Paul Otieno Olewe t./a Min Piny International Limited v Nderi & another; George Otieno Osino t/a Cosino Investment (Objector); Lysajoy Auctioneers (Interested Party) (Environment and Land Appeal E060 of 2024) [2024] KEELC 4266 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4266 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E060 OF 2024

JO MBOYA, J

MAY 23, 2024

BETWEEN

PAUL OTIENO OLEWE T./A MIN PINY INTERNATIONAL LIMITED ..... APPELLANT

AND

SUSAN MUMBI NDERI ..... 1ST RESPONDENT

SAMUEL KIBOCHA T/A BROADLINK ESTATE MANAGEMENT .... 2ND RESPONDENT

AND

GEORGE OTIENO OSINO T/A COSINO INVESTMENT ..... OBJECTOR

AND

LYSAJOY AUCTIONEERS ..... INTERESTED PARTY

RULING

Introduction And Background:

1. The instant Ruling relates to and/or concerns two [2] applications, namely, the application dated the 3rd May 2024 filed by the Appellant/Applicant; and the application dated the 14th May 2024, but which has ben filed by [sic] the Objector herein.

2. Notably, even though the two [2] applications have been filed by the Appellant and the Objector respectively, the golden thread that runs beneath the two application[s] touches on and/or concerns the issuance of orders of stay of execution on one hand and an injunction on the other hand, with a

view to averting the intended execution of the orders issued by the Business Premises Rent Tribunal [BPRT] on the 8th April 2024.

3. Given that the Ruling relates to two [2] application[s], it is thus important to highlight each and every application and similarly, to reproduce the reliefs sought thereunder, for ease of reference and clarity.

4. Vide the application dated the 3rd May 2024; the Appellant/Applicant has sought for the following reliefs;

   i. Spent.

   ii. Pending the hearing of this Application inter-partes the Honorable court be pleased to stay the execution of the orders issued on the 8th April 2024 in Nairobi BPRT Cause No. E453 of 2023 between Susan Nancy Mumbi Nderi & Another vs Paul Otieno Olewe T/a Min Piny International Ltd.

   iii. Pending the hearing of the intended Appeal herein, the Honorable court be pleased to stay the execution of the orders issued on the 8th April 2024 in Nairobi BPRT Cause No. E453 of 2023 between Susan Nancy Mumbi Nderi & Another vs Paul Otieno Olewe T/a Min Piny International Ltd.

   iv. Costs of the Application be borne by the Respondents

5. The subject application is premised and anchored on various grounds which have been enumerated in the body thereof. Furthermore, the application beforehand is supported by the affidavit of Paul Otieno Olewe [Deponent] sworn on 3rd May 2024.

6. Instructively, even though the application beforehand was [sic] served upon the Respondents, same [Respondents] have neither responded thereto nor filed any written submissions in opposition to the said application.

7. The other application is the one dated the 14th May 2024; and which has been filed by the Objector. For coherence, the reliefs sought at the foot of the subject application are as hereunder;

   i. That this Application be Certified Urgent, fit and proper to be heard ex-parte and services be dispensed with in the first instance.

   ii. That Pending the Hearing and Determination of the Objector's Proceedings, this Honourable court be pleased to Restrain the Respondent, her employees, agents, servants, auctioneers and any other person acting at her behest from evicting, harassing, levying Distress against the Appellant on the basis of the Orders given in the Ruling Dated 8th April 2024 in Nairobi BPRT Case No.E453/2023; Susan Nancy Mumbi Nderi & Another - Vs -paul Otieno Olewe.

   iii. That Pending the Hearing and Determination of this Appeal, this Honorable court be pleased to Restrain the Respondent, her employees, agents, servants, auctioneers and any other person acting at her behest from evicting, harassing, levying distress against the Appellant on the basis of the Orders given in the Ruling Dated 8th April 2024 in Nairobi BPRT Case No. E453/2023, Susan Nancy Mumbi Nderi & Another- Vs-paul Otieno Olewe.

   iv. The Honorable court be pleased to issue any such orders that it deems fit to issue with regards to the Objectors proceedings.

   v. The costs of this Application be borne by the Respondents.

8. The instant application is anchored on a plethora of grounds which have been adverted to and highlighted at the foot thereof. Furthermore, the application is supported by the affidavit of the Objector sworn on even date and to which the Objector has annexed various documents, in an endeavor to demonstrate that same [Objector] is entitled to the reliefs sought.

9. Furthermore, it is appropriate to state that though the application is said to have been served upon the Respondents, same [Respondents] have neither filed any response thereto nor written submissions in opposition to the said application.

10. Be that as it may, the two applications [details in terms of the preceding paragraphs] came up for hearing on the 21st May 2024 whereupon the court ordered and directed that same be canvassed by way of written submissions. In any event, the court circumscribed the timelines for the filing and exchange of the written submissions.

11. Pursuant to and in line with the directions of the court, the Appellant and the Objector respectively proceeded to and filed their written submissions. Suffice it to point out that the written submissions by both the Appellant and the Objector are dated the 21st May 2024.

12. For good measure, the two [2] sets of written submissions [details in terms of the preceding paragraph] form part of the record of the court and shall thus be utilized and considered whilst crafting the Ruling under reference.

Parties' Submissions:

A. Appellant's Submissions:

13. The Appellant herein filed written submissions dated the 21st May 2024 and in respect of which same [Appellant] has adopted the grounds contained at the foot of the application and reiterated the averments in the body of the supporting affidavit.

14. Furthermore, learned counsel for the Appellant has thereafter raised, highlighted and canvassed three [3] salient issues for consideration and determination by the Honourable court.

15. Firstly, learned counsel for the Appellant has submitted that even though the Respondents were duly served with the application beforehand, same [Respondents], have neither filed any response thereto nor written submissions in answer to the claims beforehand.

16. Arising from the foregoing, learned counsel for the Appellant has thus contended that the application beforehand has therefore not been opposed and hence the court ought to deem same [application] as uncontroverted. Consequently, learned counsel has implored the court to proceed and grant the application as prayed.

17. Secondly, learned counsel for the Appellant has submitted that the Appellant herein has since filed an appeal before this court and in respect of which same [Appellant] seeks to invite the court to determine various issues, inter-alia, the interpretation as pertains to the lapse of time and the termination of the lease especially [sic] the lease under reference was bound to terminate and/or lapse.

18. Pertinently, learned counsel for the Appellant has submitted that the appeal beforehand establishes a sufficient cause and/or basis and thus there is need for the court to grant and/or issue an order of stay of execution pending the hearing and determination of the appeal.

19. Learned counsel for the Appellant has submitted that unless the orders sought are granted, the Respondents shall be at liberty to execute the orders arising from the Business Premises Rent Tribunal and hence the entire appeal shall be rendered academic and/or redundant.

20. Based on the foregoing submissions, learned counsel for the Appellant has implored the court to find and hold that the Appellant has established and demonstrated the requisite ingredients to warrant the grant of the orders sought. In this regard, counsel has implored the court to grant the orders of stay.

B. Objector's Submissions:

21. The Objector herein similarly filed written submissions dated the 21st May 2024, and in respect of which the Objector has reiterated the grounds contained at the foot of the application as well as the averments highlighted in the body of the supporting affidavit.

22. Additionally, learned counsel for the Objector has thereafter raised, amplified and canvassed Four [4] salient issues for consideration by the court.

23. First and foremost, learned counsel for the Objector has submitted that the Objector herein duly complied with the provisions Order 22 Rule 51 of the Civil Procedure Rules, 2010; as pertains to the issuance and service of a Notice of Objection to the Attachment of the goods, which have since been proclaimed by and at the instance of the Respondent.

24. To the extent that the Objector duly issued and served the requisite notice of objection of attachment, learned counsel for the Objector has thus submitted that the objection proceedings beforehand are well grounded and thus ought to be determined on merits.

25. Secondly, learned counsel for the Objector has submitted that though the Respondents herein were served with the notice of objection in accordance with the provisions of Order 22 Rule 51 of the Civil Procedure Rules, 2010, same [Respondents] have neither filed any intimation to proceed with the attachment and hence it is deemed that the impugned attachment has been raised in accordance with the provisions of Order 22 Rule 54 of the Civil Procedure Rules 2010.

26. To buttress the submissions that failure to file the intimation to proceed with the attachment vitiates the intended attachment, learned counsel for the Objector has cited and relied on the holding in the case of Chai Trading Company Ltd vs Muli Mwanzia & 2 Others [2019]eKLR.

27. Thirdly, learned counsel for the Objector has submitted that the objector herein has placed before the court sufficient evidence and material to demonstrate his [Objector's] interests over and in respect of the goods that have since been proclaimed.

28. Furthermore, learned counsel for the Objector has submitted that towards demonstrating his [Objector] interests over and in respect of the goods in question, the Objector has tendered and produced before the court assorted receipts and invoices to prove that same [Objector] is the one who purchased the said goods.

29. In any event, learned counsel for the Objector has cited and relied on various decisions inter-alia Stephen Kiprotice Koech vs Edwin K Barchilei; Joel Sitienei [Objecto] [2019]eKLR and Arun C Sharma vs Ashana Raikundalia T/s A. Raikundalia & Co Advocates & 4 Others [2014]eKLR, respectively to demonstrate the ingredients towards proving title to and/or equitable interests over the goods which are the subject of objection proceedings.

30. Finally, learned counsel for the Objector has submitted that the Appellant and the Objector are two separate and distinct persons and hence same [Appellant and Objector] are at liberty to approach the court with a view to vindicating their respective rights and/or interests in accordance with the law.

31. Further and in any event, learned counsel for the Objector has submitted that it was incumbent upon the Respondents herein to demonstrate and/or prove that the Appellant and the Objector are one and the same; which burden has neither been discharged nor established, whatsoever.

32. Arising from the foregoing, learned counsel for the Objector has therefore invited [implored] the court to find and hold that the Objection proceedings are meritorious and thus same ought to be granted.

C. Respondent's Submissions:

33. Suffice it to point out that the Respondents herein neither filed any Response to the applications or at all. Furthermore, the Respondents herein also did not file written submissions.

34. For coherence, the only written submissions which have been filed as pertains to the Application[s] beforehand, are the ones which have been highlighted elsewhere herein before.

Issues For Determination:

35. Having reviewed the applications beforehand and upon consideration of the written submissions filed by and on behalf of the respective parties, the following issues do emerge [crystalize] and are thus worthy of determination;

    i. Whether this Honorable court is seized of the requisite Jurisdiction to entertain and adjudicate upon [sic] the Objection Proceedings beforehand.

    ii. Whether the Objection Proceedings are competent.

    iii. Whether the Appellant herein has established the requisite ingredients to warrant the issuance of an order of stay of execution pending appeal or otherwise.

Analysis And Determination:

Issue Number 1 Whether this honorable court is seized of the requisite Jurisdiction to entertain and adjudicate upon the Objection Proceedings beforehand.

36. The Objector herein has filed and/or mounted the objection proceedings and in respect of which same [Objector] is seeking various reliefs but which are essentially geared towards protecting the Appellant and not otherwise.

37. Be that as it may, what the court is concerned with at this juncture and whilst endeavoring to answer issue number one, is whether the objection proceedings in question have been mounted and/or lodged before the appropriate court or forum.

38. Notably, any party, the Objector not excepted, who is desirous to ventilate his/her grievances, is obligated to discern the appropriate court or forum, which is seized of the requisite Jurisdiction to entertain and adjudicate upon the issues in dispute. Instructively, the discernment of the correct court/forum, is the first albeit critical step to be taken by any Litigant.

39. Pertinently, the choice of the court and/or forum, wherein the dispute ought to be lodged and/or mounted, is critical and paramount. For good measure, a dispute can only be entertained and adjudicated upon by a court that is vested with the requisite jurisdiction and not otherwise.

40. Put differently, the jurisdiction of a court to entertain and adjudicate upon a dispute beforehand is critical and paramount; and where a court is divested of the requisite jurisdiction then the court must decline to entertain and/or engage with the issues beforehand.

41. At any rate, it is common knowledge that where a court which is divested of jurisdiction entertains and/or adjudicates upon a particular issue which is outside her jurisdiction; then the entire proceedings and any resultant order[s] therefrom are a nullity ab initio and of no legal effect.

42. To this end, it is instructive to take cognizance of the holding of the Supreme Court of Kenya [the Apex Court] in the case of In the Matter of the Speaker of the Senate & another [2013] eKLR, where the court state and held thus;

    (4) Jurisdiction, in any matter coming up before a Court, is a fundamental issue that must be resolved at the beginning. It is the fountain from which the flow of the judicial process originates. The position is clear from the words of Nyarangi, J.A. in Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd. [1989] KLR 1 (at p. 14):

    "Without jurisdiction, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

    The consequence of a Court proceeding without jurisdiction is stated, in unambiguous terms, in Words and Phrases Legally Defined, Vol 3: 1 – N (at p.113): "Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing."

    (5) Learned counsel, Mr. Kilukumi for the applicants urged that this Court has the competence and should exercise its advisory jurisdiction on the issues arising. He submitted that the applicants duly satisfied the requirements set out in Article 163(6) of *the Constitution*: firstly, the applicants are State organs, entitled to move the Court for an Advisory Opinion; and secondly, the subject-matter, in this instance, should be one concerning county government. It was submitted that the first applicant is a State organ, as defined in Article 260 of *the Constitution*: the office of Speaker of the Senate is established under Part 3 of Chapter 8 ("Offices of Parliament") and in particular, Article 106(1) of *the Constitution*. And the second applicant is also a State organ, being a body established under Article 93(1) of *the Constitution*.

43. The centrality of jurisdiction of a court before entertaining and/or engaging with a particular dispute was also highlighted by the Supreme Court in the case S K Macharia vs Kenya Commercial Bank & Another [2012]eKLR, where the court stated and held thus;

    (68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where

the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

44. Similarly, the implication[s] attendant to jurisdiction and the consequences arising from proceedings entertained by a court without jurisdiction was also adverted to and highlighted by the Court of Appeal in the case of Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR, where the court stated as hereunder;

    1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?

    2. In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae. It is for this reason that this Court has to deal with this appeal first as the result directly impacts Civil Appeal No.6 of 2018 which is related to this one. We shall advert to this issue later. In the meantime, it is important to put this appeal in context.

45. Arising from the foregoing excerpts, there is no gainsaying that it was incumbent upon the Objector herein to discern from the onset whether or not this court is seized of the requisite jurisdiction to entertain the Objection Proceedings.

46. To my mind, Objection Proceedings are taken by a person [Objector] who contends that the execution and/or attachment of the decree of the court is being taken/undertaken against the properties which [sic] do not belong to the Judgment debtor.

47. On the contrary, it is ordinarily the Objector's position that the impugned attachment is being carried out and/or undertaken against the goods and the properties of the Objector who was however not a party to the suit giving rise to and/or birthing the decree under execution.

48. Pertinently, the objection proceedings are by law to be lodged and/or mounted before the court that issued the Judgment and decree which is the subject of execution and whose execution is being complained of by the Objector.

49. To this end, it is instructive to point out that the only court that has since issued a decree and/or made orders capable of execution and in any event, which are the basis of the execution complained of is the Business Premises Rent Tribunal. For good measure, it is worth pointing out that the tribunal also constitutes and/or forms part of the subordinate courts. [See the provisions of Article 169 of *the Constitution* 2010].

50. Conversely, it is not lost on this court that no Judgment and/or decree has been issued herein. Furthermore, there is no execution proceedings that have since been commenced and/or undertaken pursuant to any orders arising from the instant appeal.

51. In view of the foregoing, there is no gainsaying that if the Objector was aggrieved by the execution and/or attachment arising from the orders of the Business Premises Rent Tribunal, the only court that is seized and/or bestowed with the requisite jurisdiction to interrogate the propriety or otherwise, of

the Objector's claim is the Business Premises Rent Tribunal whose orders are the subject of execution and not otherwise.

52. In any event, the provisions of Order 22 Rule 51 of the Civil Procedure Rules, 2010 which underpin Objection Proceedings, are explicit and succinct as pertains to the court seized of jurisdiction to entertain objection proceedings.

53. For ease of reference, the provisions of Order 22 Rule 51 [supra] are reproduced as hereunder;

    51. Objection to attachment [Order 22, rule 51]

        (1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.

        (2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.

        (3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties.

54. My understanding of the foregoing provisions of the law is to the effect that the notice of objection to attachment is to be issued to inter-alia the court whose decree is the subject of execution and the decree holder. Instructively, one cannot talk about a decree holder where no Judgment and/or decree has since been issued and/or rendered.

55. Consequently and in view of the foregoing, there is no gainsaying that the only court wherein a decision has since been made giving rise to a decree holder and a Judgment debtor respectively, is the Business Premises Rent Tribunal [BPRT] and not otherwise.

56. In a nutshell, it is my finding and holding that the objection proceedings beforehand have been filed and lodged before a court without the requisite jurisdiction. Consequently and in this regard, my answer to issue number one is in the negative.

Issue Number 2 Whether the Objection Proceedings are competent.

57. Other than the question of Jurisdiction, which has been discussed and analysed in the preceding paragraphs, there is also the issue as pertains to the nature of reliefs, [if any] that an Objector may canvass and/or ventilate before the designated court.

58. Notably, the Objector's concern is ordinarily anchored on the imminent attachment of the properties and/or goods wherein the Objector claims to hold and/or have legal or equitable rights to.

59. To my mind, the interests of an Objector is ordinarily premised on challenging the attachment being levied on specific and/or designated properties and not otherwise. In this regard, it is imperative to underscore that an Objector cannot seek to procure an absolute stay of execution of the decree, save to the limited extent that the execution is said to impact on the Objector's goods or property.

60. Notwithstanding the foregoing, what is before this court is a scenario where the Objector is actually not seeking reliefs to protect specific or designated properties but same [Objector] is seeking reliefs to stop/restrain eviction of and levying of distress against the Appellant.

61. Quite clearly, the Objector herein appears to be ventilating and/or canvassing the interests of the Appellant and not otherwise. In fact, a reading of the entire application filed by and on behalf of the Objector, leaves no doubt that the Objector herein is actually propagating the interests of the Appellant and not otherwise.

62. To my mind, it is evident and/or apparent that the objections proceedings herein have been actuated and/or sponsored by the Appellant, albeit disguised as an objector, but with the sole aim of procuring [sic] injunctory reliefs, which the court had declined to grant in favor of the Appellant.

63. Be that as it may, I beg to point out that the nature of reliefs that have been highlighted and amplified in the body of [sic] the objection proceedings are not available to and in favor of an Objector.

64. Without belaboring the point, it is worthy to point out that an Objector's interest is ordinarily geared towards protecting his/her interests over specific good[s] claimed by same [Objector], but not to defeat the execution of a lawful decree and/or judgment against the Judgment debtor.

65. Arising from the foregoing, it is therefore my finding and holding that the objection proceedings herein whose net effect is to restrain the eviction of and levying of distress against the Appellant, are not only misconceived but constitute an abuse of the due process of the court.

66. Before departing from the issue beforehand, it is imperative to underscore that abuse of the court process takes various perspective and/or nuances, but primarily bears attributes where one, the Objector herein not excepted, seeks to misuse the due process of the court towards achieving an ulterior and/ or clandestine purpose.

67. For good measure, the ulterior motive [purpose] sought to be achieved by and on behalf of the Objector herein is to procure favorable orders albeit through the backdoor, with a view to vindicating the rights of the Appellant, whose previous application did not attract an order of stay.

68. Pertinently, the concept of abuse of the due process of the court has been highlighted in various decisions inter-alia the case of Muchanga Investments Ltd V Safaris Unlimited (africa) Ltd & 2 others [2009] eKLR, where the court stated as hereunder;

> The action was also wanting in bona fides and was oppressive to the appellant. All these in our view constitute abuse of process.
>
> To re-inforce the point, abuse of process has been defined in WIKIPEDIA, the free encyclopedia:
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> > " The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice."
>
> In BEINOSI v WIYLEY 1973 SA 721 [SCA] at page 734F-G a South African case heard by the Appeal Court of South Africa, Mohomad CJ, set out the applicable legal principle as follows:-
>
> > " What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process." It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for

purposes extraneous, to that objective." [See also Satya Bharma versus Director of Public Prosecution [2019]eklr].

69. In a nutshell, my answer to issue number two [2] herein before is twofold. Firstly, the reliefs being sought at the foot of the objection proceedings are not available to and in favor of an objector. In this regard, the Objection proceedings are not competent and thus not merited.

70. Secondly, the golden thread discernable from the objection proceedings is that same is a disguised attempt by the Appellant to defeat the orders of the Tribunal, albeit through the backdoor. Consequently, there is evidence of abuse of the court process, which cannot be countenanced by a conscientious court of law.

Issue Number 3 Whether the Appellant herein has established the requisite ingredients to warrant the issuance of an order of stay of execution pending appeal or otherwise.

71. Having dealt with and disposed of the Objection proceedings by and on behalf of the Objector, it is now appropriate to consider whether the Appellant herein has established and/or demonstrated the ingredients to warrant the grant of an order of stay of execution pending appeal.

72. Suffice it to point out that any Applicant, the Appellant not excepted, who is desirous to procure an order of stay of execution pending the hearing and determination of an appeal is obligated to demonstrate three [3] critical ingredients.

73. To start with, such an Applicant must demonstrate the existence of sufficient cause and/or basis. In this respect, there is no gainsaying that a sufficient basis would only ensue and/or arise where the Applicant has filed an appeal before the court and which appeal must no doubt, exhibit prima facie ground[s] that can be interrogated and canvassed during a plenary hearing.

74. Notably, the grounds to be canvassed in any such appeal must not be ones which would ultimately succeed. Nevertheless, it is not lost on this court that there must be some credible basis to be agitated before the court.

75. Be that as it may, in respect of the instant matter what the Appellant intends to canvass before the court relates to whether or not the lease agreement which was entered into on the 7th January 2019 and which was for a period of 5 years and 3 months; expired in 2024 or was set to expire in 2025.

76. Certainly, the Appellant herein does not require to be a reputed mathematician to discern that 5 years 3 months would lapse on or before April 2024 and not otherwise.

77. Consequently and to my mind, if the appeal is for purposes of determining whether or not the term of the lease has extinguished then same [Appeal] is ex-facie frivolous and thus does not espouse a sufficient cause.

78. To this end, it is appropriate to ascertain what the term "sufficient cause" constitutes. For coherence the term Sufficient cause was discussed by the Court in the case of Bildad Wachira vs Kimani [2016]eKLR, where the court stated and held as hereunder;

> It's important for me to mention that in the above case, the court defined what constitutes sufficient cause and in this respect the following paragraph is highly relevant to the issues before me:-
>
> > " Once the defendant satisfies the court on either, the court is under duty to grant the application and make the order setting aside the ex parte decree, subject to any

conditions the court may deem fit. However, what constitutes 'sufficient cause' to prevent a defendant from appearing in Court, and what would be 'fit conditions' for the court to impose when granting such an order, necessarily depend on the circumstances of each case.

Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions"

The applicant is required to satisfy to the court that he had a good and sufficient cause. What does the term "sufficient cause" mean.? The Court of Appeal of Tanzania in the case of The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others[9] discussing what constitutes sufficient cause had this to say:-

> " It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant" (Emphasis added)

In Daphene Parry vs Murray Alexander Carson[10] the court had the following to say:-

> " Though the court should no 'doubt' give a liberal interpretation to the words 'sufficient cause,' its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, ..."[Emphasis added].

79. The second ingredient that must also be satisfied by an Applicant relates to proof and/or demonstration of substantial loss. In this regard, it behooves the Applicant not only to implead substantial loss at the foot of the application but also to avail evidence to substantiate the claim that substantial loss is likely to accrue and/or arise, unless the orders sought are granted.

80. Instructively, it is the duty and obligation of an Applicant to place before the court evidence and material upon which the court can arrive at and/or reach a conclusion that substantial loss, in its various perspectives, shall accrue.

81. Nevertheless, I beg to point out that despite the clear provisions of Order 42 Rule 6[2] of the Civil Procedure Rules, the Appellant herein did not find it fit and/or appropriate to implead the requisite ingredient[s] underpinning the application for stay of execution.

82. At any rate, it is worth stating that instead of adverting to the statutory ingredients that underpin an application for stay of execution pending appeal, the Appellant herein has chosen to implead and highlight irreparable loss, which to my mind is a concept that does not apply and/or avail in matters pertaining to stay of execution pending appeal.

83. Premised on the foregoing, I am unable to find and hold that the Appellant herein has demonstrated and established the requisite ingredient[s] that underpin an application for stay of execution pending appeal.

84. In any event, there is no gainsaying that the foundation upon which an order of stay of execution pending appeal rests, is proof and/or demonstration of substantial loss and not otherwise.

85. To this end, it suffices to take cognizance of the holding of the court of appeal in the case of Kenya Shell Ltd vs Benjamin Karuga Kibiru &Another [1986]eKLR, where the court stated and held thus;

> It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.

86. Simply put, my answer to issue number three [3] is to the effect that the Appellant herein has failed to prove and/or establish the requisite ingredient[s] to warrant the grant and/or issuance of the orders of stay of execution pending appeal.

87. For good measure, it is important to underscore that the burden of establishing and or proving the existence of sufficient cause and the likelihood of substantial loss arising, laid on the shoulders of the Appellant. [See Sections 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya].

Final Disposition:

88. From the foregoing analysis [details in terms of the preceding paragraphs], it is apparent that the two [2] applications which are the subject of the instant Ruling, are devoid and bereft of merits.

89. Consequently and in the premises, I proceed to and do hereby make the following orders;

    i. The Application dated the 3rd May 2024 be and is hereby Dismissed.

    ii. The Application dated 14th May 2024 be and is hereby struck out for lack of Jurisdiction.

    iii. No orders as to costs.

90. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2024.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson Court Assistant

Ms. Rosemary Monyangi for the Appellant

Mrs. Osabwa for the Objector

N/A for the Respondents