



Erick Kipkemboi Barng’etuny v Rubis Energy Kenya Plc (Formerly Kenya Oil Company Limited) (Environment and Land Case 77 of 2007) [2025] KEELC 7808 (KLR) (13 November 2025) (Ruling)

Neutral citation: [2025] KEELC 7808 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND CASE 77 OF 2007
CK YANO, J
NOVEMBER 13, 2025**

BETWEEN

ERICK KIPKEMBOI BARNG’ETUNY PLAINTIFF

AND

RUBIS ENERGY KENYA PLC (FORMERLY KENYA OIL COMPANY LIMITED) DEFENDANT

RULING

1. The Defendant/Applicant filed the Notice of Motion dated 9th April, 2025 seeking for orders that:-
 - a. Spent
 - b. Spent
 - c. Pending hearing and determination of the Applicant’s intended appeal by the Court of Appeal, this Honourable Court be and is hereby pleased to stay the execution of its judgment delivered on 26th March 2025 together with the consequential Orders and Decree; and
 - d. Costs of this Application be provided for.
2. The Application is based on the grounds set out on the face of the Motion and the Supporting Affidavit of even date sworn by Nelson Owiye, the Applicant’s Retail Development Manager. Mr. Owiye deponed that the Plaintiff/Respondent commenced this suit being Eldoret HCC No. 77 of 2007, against the Defendant/Applicant. The suit was later transferred to the ELC and given the current number. The Defendant filed a Defence and counterclaim, but on 26th March, 2025 the court delivered its judgment in favour of the Plaintiff.
3. Mr. Owiye deponed that the Applicant being dissatisfied, has since lodged a Notice of Appeal dated 2nd April, 2025 and on the same date applied for a certified copy of typed proceedings. He acknowledged



that on the date of delivery of judgment, the court gave the Applicant 30 days stay of execution which lapsed on 25th April, 2025. He also claimed that the Applicant has occupied the suit land herein, Eldoret Municipality Block 7/111, in the name of the Respondent's deceased father for 40 years since 1980, running a service station thereon and has substantially developed it. Further, that the Applicant eventually purchased the land from the Respondent's father and paid the agreed Kshs. 1,650,000/- in full on 12th October, 1992.

4. Mr. Owiye deponed that the Applicant has thus demonstrated a long-term stake as well as a legal and equitable claim on the suit land. He claimed that Applicant's investments will be lost if stay is not granted and it is evicted. He averred that the Applicant's business will suffer major disruption and the livelihoods of its workers will also be severely impacted, alongside their dependants and the local economy. He claimed that the Applicant has a viable appeal which will be rendered nugatory if the stay is not granted, and its right to appeal will be curtailed. He added that the Application herein had been brought without unreasonable delay, and that it is in the public interest as well as the interests of justice that the application is allowed.
5. The Application was served on the Respondent who opposed it through his Replying Affidavit dated 5th May, 2025. According to the Respondent, the Applicant has no right to a stay of execution due to its intention to file an appeal, but conversely, he has a recognised right to enjoy the fruits of his judgment which the Applicant should honour in full. He averred that a valuation was done pursuant to the judgment and the report showing the rental assessment duly filed. He deponed that there are no good reasons shown why the Applicant's appeal will be rendered nugatory if stay is not granted, and accused the Applicant of being a trespasser who denied him his land.
6. The Respondent averred that the application was not made in good faith as the Applicant had not made any sound proposal or offered security as a condition for the stay pending appeal. He averred that the application was an afterthought and that it would prejudice his right to enjoy his judgment. The Respondent averred that the Applicant had used his premises for a long period without paying rent. The Respondent asserted that the right to appeal has no automatic corresponding right to a stay of execution.
7. The Respondent claimed that the Application lacks substratum and exhibits no just cause to warrant the grant of stay, but is only meant to defeat, frustrate and abuse the course of justice. He urged the Court to dismiss this Application with costs, but contended that if the Court be inclined to grant the stay, then it should order the Applicant to deposit the entire amount of the accrued rent being KShs. 36,549,722/-. Further, that the monthly rent as well as any subsequent rent be deposited in a joint interest earning account in the names of both advocates until the Appeal is determined.
8. Reacting to the Respondent's reply, the Applicant filed a Supplementary Affidavit sworn by Nelson Owiye on 7th May, 2025. He conceded that the right of appeal does not operate as an automatic stay, but insisted that the present application is properly before court. He claimed that contrary to the 30 day stay granted by the court, the Respondent went behind the Applicant's back and wrote to the Chairman, CISK to appoint a valuer to conduct the valuation ordered by the court. That as a result, Victor Mairura Bosire of Vic Scott Appraisal Limited was appointed without their knowledge, who claims to have undertaken a valuation on 10th April, 2025 and produced a report dated 16th April, 2025.
9. Mr. Owiye claimed that the valuation had not been done as at 9th April, 2025 when this court issued interim orders. He further, averred that the actions of Respondent, the Chairman CISK and the Valuer had no lawful or procedural basis, and he challenged their validity, as well as that of their outcome. He argued that the appeal will be rendered nugatory, especially considering the Respondent's demonstrated haste and disregard of court orders. He accused the Respondent of acting in bad faith,



malice and clear intent to circumvent due process and the authority of the court. He claimed that the matter raised weighty legal issues that warrant grant of the stay order, and asked the court to allow the application in its entirety.

Submissions:

10. The court directed that the application be canvassed by way of written submissions. The Defendant/Applicant filed its submissions dated 21st August, 2025. The Respondent's Submissions are dated 9th October, 2025.

The Applicant's Submissions;

11. Counsel for the Applicant submitted that the Applicant has fully satisfied the criteria necessary for grant of a stay of execution pending appeal, as stipulated by Order 42 Rule 6(2) of the Civil Procedure Rules. On substantial loss, the Applicant submitted that the judgment requires the Applicant's eviction from the suit premises. Counsel argued that if the Applicant is evicted, the very essence of its appeal, its right to occupy and operate on the land, would be extinguished, rendering the appeal nugatory. Counsel called on the need to preserve the substratum of the Appeal herein, which he argued was the Applicant's proprietary rights and possession of the suit property, and its established business operations thereon.
12. It was argued that eviction may also result in the physical destruction of its property, and also result in financial ruin and an insurmountable loss of income for the Applicant, as well as the loss of employment for its workers. Counsel argued that the Respondent is unlikely to suffer any substantial loss in the event that this stay of execution is granted since he has not been in possession of the suit property for 40 years and his claim is primarily financial. He relied on Mbili & another vs Suleiman El Busaidy & another (2022) KECA 750 (KLR), Butt vs Rent Restriction Tribunal (1979) eKLR, Muchiri vs Rutere (Environment & Land Case 319 & 316 of 2017 (Consolidated) (2023) KEELC 22377 (KLR).
13. On whether the appeal is arguable, Counsel asserted that the intended appeal raises serious legal and factual issues that demand thorough examination by an appellate court and are demonstrably not frivolous. Counsel relied on Kaptoror Holdings Limited vs Kibore & 3 others (2024) KECA 532 (KLR) and Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 Others (2023) eKLR. On the final requirement, Counsel argued that the Court delivered its judgment on 26th March 2025 while the instant application was filed 14 days later on 9th April, 2025, thus the application was made without delay.
14. As to security, Counsel submitted that the Applicant is ready to provide such security as the court may order, and willing to comply with procedural requirements. He however urged the court to set a quantum that is fair, proportionate, does not unduly burden its ongoing operations or undermine its capacity to effectively pursue the appeal. Counsel relied on Stephen Wesonga Makokha & another vs Ignatius Opema Maliba (as the legal & personal representative of the Estate of Antony Gisiye - Deceased) (2021) KEHC 1082 (KLR), Kiambu County Council vs Coffee Board of Kenya & Others (2011) eKLR and Arun C Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others (2014) eKLR.
15. Counsel then drew the Court's attention to the alleged contemptuous actions by the Respondent after the delivery of the Judgment. Counsel pointed to the Respondent's action of obtaining a valuation through the Chairman CISK without the applicant's notice, and alleged that the said actions were in contravention of the 30 day stay of execution order and the interim stay orders on 9th April 2025. He



argued that it was malicious, calculated and undermines the very principles of fairness and transparency that underpin the judicial system. Counsel cited *Bikeri vs Abdille* (2022) KEHC 12089 (KLR) and *Hadkinson vs Hadkinson* 2 ALL ER 567.

16. Counsel further accused the Respondent of failure and/or refusal to supply the valuation report to the Applicant, and that it only came to know of it in the Respondent's response to this Application. Counsel accused the Respondent of trying to gain an unfair advantage and to push forward the execution of a judgment that is still subject to challenge, hence the need for urgent intervention of this Honourable Court through the grant of a stay, and costs of the application.

The Respondent's Submissions;

17. On his part, Counsel for the Respondent cited Article 159(2)(b) and Section 79G of the *Civil Procedure Act* and claimed that the application had been brought as an afterthought and after an inordinate delay. Counsel submitted that the application is a delay tactic aimed at delaying the Respondent from enjoying the fruits of his judgment. Counsel submitted that a party seeking a stay pending appeal must satisfy the conditions set out at Order 42 Rule 6(2).
18. On the first condition, Counsel argued that substantial loss is a mandatory requirement and that an applicant must prove for the court to grant the orders sought. Counsel submitted that the Applicant has not proved the nature of the substantial loss that it will suffer, thus the court has no basis to assess the risk and loss, if any. Counsel avowed that mere financial burden does not constitute substantial loss. Counsel relied on *Machira t/a Machira & co. Advocates vs East Africa Standard* (No. 2) (2002) KLR 63 and *Andrew Kuria Njuguna vs Rose Kuria* (Nairobi Civil Case 224 of 2001) (unreported).
19. Counsel further submitted that the Applicant's Appeal is not tenable before court. That the said Appeal is weak and stands no chances of success since the court made a valid judgment after the Plaintiff proved that the Applicant is a trespasser who ought to be restrained and evicted from the respondent's property. Counsel reiterated the principle that a successful party should be allowed to enjoy the fruits of his judgment.
20. Counsel submitted that the Applicant's acts of trespass caused the respondent to suffer loss and damage, being the loss of quiet enjoyment of his late father's property. That the Applicant had infringed on the Respondent's right to property and enjoyed collecting rent for a long time without any justification. Counsel decried that if the matter is left pending before the court, the Plaintiff will continue to be out of the property and be denied rent that he has rightfully acquired.
21. Counsel submitted that should the court however be inclined to grant the stay, then the Applicant should be directed to deposit the entire rent amount of KShs. 34,395,562.87 accrued over the years. Counsel also asked that the Applicant be directed to deposit a monthly rent of Kshs. 164,340/- per month as well as any subsequent rent in a joint interest earning account until the determination of the Appeal. In conclusion counsel urged the Application is without merit and the court should dismiss it with costs. Counsel relied on the case of *Gitahi & Another vs Waruogongo* (1981) KLR 621 and *Absalom Dova vs Tarbo Transporters* (2013) eKLR.

Analysis and Determination:

22. I have carefully considered the Applicant's Motion alongside the affidavits filed in support thereof, the response filed in opposition to the application as well as the submissions by the parties and the authorities cited therein. The following are the issues for determination: -



- i. Whether the Respondent contravened orders of the court in obtaining the valuation for the accrued rent;
- ii. Whether the Court ought to grant an order to stay the execution of the court's judgment pending hearing and determination of the intended appeal.

Whether the Respondent contravened orders of the court in obtaining the valuation for the accrued rent;

23. This issue arose because the Applicant alleged that the Respondent violated the orders of the court by going behind its back to contact the Chairman, CISK to appoint a valuer. In its judgment dated 26th March, 2025, the court issued the following orders:
- “ 1. An order for payment of rent payable monthly with effect from 1st August, 2000 until the time when the rent due is assessed by a valuer to be nominated by the Chairman of the Chartered Institute of Surveyors of Kenya. A report to be filed in court within 30 days.
 2. An order of eviction do issue against the Defendant from LR No. Eldoret Municipality Block 7/111. The eviction to take effect within 30 days of the time of the filing of the valuation of rent report in court.
 3. The assessed rent shall attract interest at court rates from the date of filing of valuation until payment in full.
 4. The plaintiff is at liberty to apply to court.
 5. The Defendant shall pay the costs of the suit.”
24. I note that from the above orders, the court did not specify who among the parties was to contact the Chairman, CISK to appoint the valuer. The Court also did not make it mandatory that the parties must act in tandem while doing so. Seeing as the Chairman, CISK was not a party to this suit, he would not have been able to know who was to appoint the valuer if the matter had not been brought to his attention one way or the other.
25. The Applicant has had since March, 2025 to write to the Chairman, CISK challenging the appointment of the valuer, yet to date, I see no evidence that he has done so. To punish the Respondent at this point, would be to punish him for actively seeking to enforce his rights as determined by judgment made herein. Had he not done so, the Respondent would have otherwise been accused of being indolent in pursuing his rights.
26. Moreover, order No. 1 of the judgment directed the Applicant to pay rent monthly until a time when the rent due is assessed by a valuer nominated by the Chairman, CISK. The order also directed that the report was to be filed in court within 30 days of the judgment. That order was not reviewed or set aside by the issuance of the 30-day stay order, and so the 30-day timeline was still effective.
27. It does not escape me that the Applicant is not challenging the validity of the contents in the Valuation report. Their only issue seems to be that it was done without informing them, and as I have already noted, the Applicant has taken no steps to register their discontent to the appointing authority. In any event, the Applicant is at liberty to seek the appointment of another valuer if it is of the opinion that the valuation report presented is erroneous, and thereafter approach the court to formally challenge the said report.



28. Notably also, the court granted the 30 day stay of execution knowing it had set the 30 day timeline for filing the report. Therefore, I would believe that that part of the judgment was not affected by the stay. Furthermore, the interim orders issued by this court on 9th April, 2025 did not suspend the 30 day timeline. In my opinion, the payment of the accrued rent and the eviction of the Applicant from the suit property are the parts of the judgment that were subject of the stay order of 26th March, 2025 and the interim stay granted on 9th April, 2025. As it is, the Applicant has not alleged that the Respondent has moved to effect the eviction or payment of the accrued rent in any way.
29. Consequently, I find no fault in the appointment of the valuer by the Chairman, CISK. In addition, I do find that the Valuation Report by Vic Scott Appraisal Limited is therefore properly on record.

Whether the Court ought to grant an order to stay the execution of the court's judgment pending hearing and determination of the intended appeal;

30. The purpose of stay of execution pending appeal is to preserve the subject matter in dispute to allow the aggrieved party pursue his right of appeal. In *RWW vs EKW (2019) eKLR*, the Court of Appeal addressed itself on this as follows:-

“The purpose of an Application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her Judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an Application for stay of execution pending appeal is discretionary. The Court, when granting the stay, however, must balance the interests of the Appellant with those of the Respondent.”

31. Stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules which states:-

6. Stay in case of appeal [Order 42, rule 6]

- (1) 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 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.
- (2) 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.



32. The above law informs that power to grant stay of execution pending appeal is an exercise of discretion of the court. However, the court cannot to make an order of stay of execution unless it is satisfied of three things, being:-
- i. That the applicant stands to suffer substantial loss.
 - ii. That the application has been made without unreasonable delay.
 - iii. That there is provided such security for the due performance of the decree.
33. The first requirement is whether the Applicant has demonstrated that it is bound to suffer substantial loss if orders of stay of execution are not granted. The question that follows is what comprises substantial loss. In *Silverstein vs Chesoni* (2002)1 KLR 867 it was held that:
- “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.”
34. Substantial loss cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. It must mean something in addition to or different from that, as was explained in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* (2012) eKLR, to the following effect;
- “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, it does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably act or negate the very essential core of the Applicant as the successful party 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.”
35. In the instant case, the Applicant has claimed, and rightly so, that the judgment requires the its eviction from the suit premises. The Applicant claims that eviction may also result in the physical destruction of its property and also result in financial ruin, as well as an insurmountable loss of income on its part including the loss of employment for its workers. Counsel argued that the Respondent is unlikely to suffer any substantial loss in the event that this stay of execution is granted since the applicant has not been in possession of the suit property for 40 years and the Respondent’s claim is primarily financial.
36. In rebuttal, the Respondent submitted that the Applicant’s right of Appeal cannot act as an automatic stay of execution. It was argued that the Respondent has a right to enjoy the fruit of his judgment and that the application herein was only meant to frustrate and delay his efforts towards that end. According to the Respondent, he is the one who has suffered from not being able to use his late father’s property while the Applicant has occupied the land to his exclusion, and has been collecting rent therefrom. The Respondent contends that he will continue to suffer such substantial loss if the Application is allowed while the case remains pending in court.
37. In such a case, the court has a delicate task of balancing the interests of both the Applicant, who seeks to preserve the status quo pending the hearing of the Appeal so that its Appeal is not rendered nugatory,



and those of the Respondent, who is seeking to enjoy the fruits of his judgement. See the decision of In RWW vs EKW (2019).

38. In this instance, the Applicant is a reputable Company running a reputable Service Station business in Kenya. There is no doubt that an eviction from the suit premises will have a devastating effect on the Applicant's business. I must point out that I agree with Applicant that due to the nature of business the Applicant undertakes, it has had to install specialised equipment and/or infrastructure to be able to run its operations from the suit land. It is therefore indeed true that an eviction on its part is not a simple process of packing up and leaving. It is thus possible that the eviction may result in not only the destruction of its investments and infrastructure, but will also have major ramifications on its business and workers.
39. In addition to the above, it is trite that the purpose of an order of stay of execution is informed by need to preserve the substratum of the Appeal pending the hearing and determination thereof. Indeed, the substratum of the Applicant's Appeal is its proprietary rights and possession of the suit property, its established business operations thereon. Certainly, if the Applicant is evicted, the very essence of its appeal, being the right to occupy and operate on the land, would have been extinguished. There is no doubt that this would in turn render the appeal nugatory.
40. Bearing in mind the matters raised by the Applicant, I am convinced that such an occurrence goes beyond the mere hardship that will arise out of the process of execution of the judgment. It will no doubt result in substantial loss on the part of the Applicant that may not necessarily be compensated by way of damages. For the foregoing reason, the first limb of the test for stay of execution has been satisfied.
41. The second prong of that test is that the application for stay must be made without undue delay. I note that judgment in this case was delivered on 26th March 2025 while the instant application was filed 14 days later on 9th April 2025. In my view, the delay of 14 days cannot be termed inordinate, especially given that the Applicant filed a Notice of Appeal within the statutory period. This limb is therefore also satisfied.
42. The final limb, is that the Applicant must provide such security for the due performance of the decree. In *Arun C Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* (2014) eKLR, the Court held that:

“The purpose of the security under Order 42 Rule 6 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the applicant...”
43. In making the order for security, the court ought not disadvantage one party over the other. Therefore, as long as the decree holder can be adequately protected, then security should be given in a way that is least disadvantageous to the Applicant and does not hinder its right to pursue its Appeal. In determining the issue of security, the court is entitled to consider whether such security has been offered in deciding an application. I agree with the position in *Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others* (2015) eKLR, where it was held that:

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words “ultimately be binding” are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under Order 42 rule 6



(2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

44. Counsel for the Applicant submitted that Rubis Energy Kenya PLC, has had a substantial and enduring presence in the national economy as a reputable company dealing in fuel throughout the country and has been in operations for more than 60 years in various forms. Counsel also submitted that the Applicant’s extensive operational history and national footprint inherently demonstrate a robust financial capacity and unwavering stability.
45. Counsel for the Applicant prudently proposed its reputation, longevity, and demonstrable financial capacity as the most fitting and robust form of assurance for the due performance of any decree. And while that may be worth something, in view of the substantial amount valued as the rent accrued over the years, in my opinion, the Applicant’s reputation is not sufficient in this case.
46. The Respondent has proposed that the Applicant be directed to deposit the total accrued rent that has been valued at Kshs. 36,549,722/- in the Valuation Report submitted by Vic Scott Appraisal Limited. Seeing as the Applicant has expressed its intention to challenge the appointment of the valuer as well as the report itself, I am disinclined to rely on the amount valued therein at this juncture despite having found that the report is properly on record.
47. Seeing as the Respondent is claiming accrued rent from the year 2000 to date, it is evident that the amount claimed thereon is quite substantial. I note however, that the Applicant has admitted that it has a robust financial capacity. In the circumstances, I am of the opinion that KShs. 10,000,000/- will be sufficient security.
48. Bearing in mind also that the Applicant will remain on the suit property for the duration of the appeal, it is only fair and prudent that it be ordered to pay rent into a joint interest earning account to be held and operated by the Advocates representing the parties in the Appeal pending the hearing and determination thereof. The rent payable shall be at the rate last payable by the Applicant in the year 2000 before payment thereof stopped.

Who shall bear the costs of this application?

49. On costs, the Supreme Court of Kenya in *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others* (2014) eKLR, stated as follows:-

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs.”

50. This rule that costs follow the event emanates from Section 27(1) of the *Civil procedure Act*, which provides that:-

27. Costs

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be



paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

51. The court is nevertheless clothed with discretion on whether or not to award costs. In exercising its discretion, the Court is to consider various factors including but not limited to the special circumstances of the case and it is guided by ends of justice.
52. In the instant case, the Respondent obtained a regular judgment in his favour after fighting in the court since the year 2012. The Respondent has a right to enjoy the fruits of his judgment, which right will be curtailed by the stay issued herein that is intended to allow the Applicant pursue its appeal. I find that there is no justice in delaying the Respondent from executing his judgment and still ordering him to pay costs of this application. In the circumstances, this court shall not condemn the Respondent to pay the costs of this Application. For that reason, each party shall bear their own costs.

Orders:

53. Having met all the requirements for grant of an order of stay of execution, the Defendant/Applicant's Notice of Motion dated 9th April, 2025 is merited. The same succeeds in the following terms:-
 - a. Pending hearing and determination of the Applicant's intended appeal by the Court of Appeal, an order be and is hereby issued staying the execution of the judgment delivered on 26th March 2025 together with the consequential Orders and Decree; and
 - b. The applicant to deposit a sum of Kshs. 10.000.000/= as security for the due performance of the decree and to pay rent at the rate payable in the year 2000 into a joint interest earning account to be held and operated by the advocates representing the parties within thirty (30) days from the date hereof, failing which the stay granted will lapse.
 - c. Each party shall bear its own costs of this application.
54. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 13TH DAY OF NOVEMBER, 2025 VIDE MICROSOFT TEAMS.

HON. C. K. YANO

ELC, JUDGE

In the virtual presence of;

Mr. Nyachiro for the Respondent.

Mr. Gacuca for Appellant.

Court Assistant - Laban.

