

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KWALE

ELC NO. E005 OF 2022

CAROLA TOLKSDORF.....PLAINTIFF/APPLICANT

- VERSUS -

**LENNY MURAYA MWANGI1ST DEFENDANT/
RESPONDENT**

FRANCIS MAINA NJONJO2ND DEFENDANT/RESPONDENT

**LAND REGISTRAR - KWALE DISTRICT LAND REGISTRY THROUGH
THE ATTORNEY GENERAL.....3RD DEFENDANT/RESPONDENT**

RULING

I. Introduction

1. This Honorable Court was tasked to make a determination on the filed Notice of Motion application dated 6th March, 2025 by *Carola Tolksdorf*, the Plaintiff/Applicant herein. It was brought under the dint of Sections 1A, 1B, 3A of the Civil Procedure Act Cap. 21 of Laws of Kenya and Order 42 Rule 6(2), Order 51 Rule 1, Order 21 and Rule 12 and Order 22 Rule 22 and any other enabling provision of the law.

2. From the onset, the Honourable court has noted that there seem to be a mix - up in the manner in which these pleadings are being filed. It appears they are drafted under the "**ELC No. 005 of 2022 - Carola Tolksdor - Versus - Lenny Muraya Mwangi** " but filed under the auspices of "**ELC No. 010 of 2022 - Lenny Muraya Mwangi - Versus - Carola Tolksdor**". Perhaps, taking that these matters involve the same subject matter and parties, in order to avoid creating multiplicity of suits, confusion and delay in determining the cases, there may be need to cause consolidation of the said cases under the provision of Section 81 (h) of the Civil Procedure Act, Cap. 21. The Honourable Court does not see any prejudice that the parties will suffer whatsoever.
3. However, for the time being the Court will proceed to deliver this Ruling as it awaits for the parties to ponder on this proposal thereof.
4. Upon service of the application, while opposing this application, the 2nd Respondent - *Francis Maina Njonjo* - filed a Replying Affidavit dated 3rd June, 2025. The Honourable Court shall be dealing with it indepth at a later stage of this Ruling hereof.

II. The Plaintiff/Applicant's case

5. The Plaintiff/Applicant's sought for the following orders: -

a) Spent.

b) That there be a stay of execution of the Judgement of this court delivered on the 27th February 2025 electronically via CTS and/or all consequential orders emanating therefrom pending the hearing and determination of this application inter - partes or until further orders.

c) That Status Quo be maintained on the parcel land known as Kwale/Galu Kinondo/1203 pending the outcome of Mombasa SRMCC/364/2011, upon the Plaintiff moving the lower court accordingly as per Judge Adraya Dena's Judgment.

d) That the cost of this application be provided for.

6. The application was premised on the grounds, testimonial facts and averments made out under the 9 paragraphed Supporting Affidavit of - CAROLA TOLKSDORF, the Plaintiff/ Applicant herein, sworn and dated the same day with the application. The Applicant averred that:

a) In total disregard of the Judgment delivered on the 27th day of February 2025 in the instant suit by Hon. Lady Justice Adraya Dena, the 1st Defendant/Respondent herein, had proceeded to unlawfully issue the Applicant with an eviction Notice dated 3rd March 2025. (Annexed in the affidavit and marked "CL 1" a copy of the Judgment.).

- b) That was a total misconstruing of the said judgment as it did not grant him any orders for proceedings with eviction; if anything, his Counterclaim was struck out and parties herein were referred back to the lower court case Mombasa SRMCC 364 OF 2011; Francis Maina T/A Njonjo & Associates Advocates - Versus - Reiten Carola, Diederich Alois & Reiten Winfried Johann.
- c) To fast track execution of the judgment, the 1st Defendant/ Respondent herein had through his agents served and or caused him to be served with an Eviction Notice through his Advocates on record. (Annexed in the Affidavit and marked "CL 2 a copy of the Eviction Notice).
- d) In light of the foregoing, his advocates were in process of moving the Lower Court at Mombasa appropriately, and in the interest of preserving the subject matter herein i.e. Kwale/ Galu Kinondo/1203, it was paramount that this Honourable Court issues stay of execution orders of the judgment delivered on 27th February, 2025 pending the determination of Mombasa SRMCC/364/2011; Francis Maina T/A Njonjo & Associates Advocates - Versus - Reiten Carola, Diederich Alois & Reiten Winfried Johann.

- e) No prejudice would be occasioned to the 1st Respondent if the Application herein was granted.
- f) The Affiant made the affidavit to beseech the Court to consider the application favorably and would abide by any other Court orders.
- g) The Affidavit in support of the Application which was before the Court.

III. The Responses by the 2nd Defendant/Respondent

7. While opposing the filed application by the Applicant, the _
2nd Defendant/Respondent filed their 17 Paragraphed Supporting Affidavit sworn by FRANCIS MAINA NJONJO and dated 3rd June, 2025 together with annexures marked as “FMN - 1 & 2” annexed thereto. He averred as follows:-
- a) He was the 2nd Defendant/Respondent herein well conversant with the facts of the case and hence competent to swear this Affidavit.
 - b) In the suit brought herein by the Plaintiff herein against all the other parties claiming to be the owners of all that property known as Kwale/Galu Kinondu/1203.

- c) However, after hearing the case, the Honourable Court delivered its Judgement finding that the Plaintiff/Applicant had no title to the suit land.
- d) Hence, the title held by the 1st Defendant/Respondent remained intact and unchallenged.
- e) Pursuant to that no appeal had been preferred against the said Judgement by either party to date.
- f) He stood as the only party holding a title to the suit property and there has been no challenge to it.
- g) He had been served with a Notice of eviction and not emanating from the Judgement of Environment & Land Court in Kwale but on the basis of a concluded Auction where the 1st Respondent bought the suit from. He affirmed that he bought the land from a Public Auction.
- h) The Judgement leading to the auction of the suit land where the 1st Defendant/Respondent herein was the Plaintiff in SRMCC (Mombasa) No. 364 of 2011 had never been set aside, reviewed nor appealed from.

- i) No party was referred to the lower Court file where as of now no action had been taken post Judgement of the ELC Court at Kwale and the Plaintiff/Applicant was not being candid with the Court.
- j) The Plaintiff/Applicant had on several times blocked execution regarding this matter since filing of Judicial Review application in the year 2012 which was dismissed by the ELC.
- k) On 24th May, 2022 the Plaintiff/Applicant approached the Lower Court to set aside Judgement that led to the auction of property which request was declined.
- l) Once the said Ruling was delivered dismissing attempts to set aside Judgement that resulted to the auction of the property now titled in the name of the 1st Defendant/Respondent the Applicant had never challenged the said Ruling on review and/or appeal meaning there was no suit pending in the SRMCC No. 364 of 2011 before the Chief Magistrate Court.
- m) The post rendering of the Judgement on 26th February, 2025 by this Court, the Applicant had neither moved the lower Court nor challenged the 1st Defendant/Respondent title and there would be no basis for granting the orders sought.

- n) The 1st Defendant/Respondent should be allowed to move as the law provide by giving necessary legal notice as required by Law and procedure for eventual eviction.
- o) All matters arising from Auction under the provision of Section 34 of the Civil Procedure Act, Cap. 21 on any matters emerging from the auction had to be done under the same file which resulted to the Auction.
- p) The application should be dismissed for lack of merit with costs.

IV. Submissions

8. On 29th May, 2025 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 6th March, 2025 be disposed of by way of written submissions and all the parties complied. Subsequently, on 30th July, 2025 a ruling date was reserved for 14th October, 2025 accordingly.

A. The Written Submissions by the Plaintiff/Applicant

9. While in support of the Notice of Motion application dated 6th March, 2025, on behalf of the Plaintiff/Applicant the Law firm of Messrs. Lawrence Obonyo Legal Advocates filed their written submissions dated 16th July, 2025. Mr. Obonyo Advocate commenced the

submissions by providing the Court with a brief background of the matter. He stated that the Plaintiff/Applicant approached this Honourable Court seeking to transfer the suit herein which was originally filed at the Sub - Ordinate Court at Msambweni, that is in **“the matter of Transfer of the Msambweni ELC Case No. E005 of 2022 from Msambweni Law Courts to the High Court (Environment and Land Court Division Kwale: Carola Tolksdorf - Versus - Lenny Muraya Mwangi and 2 Others.)**

10. He informed the Court that the Court in exercising its discretionary powers transferred the said suit, and further directed that the following matters run concurrently until determination that is **“ELCC/E005/22 - Carola Tolksdorf - Versus - Lenny Muraya and Francis Njonjo & 1 Other; ELCMISC/E007/22 - Carola Tolksdorf - Versus - Lenny Muraya and Francis Njonjo & 1 Other;and ELCMISC/E010/22: Lenny Muraya - Versus - Carola Tolksdorf”**
11. The Learned Counsel stated that with **“ELCC/E005/22: Carola Tolksdorf Versus - Lenny Muraya and 2 Others”** having been made the lead file; the Applicant/Plaintiff sought for the following Orders inter alia:-
- a) **A Declaration that the Plaintiff is the lawful proprietor of the Suit Property.**

b) ***A Declaration that the Title Deed issued to the 1st Defendant, is null and void as the same was acquired illegally and/or fraudulently and should be revoked.***

c) ***An Order of Permanent Injunction restraining the Defendants, their agents, employees and/or nominees from trespassing and/or dealing with the suit property in any manner.***

d) ***An Order directing the 3rd Defendant to cancel and/or revoke and/or nullify the fake Title Deed of KWALE/GALU KINONDO/1203, Approximate Area 0.70Ha of the suit property issued to the 1s Defendant.***

e) ***General damages.***

g). ***Costs of and incidental to this suit, Interest on (e) and (f) above af Court rates.***

h). ***Any other or further relief that this Honourable Court may deem appropriate to award.***

12. On the other part, the 1st Defendant/Respondent filed the Civil Suit No. ***“ELCMISC/E010/22 - Lenny Muraya - Versus - Carola Tolksdorf”***, in retaliation to ***ELCMISC/E007/22: Carola Tolksdorf - Lenny Muraya and Francis Njonjo & Other”***, where the 1st Defendant sought for Orders that:-

(i) THAT the Court do Order the Respondent, her Agents or Servants to hand over Vacant possession of property number Kwale/Galu Kinondo/1203 to the Applicant with immediate effect.

(ii) THAT the Court do Order on failure to give possession peacefully, the Applicant be allowed through the help of Msambweni and or Kwale OCPD to evict the Respondent and take over possession with all costs of such eviction be paid by the Respondent.

(iii) THAT the Court do Order on the Judgment debtor failure to put the Applicant into possession within 14 days after the Order No. 1 is issued, the debtor be committed or be detained in prison for a period of thirty (30) days.

13. The Learned Counsel asserted that in a snapshot, the Plaintiff/Applicant submitted that, the substratum of the suit was centered around the revocation and/or nullification of the title deed of the land known as **KWALE/GALU KINONDO/1203, APPROXIMATE AREA 0.70 Ha**, which according to the Plaintiff/Applicant, was unlawfully and/or illegally acquired by the 1st Defendant under unclear circumstances. That the matter was heard and a Judgement rendered on the 27th day of February 2025 in which the

Applicant's and the 1st Defendant/Respondent's suits were dismissed and struck off respectively.

14. The Learned Counsel submitted that the Plaintiff/Applicant had satisfied the conditions for granting of stay of execution. He averred that, the principles upon which the Court may grant stay of execution are well-settled. These are captured in Order 42 Rule 6 of the Civil Procedure Rules, 2010 which requires an applicant seeking a stay of execution to demonstrate that:-

(a) Substantial loss may result to the Applicant unless the order was made:-

(b) The application was made without unreasonable delay; and

(c) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the Applicant.

15. He submitted that a stay of execution ought to be granted where sufficient cause was shown. In the case of:- ***“Antoine Ndiaye - Versus - African Virtue University (2015) eKLR”*** Gikonyo J opined that:-

.... stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites

provided under order 42 rule 6 of the Civil Procedure

Rules...

16. Granting orders of stay of execution is a discretion of the Court. In the case of:-“**Butt - Versus - Rent Restriction Tribunal (1982) KLR**” the court gave guidance on how such discretion should be exercised and held that

“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. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements”.

17. He submitted that the purpose of stay of execution is to preserve the status quo of the suit subject. The foregoing principle apply in determining the present application.

(i) The first consideration is whether the application was filed timeously. T

Judgment was delivered on the 27th day of February 2025. The Learned Counsel averred that the present application herein was filed without a

undue delay, having been filed on the 6th day of March 2025, 7 days after the Judgment.

(ii) the second consideration is whether the Applicant will suffer substantial

loss: the Learned Counsel submitted that the Applicant would suffer substantial loss if the orders sought were not granted as the Defendant /Respondent will end up acquiring the suit property when he/she had no right to do so. The Learned Counsel averred that it was the duty of the Applicant in an application for stay of execution to establish that he/she will suffer substantial loss if the orders sought are not granted.

the case of:- "***Machira t/a Machira & Co. Advocates - Versus - East African Standard (No 2) (2002) KLR 63***" the Court of appeal considered as to what amounts to substantial loss and 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, that is to say, 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 state of affairs 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 has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

18. The Learned Counsel argued that there was an immediate risk of execution unless a stay of execution of the said Judgment and/or decision was granted. Further, he submitted that the Applicant will suffer substantial loss that would be irreversible as she was in danger of being evicted from the only home she had ever known. He invited the Court to note that the 1st Defendant/Respondent responded to the suit by way of Counter - Claim with the attendant documentation in support thereof most of which were produced by the 2nd Defendant including his own bundle. That in rendering its decision/Judgement in respect to the 1st Defendant's/Respondent's Counter - Claim the court said thus:-

"that it is the court executing the decree that shall determine any emerging issues arising out of the satisfaction of the decree and not by a separate suit. It is not in dispute that there was an auction that was pursuant to the proceedings in SRMCC 364 of 2011. The Plaintiff impugns the said auction that resulted into the registration of the suit property into the 1st Defendant's name as having been irregular and fraudulently undertaken casting aspersions on the 2nd Defendant. I think for purposes of section 34 herein this courts hands are tied. The present suit is not the proper forum for this court to investigate the processes that arose from SRMCC 364 of 2011".

To propound further, the court's rendered itself thus:

"in view of the above this court cannot declare the 1st Defendant an innocent purchaser without investigating his behaviour against the principles laid out in the case of Katende - Versus - Haridar & Company Limited (2008) EA as relates to the auction as such would essentially necessitate the court going into the details of the process that led to the auction and the 1st Defendant's involvement which I have already shown I'm not permitted by statute".

19. That pursuant to the above, the 1st Defendant/Respondent's Counter Claim was struck off thus affording the 1st Defendant/Respondent another future opportunity at filing a new suit after a determination on the legality of the auction pursuant to which he was registered as the proprietor. In view of the foregoing, the 1st Defendant could not claim and/or purport to claim, that the Judgement rendered by Lady Justice Dena conferred upon him ownership over the suit property to accord him the impetus to evict the Plaintiff/Applicant herein.

20. In conclusion, the Learned Counsel urged the Honorable Court not to lose sight of the fact that this was a case, which involved ownership of property. He referred Court to the case of:- ***"Issa Masudi Mwabumba Versus - Alice Kavenya Mutunga & 4 others [2012] eKLR***, Koome, JA invoked the oxygen principle that guide the Court in the exercise of judicial discretion, where she stated inter alia:

".....I am also guided by the provisions of Section 3A and 3B of the Appellate Jurisdiction Act otherwise known as the oxygen principle. Stemming from the overarching objectives in the administration of justice, the goal is of the end of day, the Court attains justice and fairness in the circumstances of each case. This is the same spirit that is envisaged

as the thread that kneads through the Constitution of Kenya, 2010 in particular Article 159."

21. Indeed, he held that the substratum of the suit herein was coined around the sanctity of a title deed and the ownership rights of land pursuant to the provision of Section 26 of the Land Registration Act, 2012. This right to land is protected at all costs. He urged that Honourable Court to issue stay orders to enable the Plaintiff/Applicant to ventilate the issue as she has since filed an application seeking leave to appeal the said Judgement out of time.

B. The Written Submissions by the 1st Defendant/Respondent

22. The 1st Defendant through the Law firm of Messrs. Oyunge & Associates Advocates filed their written submissions dated 4th August, 2025. Mr. Oyunge Advocate commence the submission by stating the Plaintiff/Applicant filed suit against the 1st Defendant/Respondent in this matter challenging the title held by the 1st Defendant who purchased Suit land number Kwale/Galu Kinondo/1203. After a full hearing the court dismissed the suit filed by the Plaintiff/Applicant with costs to the Defendant.

23. In essence, the Learned Counsel held that the title the Plaintiff/Applicant herein was brandishing to the court and on which she had been relying on to stay put on the suit-land was declared to be no title as she failed to demonstrate the root of the said purported title. While it was true the 1st Defendant/Respondent's Counter - Claim was struck out purely on the orders sought, ordinarily should as guided by the provision of Section 34 of the Civil Procedure Act, Cap. 21 to be addressed in the file where Auction arose.

24. The Learned Counsel posed the query whether the trial court affirmed the title deed of the 1st Defendant or not because the courts hands were tied by Section 34 of the Civil Procedure Act, the title deed in the hands of the 1st Defendant remained valid. There was no appeal or suit currently in any court challenging it and no appeal had been proffered against the Judgment of Hon Justice Dena. In the application filed by the applicant herein on the 6th March, 2025, the applicant under the certificate of urgency item 2 stated:-

"The applicant has challenged the root of the 1st Defendant's title in SRMCC No. 364 of 2011, which suit is still pending in court".

25. The Counsel observed that under the Notice of motion application itself dated the same day prayer no. 3 the applicant prayed:-

"for status quo to be maintained.... pending the outcome of Mombasa SRMCC No.364/2011"

26. First, the suit filed by the Plaintiff as against the 1st Defendant/Respondent and which was dismissed by Hon. Justice Dena was in itself a challenge of the 1st Defendant's title deed. This suit was dismissed. The Plaintiff/Applicant could not have a second bite on the cherry by mounting another challenge as alleged under the certificate of urgency dated 6th March, 2025. The issue of mounting a challenge of the 1st Defendant's title was over and done by the Plaintiff/Applicant there being no appeal to *the* judgment of Justice Dena. The court was invited to look at the affidavit filed in support of the application dated 6th March 2025 under paragraphs no. 5 where the applicant depones that she was in the process of moving the Lower Court Mombasa appropriately in file no SRMCC No. 364/2011, where she sought to challenge the root of the 1st Defendant's title. According to the Learned Counsel, the issue of challenge of the 1st Defendant's title had already been adjudicated by Justice Dena and it could not be raised again.

27. Further, the Learned Counsel informed the Court that this court was directed to the ruling of the court in SRMCC o 364/2011 Mombasa contained in the 1st Defendant/Respondent Replying Affidavit dated 18th March, 2025. It clearly showed the applicant herein vide an application dated 22nd May, 2022 attempted to set aside the Judgment that led to the Auction of the sale of the property to the 1st Respondent herein. However, vide a ruling delivered on the 15th September, 2022, the Court dismissed the said application. From the dismissed application filed in 2022, no appeal was filed meaning again the Plaintiff/Applicant had exhausted her rights of any move with regard to this file since the year 2022. For her now to tell the court she was challenging the root of title for the Defendant/Respondent herein or she was moving the court in the lower court file was outrightly misleading of this court.

28. It was the Learned Counsel's contention that since she filed the application herein, she had again not demonstrated how she had moved the lower court or at all. There was no part from the Judgment of Justice Hon. Dena referred parties to the lower court file number SRMCC 364/2011 Mombasa. There was no orders subsequently ensured to go back to the lower court file. The 1st Defendant/Respondent herein wasn't even a party to the lower court file and having been sued in the current

matter it was upon the applicant to chose a forum to litigate her matter which she rightly did and her can of challenge of title in the hands of the 1st Defendant/Respondent was dismissed. For the applicant then to say that parties were directed to go to the lower court case is misleading this court as evidently there is no order to that extent.

29. Further, the Learned Counsel argued that there was no case pending in the lower court for the Plaintiff/Applicant to state that they had an arguable case in the lower court as no such case existed. A court could only make direction through issuance of an order and none existed referring parties to this suit to lower court. Even assuming there was such an order, the applicant had not demonstrated how she had taken this dispute to the lower court file. There being no matter in the lower court as demonstrated above what this that the Applicant was awaiting conclusive determination so that she can plead for stay of execution and or status quo? It is trite law that a status quo and or stay of judgment is issued awaiting an outcome of an event. Clearly there is nothing being waited as between the applicant herein and 1st Respondent leave alone the other parties to this suit.

30. The Learned Counsel wondered how would Mombasa suit number SRMCC 364/2011 be said it would be rendered nugatory if status quo is

not maintained? The 1st Defendant/Respondent herein holds no judgment against the Applicant to execute. What the 1st Defendant/Respondent held was a title to the property which he acquired at an auction and which the applicant had mounted a challenge on and failed. On the basis of ownership which was now not under any challenge in any court, the 1st Defendant/Respondent had issued the required notices under the provision of Section 152A to 152E of the Land Act to commence execution. The said notice was clear. It had not been issued in execution of the Judgment delivered by Justice Dena.

31. The contention by the Learned Counsel was that a stay of execution was issued awaiting an outcome of an event or process. This could be an appeal or hearing and determination of the main suit. There was no appeal herein and the main suit had been determined and the question was even whether without some event or process being awaited this court could issue orders to stay or even orders of status quo. In conclusion, the Counsel urged Court to dismiss the application dated 6th March, 2025 as had no merit.

V. Analysis & Determination.

32. I have carefully read and considered the pleadings herein by the 1st Defendant/Applicant, the myriad of cases cited herein by parties, the relevant provisions of the Constitution of Kenya, 2010 and statutes.

33. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has six (3) framed issues for its determination. These are:-

- a) Whether the Notice of Motion application dated 6th March, 2025 seeking to Stay of Execution of the judgement delivered on 27th February, 2025 is merited?***
- b) Whether the parties herein were entitled to the reliefs sought.***
- c) Who will bear the Costs of Notice of Motion application dated 6th March, 2025.***

ISSUE No. a). Whether the Notice of Motion application dated 6th March, 2025 seeking to Stay of Execution of the Judgement delivered on 27th February, 2025 is merited.

34. Under this Sub - title, the main gist of the matter is on whether or not to grant Stay of Execution from a delivered Judgement or Decree of the Court. According to the Plaintiff/Applicant has specifically prayed verbatim "*inter alia*:-

- a. That there be a stay of execution of the Judgement of this court delivered on the 27th February 2025 electronically via CTS and/or all consequential orders emanating therefrom pending***

the hearing and determination of this application inter - partes or until further orders. (Emphasis is Mine)

b. That Status Quo be maintained on the parcel land known as Kwale/Galu Kinondo/1203 pending the outcome of Mombasa SRMCC/364/2011, upon the Plaintiff moving the lower court accordingly as per Judge Addraya Dena's Judgment.

35. The law concerning stay of execution pending Appeal is found in the provision of Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, 2010 which stipulates as follows:

“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 sub rule (1) unless—

(a)the Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; 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.

36. It is trite law that stay of execution pending appeal is a discretionary power bestowed upon this court by the law. In the initial stages of building Jurisprudence around this legal aspect, the Court of Appeal in the case of **“Butt -Versus - Rent Restriction Tribunal {1982} KLR 417”** gave guidance on how a court should exercise the said discretion and held that:

“1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. 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 that appeal Court reverse the Judge’s discretion.

3. 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.

4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application

by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

37. Further to the above, 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 the provision of 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 Civil Procedure Act, cap. 21 or in the interpretation of any of its provisions.

38. The provision of Section 1A (2) of the Civil Procedure Act provides that **“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 the provision of Section 1B some of the aims of the said objectives 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.”**

39. There are three (3) conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which:

- i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
- ii. The application is brought without undue delay and
- iii. 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.

40. I find issues for determination arising therein namely:

- i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of judgment.
- ii. What orders this Court should make?

41. The purpose of stay of execution is to preserve the substratum of the case. In the case of ***“Consolidated Marine - Versus - Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)”***, the Court held that:-

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.

42. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that

substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.

43. As for the applicant having to suffer substantial loss, in the case of **“Kenya Shell Limited - Versus - Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018”** the Court of Appeal pronounced itself to the effect that:

“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 rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

44. The Court of Appeal in the case of **“Mukuma - Versus - Abuoga (1988) KLR 645”** where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

45. The Applicant has a burden to show the substantial loss they are likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Applicant to the Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the

decree. The Court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. {See the case of **“Absalom Dora -Versus -Turbo Transporters (2013) (eKLR)”**}.

46. As F. Gikonyo J stated in the case of:- **“Geoffery Muriungi & another - Versus - John Rukunga M’imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (Deceased) [2016] eKLR”** and which wisdom I am persuaded with: -

“.....the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court of Appeal; and that is the loss which is sought to be prevented by an order for stay of execution pending appeal...”

47. Now applying these legal principles to the instant case. From the record, this Court delivered Judgment on 27th February, 2025 (By Justice Lady Dena). In essence, the Court proceeded to dismiss the suit instituted by the Plaintiff/Applicant on grounds that she held no good title and for failure to provide clear root of the title for the suit

land. Further to that the Court proceeded to struck out the Counter - Claim by the 1st Defendant herein. Taking that the 1st Defendant/Respondent claimed to have acquired the title from a public auction and which was a subject of a pending matter in the lower Court in SRMCC No. 364 of 2011, this Court found that it was barred by the provision of Section 34 of the Civil Procedure Act, Cap. 21. Resultantly, this Judgement seem to have left the parties at the cliff. They all interpreted it differently. While the 1st Defendant assumed that his title was still intact and therefore was desirous to proceed on with the execution in terms of evicting the Plaintiff to the suit land. On the other hand, the Plaintiff insisted that the issue of the ownership of the suit land was still undetermined. There was need to have this legal dilemma be decided. Being apprehensive of the actions meted by the 1st Defendant/Respondent to proceed on with the execution of the Decree of this Court, decided to file this application on 6th March 2025 supported by an affidavit sworn the same day. The Applicant attaches the 27th February 2025 Judgment and an eviction notice dated 3rd March 2025, said to have been issued by or on behalf of the 1st Respondent. The Applicant says the 27th February 2025

judgment struck out the Respondent's Counter - Claim and referred the parties to Mombasa SRMCC/364/2011 (the lower court matter). The Applicant's advocates are taking steps in the lower court to pursue the referral. The Respondent was served with the application and has had opportunity to respond; no material before the Court shows that a stay would cause irreparable prejudice to the Respondent that cannot be compensated by an undertaking or security.

48. This is a unique situation. Although no appeal has been preferred against the Judgement by this Court, it appears the matter is still pending hearing before the Lower Court. Having established the law and authority as to the grant of stay of execution orders, I discern that the application has merit and should succeed but upon fulfilment of certain conditionalities. I shall proceed to evaluate if the prayers sought by the Applicant.

ISSUE NO. b). Whether the Applicant herein were entitled to the reliefs sought

49. Under this sub heading, the Honourable Court now wishes to apply the above legal principles to the instant case. The Plaintiff/Applicant's case rests on concrete documentary material:

the impugned judgment and the Eviction Notice. Although the Learned Counsel for the 1st defendant has vigorously attacked the issue of any referral of the matter to lower Court from the delivered Judgement, taking that the High Court's Judgment referred the parties back to the lower court, the facts disclosed are more than fanciful or speculative and give rise to a genuine, arguable question as to whether immediate execution is consistent with the true effect of the 27th February 2025 decision. The existence of a pending related proceeding (Mombasa SRMCC/364/2011) and the referral in the judgment constitute a prima facie basis for the Applicant's contention that execution may be premature. On this limb the Applicant has established an arguable/triable case for interim purposes.

50. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under Order 42 Rule 6. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicant unless stay of execution is granted; and thirdly such security as the court orders for the due performance of

such decree or order as may ultimately be binding on them has been given by the Applicant.

51. Regarding the pre-requisite conditions evolving from the law is on substantial loss occurring to the Applicant. The court has already deliberated on this aspect and taken into consideration of it from the case of:- **“Kenya Shell Limited (Supra)”**. Eviction and loss of possession of land are paradigmatic examples of irreparable harm. Once physical possession is lost the practical effectiveness of any subsequent favourable ruling may be nullified; monetary compensation may be an inadequate remedy. The Eviction Notice dated 3rd March 2025, when read with the Applicant’s stated steps in the lower court, discloses an imminent and real risk that execution will proceed before the referral or lower-court adjudication obtains full effect. From the surrounding facts and inferences of the instant case, I am strongly persuaded that indeed, the Plaintiff/Applicant has proved that she will suffer substantially and irreparable harm and sufficient cause if the orders for stay of the execution are not granted as prayed. For that reason, the application should succeed.

52. Next issue is to determine is the application case on a balance of convenience. The balance of convenience requires comparison of the likely consequences to both parties if the stay is granted or refused. The likely and irreversible prejudice to the Applicant from eviction outweighs the Respondent's interest in immediate execution, particularly where the Respondent's money or proprietary prejudice can be compensated by an undertaking as to damages or appropriate security. The Respondent has not demonstrated irreparable prejudice that cannot be remedied by such safeguards. In these circumstances the balance of convenience favours preservation of the status quo pending resolution of the referral or related proceedings.

53. On the last condition as to provision of security. I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. It is settled practice that where a stay is granted the Court may require an undertaking as to damages or other security to protect the judgment creditor should it be subsequently shown that the stay ought not to have been granted. The form and quantum of

security are fact-specific and must be proportionate to the risk of loss. Requiring an undertaking or approved security strikes a fair balance between protecting the Applicant from irretrievable dispossession and protecting the Respondent from uncompensated delay.

54. This provision of the law notwithstanding from the face value, this court is not bound by the type of security offered by an applicant. It can make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.

55. In saying so I seek refuge from the case of **“Aron C. Sharma - Versus - Ashana Raikundalia T/A Rairundalia & Co. Advocates”** the court held that:

“The purpose of the security needed under Order 42 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 judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

56. Therefore, in the interest of justice and fairness, it behooved the Applicant herein to deposit some finances into an interest earning Escrow joint account to be held by the Advocates for the parties, Stay of execution is exactly what it states. It is an order of the court barring a Decree Holder from enjoying the fruits of his Judgment pending the determination of some issue in contention. It matters not whether the issue in contention is the amount awarded in the Judgment Debt, or liability or legality of the extracted warrants as in this case. Where a party seeks to stay execution, the Court must be guided by the parameters set out in the provision of Order 42 Rule 6 of the Rules.

57. The Court observed in the case of:- ***“Gianfranco Manenthi & Another - Versus - Africa Merchant Assurance Company Limited [2019] eKLR”***, thus:-

“..... 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 ... Thus 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. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree. (Underlining mine for emphasis)

58. Requiring an undertaking or approved security strikes a fair balance between protecting the Applicant from irretrievable dispossession and protecting the Respondent from uncompensated delay.
59. On the preservation of the status quo over Kwale/Galu Kinondo/1203 the Court takes cognizance that where execution would alter or destroy the subject matter in dispute (physical possession of land) and render subsequent relief nugatory, an order preserving the status quo is appropriate. The Eviction Notice

threatens immediate dispossession and therefore a narrowly framed injunction preserving possession of Kwale/Galu Kinondo/1203 pending the outcome of Mombasa SRMCC/364/2011 accords with established principles and is necessary to ensure the effective administration of justice.

60. As already demonstrated in the case of ***“James Wangalwa & Another - Versus - Agnes Naliaka Cheseto (Supra)”*** the three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. It is my finding that the Plaintiff/Applicant herein, though they brought this Application without undue delay and adequately demonstrated the substantial loss that they would suffer as stipulated by sub-rule 2b.

ISSUE No. c). Who will bear the Costs of Notice of Motion application dated 6th March, 2025.

61. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of

Supreme Court *“Jasbir Rai Singh - Versus - Tarchalan Singh (2014) eKLR”* and *Cecilia Karuru Ngayo - Versus - Barclays Bank of Kenya Limited, (2014) eKLR”*.

62. In the case of *“Hussein Muhumed Sirat - Versus - Attorney General & Another [2017] eKLR”*, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
63. In this case, this Honourable Court has reserved its discretion in awarding the costs of this application whereby each party shall bear their own costs.

V. Conclusion & Disposition

64. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to the Preponderance of Probabilities and balance of convenience.
65. Ultimately in view of the foregoing detailed and expansive analysis to the framed issues herein, this Honourable Court specifically provides the following orders:-

a) THAT the Notice of Motion application dated 6th March, 2025 be and is hereby found to have merit and hence allowed subject to the fulfilment of the Pre - Conditions stated herein.

- b) THAT this Honourable Court do hereby issue an order to stay the execution of its decree arising from the Judgment of this Honorable delivered on 27th February, 2025 and of all consequential orders emanating from it, pending the final determination of Mombasa SRMCC/364/2011 or until further orders of this Court.**
- c) THAT an order be and is hereby made restraining the 1st Respondent, his servants, agents and any person action in the 1st Respondent's instructions from evicting, dispossessing, removing or causing to be removed the Applicant or any person in occupation from the parcel of land known as Kwale/Galu Kinondo/1203 while this stay is in force.**
- d) THAT an order that the Plaintiff/ Applicant shall, WITHIN 30 DAYS from the date of this Ruling, deposit a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1, 500, 000.00/= in an Escrow Interest earning Joint bank Account in a reputable Commercial bank to be held in the names of the Law firm of Messrs. Lawrence Obonyo Legal Advocates and Oyunge Associates Advocate to serve as security for the due performance of the Decree by this Court**
- e) THAT in default of this orders under Clause no. (c) & (d) above the application shall stand dismissed automatically.**

- f) **THAT** the Plaintiff/Applicant shall, **WITHIN NEXT 21 days** from the date of this Ruling, file and serve an affidavit in these proceedings proving tangible steps taken in Mombasa SRMCC/364/2011 to prosecute the referral made by this Court.
- g) **THAT** in order to keep track of the progress made on the case there be a mention on 23rd April, 2026.
- h) **THAT** each party shall bear their own costs.

IT IS SO ORDERED ACCORDINGLY.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS.....23RDDAY OFFEBRUARY.....2026.

.....
**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT
AT
KWALE**

66.

Ruling delivered in the presence of:

- a) M/s. Daniel Disii, the Court Assistant.
- b) Mr. Otieno Advocate holding brief for Mr. Obonyo Advocate for the Plaintiff/Applicant.

c) M/s. Akoth Advocate holding brief for Mr. Oyunge for the 1st Defendant/Respondent.

d) Mr. Njonjo Advocate for the 2nd Defendant/Respondent.

Judge's Copy