



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC APPEAL NO. 33 OF 2020

SAMAKI INDUSTRIES LIMITED.....APPELLANT/APPLICANT

VERSUS

KENYA PORTS AUTHORITY.....RESPONDENT

RULING

1. Before this Honorable Court is the Notice of Motion application dated 28th September, 2021 by the Appellant/Applicant. Being aggrieved by the Judgment of this court delivered on 13th September, 2021, the Appellant/Applicant herein applied to institute an appeal at the Court of Appeal against the said decision. In the meantime, pending the hearing of the said appeal it is brought this application under the provisions of Article 159 of the Constitution of Kenya, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Sections 1A, 1B, 3A of the Civil Procedure Act, Cap. 21 of the Laws of Kenya. The application seeks for the following orders:

a) Spent

b) Spent

c) That pending the hearing and determination of this Application herein, this Honorable Court does issue a stay of a Execution of the Judgement of Honorable Justice C. K Yano dated the 13th September, 2021 and delivered on 27th September, 2021 and further stay of proceedings and Judgement/Decree in CMC No. 307 of 2003.

d) That pending the hearing and determination of the Appellant's intended Appeal, this Honorable Court does issue a stay of a Execution of the Judgement of Honorable Justice C. K Yano dated the 13th September, 2021 and delivered on 27th September, 2021 and further stay of proceedings and Judgement/Decree in CMC No. 307 of 2003.

e) That the Honorable Court be pleased to make such further or other orders, as it may deem just and expedient in the circumstances of this case.

f) That costs of this application be provided for.

2. The application is premised on the grounds and the 10 Paragraphed Supported Affidavit of SALIM VERJEE sworn and dated 28th September, 2021 and the three (3) annextures marked as "SV – 1 to 3" annexed hereto. He deposed that he was a male adult of sound mind and understanding and a resident of the County of Mombasa and hence competent to swear and sign this affidavit. He deposed that this Honourable court on 27th September, 2021 dismissing the appeal with costs upholding the Judgement of the trial court dated 28th September, November, 2019.

3. He stated that he had preferred an appeal against the aforesaid Judgement of Justice C. Yano and his appeal would be declared nugatory if the Judgement delivered on 2th September, 2021 and Judgement and Decree of the trial court in CMC No. 307 of 2003 was not stayed. He averred that the Appellant/Applicant was likely to be evicted from the suit premises at any time inn view of the already extracted decree in CMCC No. 3037 of 2003 issued on 31st January, 2020. The deponent annexed copies of the Judgement, filed Notice of Appeal dated 27th September, 2021 and the Decree of the trial court marked as "SS 1 – 3".

4. He averred that they would be greatly prejudiced and suffer loss if the matter followed that route and their right to a fair trial as enshrined Under Article 50 of the Constitution of Kenya would be infringed. He further held that they would be no prejudice and loss occasioned to the Respondent if stay orders were granted.

5. He informed court that the application was filed without undue and inordinate delay. He further informed court that they had lived on the suit property since the year 1935 by their grand father where they had started the first historical fish business in Kenya and which the Appellant/Applicant inherited from his father being a family business but under different names. He urged Court to grant the said orders as the application had been brought in good faith.

The Respondent's case

6. On 12th October, 2021, the Respondents filed an 18 Paragraphed Replying Affidavit sworn and dated the same date by one STEPHEN KYANDIH in response to the aforesaid application. He deposed he was the Principal Legal Officer in the Litigation & Disputes Department of the Kenya Ports Authority, the Respondent herein hence authorized and duly competent to swear this affidavit. He deposed that and as advised by their Advocates on record, the application by the Appellant/Applicant was misconceived, bad in law, inept and brought to court in bad faith by the said Appellant/Applicant and should be dismissed with costs for the reasons that it had failed to meet the criteria for the grant of an order of stay of execution whereupon they would suffer any substantial loss if denied the orders; failure to have any grounds of appeal having failed to attach a Memorandum of Appeal and that they were not granted the orders the appeal would be declared nugatory hence no arguable appeal with triable issues. He stated that the Appellant/Applicant had continued to hold over the suit property despite not being a tenant and had consequently failed to demonstrate the prejudice and the manner in which it would suffer loss given the circumstances. Indeed, they are still in occupation of the suit premises.

7. He held that on the admission by the Appellant/Applicant upon the expiration of the lease on 31st March, 2005 they chose to close down the premises instead of vacating from it. Having closed down the shop over 20 years ago the premises had been dilapidated and wasted at the expense of the Respondent as a property owner who can not enjoy the fruits of its judgement after being court since the 2003 and counting

8. He noted that the Appellant/Applicant had failed to propose and/or offer any security for costs for the intended and/or proposed appeal for consideration by this court. The deponent urged Court to dismiss the application as the Applicants had not proved the grounds required for a grant of stay of execution.

The Supplementary affidavit by the Appellant/Applicant

9. On 13th October, 2021, the Appellant/Applicant were granted leave to file a Supplementary Affidavit. On 15th October, 2021, the Appellant/Applicant filed a 27 Paragraphed Supplementary Affidavit sworn by SALIM VERJE and dated the same date. He attached two (2) annexures marked "SV – 1 & 2". He deposed that the court had unfettered discretion and an overriding duty to promote justice and from this duty there arise power of stay. He held that the power of the intended Appeal was to preserve the subject matter in dispute so that the Appellant's rights are safeguarded. He averred that the Appellant/Applicant was not keen in frustrating the Respondent but only seeking justice where the substratum of the case was a breach of a lease agreement by the Respondents and the application was brought without undue or inordinate delay.

10. He deposed that there was an extracted decree which amounted to exposing the Appellant/Applicant to eminent danger of execution on the issues of failing to attach a memorandum of Appeal it held that it had filed a Notice of Appeal which was intended to notify parties and the court that it intended to appeal the decision and one required 60 days to file a Memo of Appeal thereafter. He held that the certificate of lease was from 1.4.1976 for 25 years expiring on 31.3.2001 and which was not issued with another Certificate of lease to expire 31.3.2026. He was not a trespasser as alleged. It continued paying rates on the suit property. The property is not dilapidated as alleged. He reiterated that the Appellant/Applicant had lived there for over 35 years with his family and to evict him they would suffer loss and economic cultural and emotional loss as they depended of the fish industry for the past 85 years.

11. He reiterated that he had fully met all the preconditions and requirements to be granted stay of execution pending the hearing of the appeal and hence its application was meritorious.

The Submissions

12. On 13th October, 2021 when all the parties were present in court, directions were taken to the effect that they dispose off the said Notice of Motion application dated 28th September, 2021, 2021 by way of written submission. All the parties abided and a ruling date for 6th December, 2021 was reserved.

A. The Submissions by the Appellant/Applicant

13. On 3rd November, 2021, the Learned Counsel to the Appellant/Applicant, the firm of Messrs. Khaminwa & Khaminwa Advocates filed their written submissions dated 2nd November, 2021 in support of the application. The Learned Counsel submitted that the grant of stay of execution pending appeal was discretionary dependent on the circumstances of each case. Counsel argued that the application had been brought without delay, having been filed on 6th July 2021, on the day the stay of execution was meant to lapse.

14. They framed and relied on several issues which they urged court to take into considerations. They submitted that there was need to be granted stay of the Chief Magistrate's decree dated 28th November, 2019 – an order by court to have the Appellant/Applicant evicted from the suit property pending hearing of the appeal as if not granted the appeal would be declared nugatory and they will suffer substantially as a family where they had lived since the year 1935 and built a first historic fish factory in Kenya. He held a damage claim of breach of contract for Kenya Shillings Twenty Million (Kshs. 20,000,000/=). They relied on the decision of *Equity Bank Limited & Another – Versus – Robert Chesang* [2016] eKLR

15. The Learned Counsel submitted that they filed the application dated 28th September, 2021 for stay without unreasonable delay as from the date of judgment which demonstrate a sign of good faith and that it did not intend to delay and/or frustrate the Respondent. The Notice

of Appeal was filed on 27th September, 2021. Here they relied on the decision of “*Re Global Tours & Travels Limited HCWC No. 43 of 2000*”. They submitted that since the Respondent was a registered government Corporate there was no evidence to show hardship/ damages it would suffer in the event stay was granted and there was no order to furnish security for costs for the appeal. It had not shown evidence why it wanted the property back.

16. The Learned Counsel argued that failure to attach a Memorandum of Appeal was not fatal at all and hence mis-concerned for reasons that they had already filed a Notice of Appeal notifying all the persons and Court of its intention to prefer an appeal. Additionally, they cited the Provisions of Rule 82 of the Appellate Court of Appeal Rules 2010 which held that upon filing of the Notice of Appeal the Memorandum of Appeal could be lodged within 60 days of filing of the Appeal.

17. They argued after all that an arguable Appeal was not one which ought necessarily succeed but one which out to be argued fully before the court and one which was not frivolous and whether the appeal would be rendered nugatory. They relied on several decisions to buttress on these points. There were:- *Reliance Bank Limited –versus- Norlake Investment Limited (2002) IEA, 227 Page 232, speaker of the National Assembly –versus_ Karume Civil Appeal No. Nai.92 of 1992;*

18. On whether security for costs was for due performance of decree from the provisions of Order 42 Rule 6 of Civil Procedure Rules they submitted it was discretionally. The contested that the decree by the Chief Magistrate Court was irregular and court was not bound to impose condition on such decree. There has never been any claim on the rent arrears made by the Respondent showing lacking of interest on their part and hence could not be seen to be demanding for security for costs now.

19. They relied on the decision of *Civil appeal No. 24 of 2018 Ezekiel Mule Musembi –versus- H. Young & Company (E.A.) Limited & David Morton Silverstan – Versus - Atsango Chesoni – Civil Appeal No. 189 of 2001 (2001) IKLR 267*. In the long run they urged court to allow their application with costs.

B. The Submissions by the Respondent

20. On 17th November, 2021, the Advocates for the Respondents, the firm of AB Patel & Patel Company Advocates filed their written submissions dated the same date in opposing the application. The Learned Counsel’s main argument was that the Appellant/Applicant had not established, the requirements stipulated on provision under Order 42 Rule 6 of the Civil Procedure Rules for granting of the orders sought. They submitted that although the Appellant/Applicant on 13.10.2021 were granted leave to file supplementary Affidavit, to strictly respond to the issues raised in the Respondent’s Replying Affidavit dated 12th October, 2021 was noncompliance and proceeded to introduce new issues in their supplementary affidavit. These were:-

- (a) The introduction of a new Certificate of Lease from 1st April, 2001 for another 25 years.
- (b) Exhibiting a statement from the Country Government insinuating that it paid rates on the suit property being an indication that the Respondent had allowed it to occupy the suit premises.
- (c) Exhibiting the Judgment and copies of the proceedings.
- (d) Issues on the new lease.
- (e) Introduction of photographs contrary to the Provisions of Section 106 (b) of the evidence Act Cap 80 for and/or without producing of photographs evidence to prove their authenticity of not only the photographs but also the process of their generation to satisfy the court that both the process and outcome – source, mode of storage and maker were free from any form of manipulation.

21. The Learned Counsel submitted that the Appellant had failed to meet the threshold on being granted stay of execution under Order 42 (6) of the Civil Procedure Rules being to demonstrate:-

- (a) Substantial loss may result to the application unless the order was made.
- (b) the application was made without unreasonable delay and
- (c) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

They relied on several decisions being *Masisi Mwita –versus- Damaris Wanjiku Njeri 920160 eKLR, Philip Kiprotich Tuitoek –versus- Edna Jebilooth Kiplagat & 2 Others (2021) eKLR*

They held that the Appellant/Applicant failed to demonstrate by way of empirical or documentary evidence the kind of loss it would suffer in the likely event the order for stay was not granted. They cited the cases of *Charles Wahome Gethu-versus- Angela Wairimu Gethu (2008) eKLR holding- It is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them”*

22. They held that after the lease expired on 31st March, 2001 they decided to close down shop and locked down the premises instead of vacating it make it clear from the action that followed that the suit premises would not benefit the Respondent in any way – it now lay wasted and dilapidated at the detriment of the Respondent as the owner and this shall remain so if the orders sought are granted.

The Learned Counsel submitted that the Appellant did not file a Memorandum of Appeal nor a draft one to demonstrate it has an arguable appeal with chances of success apart from just filing a Notice of Appeal whose purpose was only to demonstrate and/or confirm the intent of the Appellant/Applicant to move the Court of Appeal on appeal against the decision of the Superior Court. Hence there is nothing to demonstrate it has an arguable appeal with high chances of success or satisfy the pre-condition set in Order 42 (b) of the Civil Procedure Rules to be granted stay. They relied on the decision of:- **“Benedict Ojou Juma & 10 Others – Versus - A.J. Pereira & Sons Limited (2016) eKLR and Alice Wambui Nganga –versus- John Ngure Kahoro (2021) eKLR.**

The Learned Counsel although admit the application was filed timeously but hold that no court of law can grant a stay based on establishment of one limb out of the three dictated under the provisions of order 42 Rule 6 of the Civil Procedure Rules.

“In the Benedict Ojou’s Case The Court of Appeal emphasized in order that the Application may succeed, he must demonstrate both limbs, Demonstrating one limb and failing on demonstrating the other would lead to failure of the application”

23. On the security for costs the Learned Counsels argued that the Appellant/Application has failed to offer any security as required by law. It was incumbent upon him to show commitment by providing security of costs. But he has failed to proposed or offer any security for the intended and/or appeal for consideration by this court which was a clear indication it only wanted to frustrate the Respondent from taking possession of the suit property which had been left abandoned and unattended to for the last 25 years and counting nor deposited the mesne profits as ordered by the subordinate court. The upshot of all this they urged court to dismiss the application by the Appellant/Applicant with costs.

ANALYSIS AND DETERMINATION.

24. 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 with regard to the Notice of Motion application dated 28th September, 2021 by the Appellant/Applicant.

In order to arrive at an informed decision, I have framed the following salient issues for consideration. These are:-

a) Whether the Appellant/Applicant have fulfilled the fundamental requirements of being granted stay of execution of the Judgement of this Court delivered on the 27th September, 2021 as set out under Order 42 rule 6 (1) & (6) of the Civil Procedure Rules.

b) Who will bear the costs of the said Notice of Motion application.

Issue No. a). Whether the Defendants/Applicants have fulfilled the fundamental requirements of being granted stay of execution of the Judgement of this Court delivered on the 27th September, 2021 as set out under Order 42 rule 6 (1) & (6) of the Civil Procedure Rules.

25. Before proceeding further, it is imperative that I spell out the facts of this case briefly. From the pleadings, I have noted that there existed a Lease agreement between the Appellant/Applicant and the Respondent duly executed on 4th February, 1982 for the suit property with all the terms and conditions stipulated thereof. It was for a term duration of twenty five (25) years starting from 1st March, 1976 and expiring on 31st March, 2001. According to Clause 3 (e) of the said Lease agreement, the Lessor had a right at the expiry of every five years of the term to raise the rent to a figure equivalent to one twentieth part of the unimproved value of the land.

26. However, it was the contention of the Appellant/Applicant that the Respondent had wrongfully increased the rent payable and purportedly terminated the lease agreement leading to the interruption of his peaceful and quiet possession. A suit was instituted before the trial court through a Complaint by the Appellant/Applicant. The Respondent filed a Defence and a Counter Claim. Upon its deliberation, on 28th November, 2019 it delivered its Judgment in favour of the Respondent directing that the Appellant/Applicant yield vacant possession of the suit property to the Respondent within ninety (90) days from the date of the said Judgment and to pay rent arrears a sum of Kenya Shillings (Kshs. 719, 000.00) and Kshs. 84, 600.00 per month from April, 2003 until payment was made in full with interest at court’s rate. Being dissatisfied by the said Judgment, the Appellant/Applicant filed a Memorandum of Appeal on 3rd December, 2019 at the High Court but on 5th November, 2020, it was later on transferred to this court. On the 27th September, 2021, this court delivered its Judgment arising from the said appeal. It is on basis of this decision that the Appellant/Applicant now intends to prefer a second appeal before the Court of Appeal and hence filed the instant application.

27. 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.

28. 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 Court’s 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,

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.*

29. In the case of *James Wangalwa & another – Vs - Agnes Naliaka Cheseto (2012)eKLR*, where substantial loss was discussed ‘... *the applicant must establish other factors which show that execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as a successful part in the appeal... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.’*

30. 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.

31. 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 emphasis 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.

32. 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.

In Victory Constructions – Vs - BM (a minor suing through next friend one PMM) (2019)eKLR, Odunga J discussed what Court ought to consider when faced by an application for stay pending appeal, he stated that: ‘It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principle of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that is the business of the Court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice, the Court in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.’

33. The Appellant/Applicant argue that the effect of the judgement would be they would be greatly prejudiced and suffer loss if the matter followed that route and their right to a fair trial as enshrined Under Article 50 of the Constitution of Kenya would be infringed. They informed court that they had lived on the suit property since the year 1935 by their grandfather where they had started the first historical fish business in Kenya and which the Appellant/Applicant inherited from his father being a family business but under different names. They urged Court to grant the said orders as the application had been brought in good faith. The Respondents on the other hand, have claimed that the Appellant/Applicant would not suffer substantial loss in that it had failed to meet the criteria for the grant of an order of stay of execution. They failed to have any grounds of appeal as they had not attached a Memorandum of Appeal and that if they were not granted the orders the appeal would be declared nugatory hence no arguable appeal with triable issues. According to the Respondent, the Appellant/Applicant had continued to hold over the suit property despite not being a tenant and had consequently failed to demonstrate the prejudice and the manner in which it would suffer loss given the circumstances. Indeed, they are still in occupation of the suit premises. They held that on the admission by the Appellant/Applicant upon the expiration of the lease on 31st March, 2005 they chose to close down the premises instead of vacating from it. Having closed down the shop over 20 years ago the premises had been dilapidated and wasted at the expense of the Respondent as a property owner who can not enjoy the fruits of its judgement after being court since the 2003 and counting. Finally, that the Appellant/Applicant had failed to propose and/or offer any security for costs for the intended and/or proposed appeal for consideration by this court. The deponent urged Court to dismiss the application as the Applicants had not proved the grounds required for a grant of stay of execution.

34. In my view, the Appellant/Applicant have not established that they stand to suffer substantial loss if the application is not allowed. They have not demonstrated with any empirical or tangible documentary evidence that they will suffer the said substantial loss. From the pleadings, it is clear the tenancy lease expired a while ago and the best they would do is to vacate the suit premises to allow the Respondent take over their own property and utilize their proprietary right over the same. It is not sufficient to merely stick onto a property which remains closed for business as it is of no value to both parties as we speak. **In Samvir Trustee Limited – Versu - Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997, Warsame J (as he then was), expressed himself as follows: ‘for the applicant to obtain a stay of execution, it must satisfy the Court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the Court will not consider assertions of substantial loss on the face value but the Court in exercising its discretion would be guided by adequate and proper evidence of substantial loss.’**

35. With regard to security for costs, I agree with the Appellant/Applicant that the powers of court to order what security the Appellant/Applicant is discretionary, as it is the one to which orders what ought to be furnished under Order 42 Rule 6 (2) of the Civil Procedure Rules, it would have been a good gesture and a sign of good faith if the Appellant/Applicant would have offered security for costs that would reflect their readiness and commitment to offer security. But that never happened. It has not proposed or offered any security for the intended appeal for consideration by this Honorable Court which I must hold its intended to frustrate the Respondent from enjoying its fruits of the Judgement and taking over possession of its property abandoned over 20 years ago. I am neither convinced nor persuaded that a mere statement by the Appellant/Applicant in their written Submissions to the effect that “.....the contested decree is irregular and the court is not bound to impose conditions on such decree.....” is a tangible security proposition. Clearly, they have failed to show any commitment onto this matter.

36. On the third issue, I do agree that this application was brought without undue delay as it was filed on 28th September, 2021 after the Judgment was delivered by this court on 27th September, 2021 only a day. Nonetheless, in the instant application, I am completely unsatisfied that the Appellant/Applicant have satisfied the conditioned melted out by Order 42 Rule 6. I associated myself with the findings of **Macharia T/A Macharia & Co Advocates – Vs - East African Standard (No. 2) (2002) KLR 63, it was held:-**

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to the principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled.’

a. Who will bear the costs of the said Notice of Motion application.

The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. In this case, as Court finds that the Appellant/Applicant have failed to fulfill the conditions set out under Order 42 Rule 6 (2) and (6) of the Procedure, this application shall be deemed to have been dismissed with costs awarded to the Respondent.

DETERMINATION

From the foregoing, therefore, and for avoidance of any doubts, I order:-

1. THAT the notice of motion application dated 27th September, 2021 by the Appellant/Applicant is bereft of any merit and the same is and hereby dismissed.

2. THAT the costs of the application to be borne by the Appellant/Applicant.

IT IS SO ORDERED.

RULING IS DATED, SIGNED and DELIVERED at MOMBASA VIRTUALLY THIS 6TH DAY OF DECEMBER 2021.

JUSTICE L.L NAIKUNI

JUDGE

ENVIRONMENT AND LAND COURT, MOMBASA

In the presence of:-

M/S. YUMNA – THE COURT ASSISTANT

MR. OMOLLO HOLDING BRIEF FOR DR. KHAMINWA ADVOCATES FOR THE APPELLANT/APPLICANT;

MR. ONDEGO ADVOCATE FOR THE RESPONDENT