despite Judgment having been delivered on 28th November 2018, the first application for stay was only made on 23rd June 2020 and was dismissed and that the instant application also seeks stay of execution of the same decree and it suffers from inordinate delay and that the Applicants have not given an undertaking to furnish such security as shall be ordered by the Court for the due performance of such decree as may ultimately be binding upon them; They pray that the Applicant's application be dismissed with costs and that directions on hearing of the Appeal be issued and that if the Court is to grant stay the same should not affect their right to realize its securities TITLE NO. NGUSISHI/SETTLEMENT SCHEME/884 TIMAU and NGUSISHI/ SETTLEMENT SCHEME/1520 TIMAU.

Issues for Determination

10. The only issue arising for determination on this application is on whether or not this Court should grant an order for stay of execution of the Ruling and Order of the lower Court issued on 6th October 2020 by Hon. D. W. Nyambu in Meru CM ELC 306 of 2013 pending hearing and determination of this appeal.

Determination

11. To begin with, this Court observes that the instant application is with respect to stay of the Ruling of 6th October 2020 and not stay of the Judgment of 28th November 2018. This Court has observed from the contents of the Respondent's replying affidavit that an application for stay dated 3rd June 2020 had been lodged by the Applicants in lower Court but the same was however dismissed. This information was not disclosed by the Applicants and if the averments made by the Respondents in this regard is true, it would appear that the Applicants are guilty of material non-disclosure and would not be deserving of any equitable remedies. The Application which culminated in the Ruling of 6th October 2020 was not one made by the Applicants but was one made by the Respondents seeking for approval of conditions of sale in order to execute the Judgment of 28th November 2018. This Court makes the observation that the Applicants may be using the said Ruling to make an application for stay through the backdoor. This should not be the case. This Court is however a court of justice and whilst acknowledging that a litigant whose application for stay under Order 42 Rule 6 of the Civil Procedure Rules has been refused is still entitled to bring a similar application in the High Court, this Court will address the application on its merits.

12. The Ruling/Order of the lower Court delivered on 6th October 2020 as observed from the contents of the said Ruling as revealed in the Respondent's supporting affidavit had the effect of approving the conditions of sale and allowing the Respondents through Clear Real Auctioneers to conduct auction of the Applicant's properties. Although the Applicant claims that the said Ruling also refused to grant stay orders pending appeal, this information cannot be verified from the contents of the said Ruling.

Principles for Stay of execution

13. The principles that guide Courts in determining an application for stay are well established under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010. The same provides as follows: -

'No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.'

No order for stay of execution shall be made under sub rule (1) unless: -

a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay.

b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.'

14. The 3 conditions in the said provision apply conjunctively and must all be present for there to be a valid reason to grant stay.

Substantial Loss

15. On substantial loss, it is argued by the Applicants that should their properties be sold, they will have been condemned to pay the entire loan arrears whereas the same ought to be paid by all the 21 members of the self help group that borrowed the loan. They also argue that their properties were not charged to the interested party and the interested party can only exercise statutory power of sale over properties for which it is registered as a chargee and in this case, it is not in the Applicants' properties; They argue that land is unique and cannot be replaced in the event the auction proceeds as scheduled and that damages alone cannot substantively compensate the Applicants in the case of loss of their land and that this is the only land they have and it is where they call home and they have nowhere else to go. The Respondents on the other hand argue that no substantial loss is likely to be suffered by the Applicants and it is in fact them who stand to suffer should the Application for stay be granted since the interested party bank will auction their properties despite there being a judgment in their favour ordering the Applicants to pay the loan arrears.

16. This Court observes that the gravamen of the Applicants' case is that should the properties be sold, they will have been condemned to pay the entire loan arrears whilst the same ought to be paid by all the 21 members of the self help group. They argue that the case in the lower Court was only instituted supposedly as a form of victimization when they vocalized their reservations as to how the funds had been utilized and demanded accountability. This notwithstanding, this Court observes that the Judgment delivered on 28th November 2018 ordered the Applicants to pay the loan arrears to the interested party and the Applicants are therefore indebted to the chargee i.e the interested party. It is not clear as to why the Appeal challenging this Judgment has not been prosecuted up to date, over 2 years later, as this would have been the easiest way to avert execution if indeed the debt is not owed by the Applicants. Whereas there seems to be an arguable question of fact on appeal, touching on the amounts to be paid by the Applicants and on whether the purported failure to account for the funds by the Respondents would have an effect on the amount due to the interested party by the Appellants, this Court observes that there is a valid Judgment requiring the Appellants to pay the loan arrears. The Judgment, which is in favour of the Respondents will fortuitously have the effect of benefiting the interested party in ensuring that their loan is repaid. Although it is argued that by allowing the execution, the Appellants will have been condemned to pay the entire loan arrears whereas they were a whole lot of 21 members who each has a responsibility of paying, the question that begs is why the Appellants have never taken any steps to prosecute their appeal. It is a principle in

equity that the law does not aid the indolent. Had the Respondent not commenced execution, the Applicants may have gone on with their lives without bothering to comply with valid court orders.

17. It is also argued by the Applicants that their properties were not the subject of any charge registered in favour of the interested party and cannot therefore be the subject of a statutory power of sale. Whilst it is true that a chargee may not seek to realize property which had not been offered as security, and whilst it is true that the Applicant's property was not offered as security, this Court finds that it is not only in instances where a charge has been registered that properties come to be sold for purposes of recovering a debt. This Court is alive to the fact that in ordinary execution processes following delivery of Judgment culminating in money decrees, execution may follow by attaching and selling any of the properties and/or assets of the Judgment debtor which may well include land. This Court is convinced that execution herein is with respect to the latter process and it is not the exercise of statutory power of sale. This is evidenced by the Respondent's application dated 25th February 2020 seeking approval of conditions of sale and the Ruling allowing the same by which the auctioneers appointed by the Respondents were given authority to proceed. These two documents i.e the application dated 25th February 2020 and Ruling on the same were both annexed to the Respondents' replying affidavit. The very fact that it is the Respondent who commenced the execution process and not the interested party confirms that the intended execution is not with respect to statutory power of sale

18. The Applicants also argue that land is unique and loss of the same may not be compensated by way of damages. Going by the definition of substantial loss as per the case of *Antoine Ndiaye v African Virtual University [2015] eKLR*, this Court finds that there is a likelihood that if stay is not granted, the Applicants may suffer substantial loss should their properties, which is where they call home be sold off. In the said case, Justice Gikonyo cited the holding in the case of *Sewankambo Dickson Vs. Ziwa Abby HCT-00-CC MA 0178 of 2005* where it was held that;

“...substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal...insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals –especially in a Commercial Court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts”.

Whilst this is true, this Court has to balance the interests of the Applicants with those of the Respondent which coincidentally are tied to those of the innocent lender (the interested party) who has a stake in the matter and has been unable to recover the loan arrears owing to the unending litigation between the Applicants and the Respondents, this Court is alive to the fact that loss of land where one resides with his or her family will most likely result in substantial loss, and a chance ought to be given to the applicants to redeem their position..

19. Concerning the Respondent's averments that if the Applicant's application is allowed they stand to suffer loss as the interested party will come for them, this Court is not convinced that this is a valid argument in the instant application for the reason that should the Respondent want to prevent their property from being sold, then they are at liberty to seek appropriate legal redress through the proper channels. This Court observes that the Respondent's application for injunction, stopping the interested party from selling their properties was dismissed for the reason that the Respondents do not have a claim against the interested party. The relationship between the respondents and the appellants which is the subject of these proceedings is only of anecdotal relevance to the charger/chargee's relationship between the respondents and the Interested party and this Court would therefore not base its finding on this argument.

Undue Delay

20. On whether or not there has been undue delay, this Court observes that following delivery of the Ruling on 6th October 2020, the Applicants filed the instant application slightly over a month later, on 11th November 2020. This cannot be said to be unreasonable. The Court, however, notes some delay as gleaned from the history of the matter especially since the orders sought in the instant application, if granted affect the execution of the main Judgment which was delivered on 28th November 2018.

21. The Applicants did not disclose that they had made an application for stay in the lower Court which was declined and the Respondents, who brought this fact of there having been such an application, did not disclose when the Ruling declining to grant the stay was made. As the application for stay before the trial court is said to have been filed in June 2020 but subsequently dismissed, even assuming that the application was dismissed immediately upon filing, this Court cannot say in the circumstances of the Covid-19 year 2020 that the coming to this court by way of this application on the 11/11/2020 in seeking stay after the refusal of the same by the trial court amounted to unreasonable delay.

Security

22. On security, the Applicants have not offered payment of any security neither have they indicated their willingness and ability to comply with any conditions of deposit of security. However in view of the fact that there is a real likelihood of the Applicants suffering substantial loss should stay not be granted, this Court in granting stay will require the deposit of a security enough to cover the decretal amount. For the comfort of the Interested Party who has a Chargee's interest in the Respondents' property, there shall be an order for the deposit as security by the appellant/applicant of the amount owing as at the date of deposit, into an interest earning joint account with the Interested Party bank in the names of the counsel for the all the parties in this appeal.

Conclusion

23. This Court observes that the appellants are guilty of dealy in failing to actively prosecute their appeal and or application for stay before this court more expeditiously. However, for the period after the refusal of an application for stay in the trial court, this court takes judicial notice of the inhibiting circumstances of the Covid-19 infested year 2020 which may have engendered such delay after alleged refusal of a stay by the trial court upon their application of June 2020. The Court also considers that by the threatened sale of the property the appellants would suffer substantial loss in the loss of their land parcels which were never part of the charge between the respondent and the Interested Party but are sought to be sold in execution of the judgment in the suit subject of the appeal herein. Although the principle that a successful

litigant is entitled to the enjoyment of fruits of his judgment is sound, it must in the interest of justice be balanced with the right of an appellant who is exercising his undoubted right of appeal and who has an arguable appeal, or one that is not frivolous and where he stands to suffer substantial loss if stay is not granted, to have the *status quo* preserved pending the hearing and final determination of the appeal.

24. The Applicants, despite knowing very well of their obligations ensuing from the Judgment of 28th November 2018 failed to comply. They also failed to be proactive in prosecuting their appeal. The instant application as well as the one of the lower Court appear to have been made in reaction to the execution by the Respondents. It is a maxim of law called '*Nullus Commodum Capere Potest De Injuria Sua Propria*' meaning that no man can take advantage of his own wrong. See *Broom's Legal Maxims* (1937) at p191. While it is within the law to approach the Court to seek redress, litigants may not obtain a favourable exercise of discretion when they themselves have contributed to the acts they seek to avert.

25. However, in the interests of substantive justice, bearing in mind that there is an arguable appeal pending in this Court, and that substantial loss may be suffered by the Applicants, this Court shall grant conditional stay. In order to forestall the accumulation of interests which has undoubtedly escalated the debt owed to the Interested Party, this Court shall direct that the dispute in the Appeal be determined expeditiously.

ORDERS

26. Accordingly, for the reasons set out above, this Court makes the following orders: -

1. An order for stay of execution of the of the Ruling/Orders issued on 6th October 2020 by Hon. D. W. Nyambu, pending the hearing and determination of the Appeal herein is hereby granted subject to the following conditions.

2. The Applicants shall deposit the sum of **Ksh.575,058.00 owing to the Interested Party bank as at 28th February 2020 together interest thereon accruing upto the date of the deposit** in a joint interest earning account to be opened in the **Interested Party bank** in the **joint names of the Advocates for the parties**, that it to say Appellant/Applicants' Advocates, Respondents' Advocates and Interested Party's Advocates **within thirty (30) days from today's date**.

3. In default of the deposit as in order (2) above, the orders for stay shall lapse and be of no effect.

4. In the interests of an expedited determination of the dispute herein and to avoid escalation of interest on the loan principal and or the decretal sum, the court orders that the appellant shall process the appeal so it is heard and determined within (90) days.

5. There shall be no order as to costs of the application which shall abide the outcome of the appeal.

Ordered accordingly.

DATED AND DELIVERED THIS 4TH DAY OF MARCH 2021.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

M/S Maitai Rimita & Co. Advocates for the Applicants.

M/S Gikunda Anampiu & Co. Advocates for the Applicants.

M/S Charles Kariuki & Kiome Associates Advocates for the Respondents.

M/S J. M. Mwangi & Co. Advocates for the Interested Party.