



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NO. 115 OF 2019

**IN THE MATTER OF THE ESTATE OF NZOLOVE KISUKE ALIAS DAUDI NZOLOVE
KISUKE (DECEASED)**

JOHN MAKAU NZOLOVE.....APPELLANT/APPLICANT

-VERSUS-

JOHN KITHUKA DAVID NZOLOVE.....1ST RESPONDENT

BERNARD MUSEMBI NZOLOBE.....2ND RESPONDENT

JOSEPH JOMO DAUD.....3RD RESPONDENT

RULING

1. There are two applications in this matter. The first is the application dated 9th September, 2019 seeking extension of time to file the appeal and for an order that the appeal filed be deemed as duly filed. The second is dated 8th July, 2020, seeking stay of execution of the judgment in Kangundo Senior Principal Magistrate Court Succession Cause number 49 of 2017 pending hearing and determination of the appeal herein.

2. The decision sought to be appealed against was made on 8th August, 2019 while the application seeking to enlarge time as well as the appeal itself were filed on 9th September, 2019, some 32 days later.

3. The reason for the later filing as given by the applicant was that though the memorandum of appeal was prepared within time, the documents were handed over to a clerk in the firm of the advocates for the applicant on 4th September, for filing but the said clerk failed to show up for work on 5th and 6th September, 2019 together with the said documents and it was not until the evening of 6th September, 2019 that it was discovered that the said documents had in fact been filed away instead of being filed in court. The applicant's position is therefore that the delay in filing the appeal was not intentional or wilful and that mistake ought not to be visited on the applicant.

4. In response to the application, the Respondents averred that the said application is an afterthought since the Applicant did not indicate his intention to appeal earlier on and that the status quo has since changed as the Respondent has already adopted the decision sought to be appealed against and has instructed a surveyor to commence the process of subdivision. It was his position that the appeal herein does not disclose any reasonable grounds to warrant the admission of the appeal.

5. The second application on the other hand is predicated on grounds that:

- a) **THAT the Applicant filed the memorandum of appeal against the entire judgment of Kangundo Senior Principal Magistrate Court Succession Cause number 49 of 2017.**
- b) **THAT the judgment under challenge relates to the distribution of the assets of the estate of the deceased wherein the trial court issued two conflicting certificates of confirmation of the grant.**
- c) **THAT the trial court in ruling on the distribution of the assets of the estate failed to consider where each beneficiary and their family lives and the judgment therefore has uprooted the Applicant's family from the land that they considered home.**
- d) **THAT some of the assets of the estate which are under the control and use by the Respondents were left out without being distributed despite the fact that they belong to the estate.**
- e) **THAT the Respondents are the processing of evicting and or preventing the applicant and members of his family from the sections of the property which they occupy and or have been using.**
- f) **THAT the Respondents are in the processing of disposing off the assets of the estate and will thus render this appeal academic if the orders sought are not granted.**
- g) **THAT the Respondents have prevented the Applicant from utilizing the assets of the estate.**
- h) **That owing to the foregoing Appellant has lodged an appeal against the entire judgment.**
- i) **THAT the said Appeal is strong on merits.**
- j) **THAT if the Stay pending the Appeal herein is not granted the Appellant stands to suffer irreparable loss.**
- k) **THAT the Application herein has been brought without delay.**
- l) **THAT the Applicant is ready, able and willing to comply with any directions the court is going to court.**
- m) **THAT it is only fair and in the wider interest of justice the orders herein be granted.**
- n) **THAT no prejudice will be suffered by the Respondent.**

6. It was deposed that the judgment which the applicant challenges relates to the distribution of the assets of the estate of the deceased wherein the trial court issued two conflicting certificates of confirmation of the grant. It was averred that the trial court in ruling on the distribution of the assets of the estate failed to consider where each beneficiary and their family lives and the judgment therefore has uprooted the applicant's family from the land that he considered home.

7. According to the applicant, some of the assets of the estate which are under the control and use by the Respondents were left out without being distributed despite the fact that they belong to the estate. He reiterated that the Respondents are in the process of evicting him and or preventing him and his members from utilizing the sections of the property which they occupy and or have been using.

8. The applicant lamented that the Respondents have prevented him from using any of the assets of the estate and that he has always been threatened with police sanctions and as such he feels disinherited.

9. The applicant denied the allegation that it was his advocate who drafted or misled the trial court to issue the certificate of confirmation of grant and insisted that the certificate of confirmation of grant that he had was prepared, signed stamped and sealed and issued by the trial court. He stated that he was unaware that the certificate of confirmation that he had was ever cancelled and that there has never been an application or even any form of invitation to himself or his advocates on record or ever at all informing them of the court's intention to have the said grant. He however later learnt from the Respondents that they had been issued with a certificate of confirmation of grant that substantially differed from the one that he had been issued.

10. He averred that he was aware that simultaneously with filing the memorandum of appeal to signal that the journey in the matter was not over, his advocates filed an application dated 9th September 2019 seeking leave to appeal out of time and to have the memorandum already filed deemed as properly on record. Though the parties exchanged submissions on the said application, the same is yet to be determined as it was affected by the Covid 19 when the courts were shut down. Owing to the Respondents action to have members of his family and himself evicted from the parcels of land where they have occupied he instructed his advocates to file the current application to seek relief from court.

11. The applicant denied that he was in contempt of the court and reiterated that the Respondents have used all means possible to have him evicted and barred from utilizing the portions of land that he occupies.

12. The applicant complained that the Respondents are in the process of disposing off the assets of the estate especially the one occupied by his family and will thus render this appeal academic if the orders sought are not granted.

13. It was the Applicant's position that his appeal is merited and has every likelihood of success hence the Court should grant the orders sought. In his view, the Respondents will not suffer any prejudice if the orders of stay are granted pending the hearing and determination of my appeal.

14. In the submissions filed on behalf of the Applicant, it was contended that the Respondents are in the process of disposing some of the assets which are the subject matter of this appeal, assertions which have not been controverted hence the Applicant is apprehensive that unless the Court intervenes the subject of the intended appeal shall be rendered nugatory. Further, if the orders sought are not granted, the Respondents shall proceed with the planned eviction and sell off some of the assets of the estate to the detriment of the Applicant and thus by the time the appeal is determined, the subject matter therefore shall have been distorted and shall only be useful for academic purposes only and the Applicant's shall have been defeated.

15. As for the existence of the appeal the Applicant insisted it is evident that the Applicant filed a memorandum of appeal and simultaneously therewith an application seeking leave to appeal admitted out of time and to have the memorandum of appeal admitted.

16. According to the Applicant, he is ready and willing to comply with any directions that the court will give and since all the proceedings in the trial court have been typed, he is now in the process of compiling the record of appeal and shall forthwith.

17. In support of his submissions the Applicant relied on the decision of the Court of Appeal in **Philip Keipto Chemwolo & Another vs. Augustine Kubende [1986] KLR 495** and contended that no prejudice will be suffered by the Respondents if the orders sought in both applications are allowed to permit the Applicant to exercise a precious right of appeal and preserve the subject matter of the appeal thereof. According to the Applicant, while the statutory timelines are certainly important to ensure the due and efficient administration of justice, they are not, in themselves a core substantive value in the same sense, for example that the Constitution and the ***Elections Act*** place on the timelines for filling Elections Petitions.

18. The Applicant submitted that the Application herein has been made without undue delay and has been

occasioned by the events that unfolded after the delivery of the judgment i.e. the Respondents actions and activities.

19. On the issue of whether substantial loss would be occasioned should stay not be granted, it was submitted that since the subject is distribution and transmission of land belonging to a deceased person to his heirs/beneficiaries, the said beneficiaries would be at liberty to deal with the land as they deem fit. There is therefore a real danger that should the appeal go in favour of the Applicant, there might be no land for the court to distribute to the Applicant or any parties to the matter and that the Respondent has not demonstrated that he and the other beneficiaries are persons of means who would be in a position to compensate the Applicant should his appeal be successful. The Court was urged to adopt the principle of maintenance of the status quo and reliance was placed on the case of **Mugah vs. Kunga (1988) KLR** and **Hamisi Salim Mwaluimo vs. Julius Wambugu Mombasa H.C Civil Appeal Number 9 of 2003.**

20. It was further submitted that where the threat of eviction is real, a party stands to suffer substantial loss if he was to be evicted from a property which is the subject matter of an appeal and the applicant relied on the holding in the case of **Mukuma vs. Abuoga [1988] KLR 645.**

21. The applicant submitted that in the circumstances and facts of this case, substantial loss is likely to be visited on the Applicants should a stay of execution not be granted.

22. Regarding issue of security, it was submitted that the rationale for this requirement is easy to see. A successful litigant is entitled to the fruits of his judgment and if he is kept away from these, there must be a guarantee of due performance of the decree or order. In monetary decrees, the issue of security is always straightforward and invariably involves order for deposit of the Decretal sum or a substantial party thereof. Looking at the nature of the impugned judgment, it was submitted that to cushion the Respondents as well as the Appellant is to have an order of *status quo* until the appeal is heard and determined.

23. In response to the application the Respondents averred that following the judgement issued in Succession Cause No. 49 of 2017 delivered on 8th August, 2019, the applicant drafted a certificate of grant which captured the wrong proposition and which was meant to mislead the Court. Subsequently, the said Grant dated 22nd August, 2019 was cancelled by the Court and a fresh Grant issued dated 2nd September, 2019 capturing the right position regarding the distribution of the estate of the deceased. They therefore averred that the cancelled grant cannot be relied upon and that the only document confirming the true position regarding the possession and occupation of the Estate of the deceased is the rectified grant. It was averred that it was the applicant's threat to evict the Respondents from the property known as Kangundo/Mbilini/695 that prompted the Respondents to confirm from the court records what had transpired and it was then that it was discovered that the Applicant had misled the Court.

24. According to the Respondents there is no appeal in existence and that in fact what is there is an application seeking leave to appeal which application is still pending hence this application is a tactic meant to delay the cause of justice.

25. The Respondent averred that the Applicant herein has been in contempt of Court orders issued by the lower court prompting them to cite him as the applicant has been destroying and wilfully cutting trees on their portions of properties in total disregard of the law. Further, the applicant has been using his sons to disobey the Court orders of the 8th August, 2019 hence this application is meant to defeat justice by delaying the said application for contempt. It was therefore their position that the Applicants are before this Court with unclean hands and is undeserving of the orders of this Court.

26. According to the Respondents, no one has threatened to evict the Applicant from his portions but it is the applicant who has encroached onto their portions which they have possessed. The Court was therefore urged to dismiss the application.

27. In their submissions, the Respondent reiterated the foregoing and averred that in the event that the Court is inclined towards granting the stay it should maintain the status quo existing before the

proceedings and those who have encroached and trespassed onto the portions belonging to the Respondent be directed to vacate the same forthwith.

Determination

28. I have considered the application, the respective affidavits and the submissions filed as well as the authorities relied upon.

29. Section 79G of the *Civil Procedure Act* provides that:

Every appeal from a subordinate 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:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

30. It Section 79G aforesaid employs the use of the phrase “an appeal may be admitted out of time” as opposed to “time may be extended to lodge an appeal out of time”. However, even in cases where the law uses the latter phraseology, it has been held that it is prudent to regularise the default before seeking to extend time. This was the position in **Mugo & Others vs. Wanjiru & Anor [1970] EA 482** where it was held that:

“Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”

31. In this case however the law expressly provides that an appeal may be admitted out of time. That this is so was affirmed by **Emukule, J** in **Gerald M’limbine vs. Joseph Kangangi [2009] eKLR**, in which he expressed himself as follows:

“My understanding of the proviso to Section 79G is that an applicant seeking an appeal to be admitted out of time must in effect file such an appeal and at the same time seek the court’s leave to have such an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court’s process which under Section 79B says.....”

32. It therefore follows that the mere fact that the application for enlargement of time has been made simultaneously with the filing of the memorandum of appeal does not render the application incompetent.

33. Under the proviso to section 79G of the *Civil Procedure Act*, an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so. This must be so since it was held in **Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633** that there is no difference between the words “sufficient cause” and “good cause”. It was therefore held in **Daphne Parry vs. Murray Alexander Carson [1963] EA 546** that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

34. As to the principles to be considered in exercising the discretion whether or not to enlarge time in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

35. As regards the reason for the delay, it was contended that the clerk in the law firm representing the applicant who was given the documents to file took a “French Leave” without filing the same. A similar situation arose in **Charles Karuri Mbutu vs. Samuel Muhoro Civil Application No. Nai. 51 of 1999**, where it was contended that the clerk of counsel for the applicant charged with responsibility of lodging the record of appeal left the employment of counsel for the applicant without warning and without lodging the requisite record. **Gicheru, JA** (as he then was) found that that was a sufficient reason for extension of time.

36. **Waki, JA** in **Seventh Day Adventist Church East Africa Ltd. & Another vs. M/S Masosa Construction Company Civil Application No. Nai. 349 of 2005** held that:

“As the discretion to extend time is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant; the period of delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors...In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves...The ruling striking out the appeal is not only necessary for exhibiting to the application for extension of time but also for consultations between the applicant’s counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay... Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle.”

37. In this case, the delay in filing the appeal was only some two days. In **Concord Insurance Company Limited vs. Susan Nyambura Hinga Civil Application No. Nai 251 of 2002** it was held that a delay for 28 days is not inordinate for purposes of an application for extension of time to appeal.

38. The intended appeal seeks to challenge a decision of the trial court in distributing the estate of the deceased. The contention is that the trial court ought to have taken into consideration the portions of the properties in occupation of the respective beneficiaries. In my view considering the circumstances of this case and as there is a plausible reason for the delay in filing the appeal, it is in the interest of justice that the applicant be granted a chance to argue his appeal on merits. The fact that he did not file his appeal within the prescribed time should not be impediment to his doing so. Prejudice if any occasioned to the Respondent can, no doubt be compensated in costs. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine. See **Waljee’s (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188**.

39. Accordingly, I find the application merited. Time is hereby extended to the applicant to file his appeal and this appeal is hereby deemed to have been filed within time.

40. As regards the stay, the principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the **Civil Procedure Rules** which provides as follows:

No order for stay of execution shall be made under subrule

(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; and

(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.

41. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the **Civil Procedure Rules** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the **Civil Procedure Act**, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

42. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the **Civil Procedure Act** are attained. 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 and 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 principles 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 it 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. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589**. This was the position of **Warsame, J** (as he then was) in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where he expressed himself as hereunder:

"Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a

fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...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...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

43. Therefore, this Court must guard against any action or inaction whose effect may remove pith of this litigation and leave only a shell as was appreciated by the Court of Appeal position in **Dr Alfred Mutua vs. Ethics & Anti-corruption Commission & Others Civil Application No. Nai. 31 of 2016** in which it cited the Nigerian Court of Appeal decision of **Olusi & Another vs. Abanobi & Others [suit No. CA/B/309/2008]** that:

“It is an affront to the rule of law to... render nugatory an order of Court whether real or anticipatory. Furthermore...parties who have submitted themselves to the equitable jurisdiction of courts must act within the dictates of equity.”

44. On the first principle, **Platt, Ag.JA** (as he then was) in **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, at page 416 expressed himself as follows:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented.”

45. On the part of **Gachuhi, Ag.JA** (as he then was) at 417 held:

“In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement.”

46. The general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his 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. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”..

47. In this case, the appeal challenges the manner in which the deceased’s estate was distributed. The issue is clearly not a frivolous one. As rightly held in **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR (Civil Application 31 of 2012)** an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court and one which is not frivolous and one *bona fide* issue suffices for the purposes of stay pending the hearing of an appeal.

48. As to the issue of delay I am satisfied that in the circumstances of this case where the issue is that of possession, the applicant cannot be said to have been guilty of inordinate delay.

49. As to whether substantial loss will be occasioned to the applicant if the stay sought to be not granted, the Court of Appeal in **Nyals (K) Ltd. vs. United Housing Estate Ltd. Civil Application No. 129 of 1995** held that where the subject matter is simply a right to possess it is difficult to see how this can be preserved unless the *status quo* is maintained pending the determination of the appeal.

50. It is in that light that I adopt the position in the case of **Mugah vs. Kunga (1988) KLR**, where the Court of Appeal stated:

“The practice of the court of appeal in the case of land which is a sensitive issue is that the parties should be allowed to come to the court to have the issues involved in their dispute determined by a court of last resort. For the parties to come to this court, the court has to consider whether the status quo should be maintained pending the hearing of the appeal failing which the appeal if successful will be rendered nugatory. The court was of the view that the status quo be maintained until the appeal was heard and determined.”

51. I also associate myself with the decision in **Hamisi Salim Mwaluimo vs. Julius Wambugu Mombasa H.C Civil Appeal Number 9 of 2003**, where the Court held:

“It is settled law that in possession suits, a stay ought to be granted as otherwise a successful appeal will be rendered nugatory. In this case, the appellant has gone on to construct a house on the said land which may lead to its demolition if execution proceeds. As to security, the Respondent is in possession of the title document and therefore the Applicant cannot transfer the same. However, I have noted that the issue of ownership was raised in the main trial. After considering all the arguments, I will grant the application on condition that the applicant maintains the land and building in their current state. There shall be no alteration in any manner of the same until the appeal is heard.”

52. In this case, taking into consideration the fact that the Court should always opt for the lower rather than the higher risk of injustice and particularly the fact that the interests of children are at stake, it is my view that a stay ought to be granted. The effect of the said stay would be to maintain the status quo as it were before decision being appealed against was made.

53. It is so ordered.

Ruling read, signed and delivered in open court at Machakos this 2nd day of November, 2020

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Tum for the Respondent

Mr Nzeu for Mr Nzioka for the Appellants

CA Geoffrey