REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
MISC APPLICATION NO. 280 OF 2024

BONIFACE MUTUNGA MUTHINI .....INTENDED APPELLANT/APPLICANT

-VERSUS-

DANIEL SAID NGANDO.....INTENDED/ RESPONDENT

RULING

1. This ruling is on the Applicant's application by way of Ex-parte Chamber Summons dated 9th September 2024 seeking for orders:

    a) **Spent**

    b) **Spent**

    c) THAT this Honourable Court be pleased to extend time and grant leave to the Applicant/ Intended Appellant to lodge their Memorandum of Appeal out of time against the Judgment entered against them by the Honourable P. Wechuli, Principal Magistrate in Civil Suit No. E066 of 2021 Kithimani Law Courts.

    d) THAT this Honourable Court be pleased to grant a stay of execution of the Judgment issued by Honourable P. Wechuli, Principal Magistrate in Civil Suit No. E066 of 2021 Kithimani Law Courts delivered on the 20th June, 2024 pending the hearing and determination of this Application.

    e) THAT this Honourable Court be pleased to grant stay of execution of the Judgment and/ or Decree issued by Honourable P. Wechuli, Principal Magistrate in Civil Suit No. E066 of 2021 Kithimani Law Courts delivered on the 20th June, 2024 pending the full hearing and determination of the Intended Appeal.

    f) THAT this Honourable Court allow the Applicant to furnish the Court with security in the form of a Bank Guarantee from Family Bank pending the full hearing and determination of this Appeal.

    g) THAT the Application be heard inter partes on such date and time as this Honourable Court may direct.

    h) THAT The costs of this Application abide the outcome of the Appeal.

2. The application is supported by the supporting affidavit of **Boniface Mutunga Muthini,** the Applicant sworn on 9th September 2024 and which application is premised on the grounds on the face of the application as follows:

a) THAT judgment herein was entered on 20/06/2024 and the Appellant was found to be 100% liable. The Respondent/ Plaintiff was awarded General Damages of Kshs.1,500,000/=, costs of future operation of Kshs.100,000/=, special damages of Kshs.5,650/= plus costs and interest.

b) THAT the Applicant herein being dissatisfied with the said judgment intends to Appeal on the said quantum.

c) THAT the Applicant's Appeal has a high chance of success.

d) THAT the Applicant is reasonably apprehensive that the Respondent, as the Judgment Creditor, may proceed and levy execution against the Applicant as the 30 days stay period granted by the trial court has already lapsed.

e) THAT the judgment is of a substantial amount and the Applicant is apprehensive that if the Respondent is paid, he may deal with the same in a manner prejudicial to the Applicant, and if the appeal is successful, he might not be able to recover the same from the Plaintiff/ Respondent.

f) THAT the delay in filing the memorandum of appeal and the current application was occasioned by a court order freezing the insurer's accounts indefinitely.

g) THAT unless stay of execution is granted, and the Respondent levies and/or executes the said judgment of 20/06/2024 the Applicant's appeal will be rendered nugatory and the Applicant will suffer irreparable loss and damage.

h) THAT the Applicant's Insurer is ready, willing and able to furnish the Court with a Bank Guarantee as security to the court.

i) THAT this Application is made in good faith and will not occasion any prejudice to the Respondent.

j) THAT the Respondent will not be prejudiced in any way if the Application is allowed.

k) THAT the Application has been brought without unreasonable or undue delay.

l) THAT unless stay of execution is ordered, irreparable loss will result to the Applicant.

3. In opposition to the said application, the Respondent filed grounds of opposition dated 29th May 2024 and sought for Applicant's notice of motion to be dismissed for the reasons that:

(a) the application is frivolous, incompetent and vexatious, Bad in law, incurably defective, an abuse of the court process, an afterthought and brought in bad faith and brought after inordinate delay,

b) the Application is brought in bad faith to frustrate the process of execution from its timing.

c) the Applicant is guilty of inordinate delay of almost 4 months.

d) the Applicant is a vexatious litigant as can be seen from the litany of applications seeking same orders after disobeying the previous ones.

e) the application is misconceived.

f) the Applicant has not given good reasons as to why the application should be allowed.

g) the Applicant's application lacks merit, is an after thought and an abuse of the court process and is improperly before this court,

4. Directions were given for the application to be canvassed through written submissions. The Applicant opted not to file submissions but to rely on the documents filed. The Respondent filed submissions dated 04/09/2025.

Analysis and Determination

5. I have carefully perused and considered the application, the supporting affidavit, the grounds of opposition and the Respondent's submissions as well as the judicial decisions relied upon. In my view, the issues for determination are as follows:-

a. Whether the court can extend time and grant leave to the Applicant/ Intended Appellant to lodge their Appeal out of time;
b. Whether the Applicant/Appellant has met the criteria for grant of orders Whether the Applicant/Appellant has met the criteria for grant of orders of stay pending Appeal;

c. Who shall bear costs of the application?

a. <u>Whether the court can extend time and grant leave to the Applicant/ Intended Appellant to lodge their Appeal out of time;</u>

6. Section 79G of the Civil Procedure Act states: -

> *"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 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.*

7. It is clear from the wording of Section 79G of the Civil Procedure Act that before the court considers extension of time, the applicants must satisfy the court that that they have good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of **Diplack Kenya Limited vs William Muthama Kitonyi [2018] eKLR** that 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.

8. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others [2014] eKLR** enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

> *"The underlying principles a court should consider in exercise of such discretion should include:-*
> *a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;*
> *b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
> *c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;*
> *d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;*
> *e. Whether there will be any prejudice suffered by the respondent if the extension is granted;*
> *f. Whether the application has been brought without undue delay.*

9. Similarly in the case of **Paul Musili Wambua vs Attorney General & 2 Others [2015] eKLR,** the Court of Appeal in considering an application for

extension of time and leave to file the Notice of Appeal out of time stated the following:-

> *".....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted."*

10. Applying the above principles to the present case, the judgment herein was delivered on **20.06.2024** and the appeal ought to have been filed by **20.07.2024**. The Applicant filed the current application together with the annexed Memorandum of Appeal on **10.09.2024**. This is almost three months outside the time limited for filing an appeal.

11. The reason given for the delay in lodging the appeal is that after judgment was delivered on 20/06/2024 the Applicant's insurer was undergoing managerial structural changes leading to the Bank accounts of the insurer being frozen for an indeterminate period of time and hence the time to launch an Appeal lapsed before the Applicant could lodge his Appeal.

12. I don't find the explanation to be reasonable and satisfying to this court. The alleged insurer is not a party to these proceedings. In any event the court has not been told what managerial structural changes were taking place, for what period and how it was connected to the Applicant. The Applicant has not shown that he communicated the entry of the judgement to his alleged insurer or followed up with his counsel after the judgement to establish if an appeal was lodged. It is trite law that Parties have the responsibility to show interest in and to follow up on their cases even when they are represented by counsel.

13. The reason for the delay is not only implausible, but also insufficient to warrant the grant of the orders sought.

14. In the case of **Dilpack (K) Ltd Vs William Muthama Kitonyi [2018] eKLR Machakos HCCA 142/2013,** Odunga J. dismissed a similar application and stated as follows:

> **"In this case the applicant has not expounded on the nature and quality of the inadvertence alluded to. This seems to be a case of mere inaction and as was held in Berber Alibhai Mawji vs. Sultan Hasham Lalji & 2 Others [1990-1994] EA 337, <u>inaction on the part of</u>**

an advocate as opposed to error of judgment or a slip is not excusable. Therefore, pure and simple inaction by counsel or a refusal to act cannot amount to a mistake, which ought not to be visited on the client."

15. In my view, the Applicant has not given any plausible reasons for the delay in filing the appeal.

16. It is imperative that the right of appeal must be balanced against an equally weighty rigid right of the Plaintiff/Claimant to enjoy the fruits of the judgment delivered in his/her favour. In the case of **Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR** the court stated:-

> **"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 judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion."**

17. In **Gideon Sitelu Konchella Vs Daima Bank Ltd [2013]eKLR** citing **Mobil Kitale Service Station Vs Mobil Oil(K) Ltd and Another [2004] eKLR**, it was held**:**

> **"It is the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously. The overriding objectives of the Act and the Rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.""**

18. Additionally, there is no evidence by the Applicant asking for certified copies of proceedings and or judgment of the trial court to enable him file an appeal. Neither has the Applicant annexed any certificate of delay to demonstrate that it was the trial court that delayed supplying her with the copies of proceedings and or judgment.

19. The Applicant through his advocate has annexed the draft memorandum of appeal which raises five grounds to appeal. I have perused the intended Memorandum of Appeal and the judgment of the trial court and noted that the appeal faults the trial court on its assessment of damages which they claim to be inordinately high. It is my considered view that the grounds set in the draft Memorandum of Appeal do not demonstrate an arguable appeal nor do they raise pertinent issues of law.

20. In the circumstances, I find that the Applicant has failed to demonstrate good and sufficient cause for not filing the appeal in time and therefore this Court declines to exercise its discretion in the Applicant's favour.

b. Whether the Applicant/Appellant has met the criteria for grant of orders Whether the Applicant/Appellant has met the criteria for grant of orders of stay pending Appeal;

21. The law relating to stay pending Appeal is Order 42 Rule 6 (2). It is also important to state that the power to grant an order of stay is discretionary and is dependent on certain conditions being met.

22. Order 42 rule 6(1) and (2) of the **Civil Procedure Rules,2010** provides as follows:

> ***"(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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."***

23. 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:

    (i) establishment of a sufficient cause,
    (ii) satisfaction of substantial loss and
    (iii) **the furnishing of security**.

    Further the application must be made without unreasonable delay.

24. In **Butt Vs. Rent Restriction Tribunal [1979],** the Court of Appeal gave pointers on what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court stated thus:

    i. The power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an Appeal.

    ii. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an Appeal may not be rendered nugatory should the Appeal court reverse the judge's discretion.

    iii. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.

    iv. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

25. On the first criterion as set out in Order 42 Rule 6 (2) i.e. Whether Applicant has brought this application without unreasonable delay. The Judgement was delivered on 20/06/2024. The Memorandum of Appeal and the instant application both dated 09/09/2024 were filed in court on 10/09/2024, which was almost three months outside the time limited for filing an appeal. In the circumstances, I find that application has been brought with unreasonable delay.

26. On second criterion is whether the Applicant has demonstrated that he 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"***

27. The Applicant has deposed that he has been informed by his advocates which information he believes to be true that the Respondent may levy execution against him any time and the same will render the appeal nugatory and the same will cause irreparable loss and damage.

28. The Applicant has also deponed that that the Respondent has not disclosed nor furnished the court with any documentary evidence to prove his financial standing thus if the decretal sum is paid out to the Respondent, he would not be in a position to refund the same if the appeal is successful.

29. The court is under a duty to hold the rings of justice even handed; it should not offer any illegitimate advantage to either party. The Appellant/Applicant appeals to this Honourable Court to grant the order of stay to enable the Applicant an opportunity to be heard on its Appeal.

30. In **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR,** it was held that**:**

> "***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 the attached properties have been sold, as is the case here,* 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 situation that will irreparably affect 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 must be prevented by preserving the status quo because such loss would render the appeal nugatory***."

31. My position is that the Applicant had a duty to demonstrate facts, and not merely to allege that the Respondent's means are unknown. Indeed, on a similar issue in **ISAAC MUTETI KISUA -VS - FELIX MWANGI NDEGWA [2016] eKLR t**he Court rendered itself thus:

> *"This Court finds that the Applicant from the reading of the above quoted provisions has the burden to demonstrate that he would suffer "substantial loss" and not just loss unless stay of execution is granted. I am not convinced that the burden of demonstrating financial means is the other way round as submitted by the Applicant. Looking at the authorities quoted, especially by the Respondent and the provisions of the quoted rules it is clear that an applicant has a duty to demonstrate that a substantial loss may result to him/her unless an order of stay is made".*

32. Similarly, in **SOCFINAC COMPANY LIMITED -VS- NELPHAT KIMOTHO MUTURI [2013] eKLR** Odunga J, held as follows:

> *"The appellant's belief that the respondent will be unable to repay the same is solely based on the appellant's lack of knowledge as to the respondent's financial ability or capability. In my view, the mere fact that an appellant does not know the respondent's financial capability does not give rise to the presumption that the respondent will be unable to repay the sum. There must be other factors that lead to that presumption. On the material before the court. I am not satisfied that the appellant has shown that it stands to suffer substantial loss if the stay sought is not granted.*

33. Further, Radido J at paragraphs 16 - 18 in **VAN DEN BERG (K) LIMITED VS-CHARLES OSEWE OSODO [2015] eKLR** rendered himself thus:

> *" 16. I have carefully perused the supporting affidavit sworn by Isaac M. Wamaasa and I have not been able to decipher what substantial loss the Appellant would suffer if stay were not grant.*
>
> *17. The closest contention is that the Respondent is a man of straw who has not demonstrated that he could refund the decretal sum. 18. The position as urged by the Appellant on this point cannot be correct. It is not a burden placed upon decree holders to prove that they can refund the decretal sum. It is the appellant who alleges that the decree holder is a man of straw to demonstrate that fact.*

34. In granting an order of stay of execution, the court should not be seen to interfere with a party's enjoyment of the fruit of the judgment. See the case of **Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No.6726 of 1991** where the court stated as follows: -

"***The financial ability of a decree-holder solely is not a reason for allowing stay, it is enough that the decree-holder is not a dishonourable miscreant without any form of income. Suffice to state that the respondent, at this moment, is the successful party and in order to deny him the fruits of his success, it is upon the applicant to prove that he is unlikely to make good whatever sum he may have received in the meantime.***"

35. The loss the Applicant has alluded to is that the appeal herein will be rendered nugatory should the stay order be declined. It is my considered view that this being a monetary claim, any loss to be suffered by either party can adequately be compensated by an award in damages. The Applicant has not shown by evidence through an affidavit that the Respondent is incapable of refunding the decretal sums should the appeal succeed.

36. On the third criterion where the Applicant/Appellant must furnish security for the due performance of the decree. I am fully aware that the court has a delicate task of balancing the interests of both the Appellant and the Respondent. The Appellant who seeks to preserve the status quo pending the hearing of the Appeal so that his Appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgement. It is true that under Order 42 rule 6 aforesaid, the Applicant is required to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder. 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."

37. I also associate myself with the holding in ***Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd*** **[2019] eKLR,** where the court observed:

> ***"… the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.***
> ***Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal … This the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine."***

38. The law is that where the Applicant intends to exercise its undoubted right of appeal, and in the event, it were eventually to succeed it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the Respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. The issue of adequacy of security was dealt with by the Court of Appeal in **Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100** where the Court of Appeal expressed itself as follows:

> ***"The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is***

least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so. The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it".

39. The Applicant has averred in the supporting affidavit that his Insurer Directline Assurance Company Limited is ready and willing to offer security to the court and has annexed as "BMM3" a copy of an Agreement between Directline Assurance and Family Bank for issuance of bank guarantee for the decretal amount.

40. I have perused a copy of the said Agreement and I note that the same is made between **Directline Assurance** and **Family Bank** and does not feature the Applicant herein. The Applicant is not privy to the Agreement. Also, the Agreement is dated 6th July 2023 and its duration is 12 months with an option of a renewal. By the time the instant application was filed in court on 10/09/2024, the said Agreement had expired. The Applicant has not demonstrated that by then, it had been renewed.

41. I find that the Applicant has not satisfying the legal requirement for security for costs as he is relying on an Agreement purported to be a Bank Guarantee to

which he is not a party to. There is nothing to show any commitment by the said Insurer or bank filed before this court on the offer for security for costs. There is absolutely no guarantee that the same will be renewed and yet there is no party that is aware how long the intended appeal will take to be heard and determined. Further, the said Bank Guarantee does not apply strictly to this matter and the Insurer and Bank are not parties to these proceedings in order for them to be bound by whatever orders that this court gives. I find the Bank Guarantee not to be proper and adequate security in the circumstances.

42. The Respondent has in his submission referred to the court proceedings of 30/01/2025. A cursory perusal of the record shows that on this particular day, Parties recorded a consent in the following terms:-

> *"By consent the application dated 9/12/2024 be allowed in the following terms;*
>
> 1. *The Applicant to deposit half the decretal sum in court being Kshs.870,454, the other half of Kshs.870,454 to be deposited with the Plaintiff's Advocates within 45 days.*
> 2. *The Applicant be allowed to file the Memorandum of Appeal within 7 days*
> 3. *Failure to comply with condition 1 above, execution to issue."*

43. It is unfortunate that I have had to consume precious judicial time in writing this ruling when the issue had been resolved by the consent of the parties as indicated above. Truly, the application is vexatious and an abuse of the process of the court.

b) <u>Who should bear the cost of this application?</u>

44. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section **27 of the Civil Procedure Act (Cap. 21).** A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. *See* **Jasbir Singh Rai & 3 Others Vs Tarlochan Singh Rai & 4 others SC. Petition No. 4 of 2012: [2014] eKLR**. The Supreme Court held that costs follow the event and that the Court has the discretion in awarding such costs.

45. Consequently, I do find the Applicant's application dated 09.09.2024 is unmerited and the same is dismissed with costs.

46. This Miscellaneous is hereby closed**.** It is hereby so ordered.

RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 30TH JANUARY 2026

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 30TH JANUARY 2026