Dzuya & another v Anjarwalla (Legal Representative Of The Estate Of Hussein Karimbhai Anjarwalla) (Environment & Land Case 132 of 2019) [2024] KEELC 4394 (KLR) (17 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4394 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 132 OF 2019

LL NAIKUNI, J

MAY 17, 2024

BETWEEN

DAVIS MWATELA DZUYA ..... 1ST APPLICANT

MASUDI BAKARI MUSA ..... 2ND APPLICANT

AND

SALIM ANJARWALLA [THE LEGAL REPRESENTATIVE OF THE ESTATE OF HUSSEIN KARIMBHAI ANJARWALLA] ..... RESPONDENT

RULING

I. Introduction

1. This Honorable Court is tasked on making a determination onto the the Notice of Motion application dated 31st July, 2023 by Davis Mwatela Dzuya and Masudi Bakari Musa, the Plaintiff/Applicant herein. The application was brought under the provision of Sections 1A, 1B, 3A & 95 of the *Civil Procedure Act* Cap. 21 and under Order 40 Rule 2; Order 50 Rule 6; Order 51 Rule 1 of the Civil Procedure Rules, 2010 and under Section 7 of the Appellant Jurisdictions Act, Cap 9.

2. Upon service of the application to the Defendant/Respondent responded through filing of a Replying Affidavit dated 26th October, 2023. The Honourable Court shall be dealing with all the issues raised from the said replies in this Ruling.

II. The Plaintiffs/Applicants' case

3. The Plaintiffs/Applicants sought for the following orders:-

    a. Spent.

b. THAT this Honorable Court be pleased to stay execution of the judgment and subsequent decree/Order herein pending hearing and determination of this application inter-parties.

c. THAT the Applicant be granted leave to file their Notice of Appeal out of time.

d. THAT the draft Notice of Appeal filed herein be deemed as dully filed upon payment of the requisite court fees/charges.

4. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 11th Paragraphed Supporting Affidavit of –DAVIS MWATELA DZUYA, the 1st Applicant herein sworn and dated 31st July, 2023 with two (2) annexures marked as 'DMD – 1 and 2' annexed thereto. The Applicant averred that:

a. The Deponent was the Plaintiff/Applicant herein with all the competence and authority to swear this affidavit.

b. Judgment in this matter was issued on 10th May, 2023 and they ought to have filed and/ or lodged their notice of appeal within 14 days from the date thereof.

c. The delay was occasioned during the process of obtaining copies of the Judgment from the Court to his office and obtaining instructions to appeal.

d. The said delay was inadvertent and not intended.

e. They were dissatisfied with the said Judgment and intend to lodge an appeal (Annexed and marked as 'DMD - 1' was a copy of the Notice of Appeal).

f. Their appeal had a high chance of success.

g. The Respondent would not be prejudiced if the said leave was granted.

h. They had applied for certified copies of proceedings and expected to have them expeditiously. (Annexed and marked 'DMD - 2' was a copy of the letter requesting copies of the proceedings.)

i. They had made the application within reasonable time

j. The affidavit was in support of the application for stay pending appeal.

III. The Defendant's response

5. The Defendant/ Respondent opposed the application through a 14 paragraphed Replying Affidavit sworn by SALIM ANJARWALLA, the Defendant/ Respondent herein with two (2) annextures marked as "SA - 1 and 2" on 26th October, 2023 where he averred that:-

a. By an email dated 28th April 2023, this Court issued a Notice of Delivery of Judgment scheduled for 10th May 2023. The said Notice was issued to both the Law firms of advocates on record for the parties through the official email addresses provided in the pleadings filed by the respective parties. Produced and shown to marked as "SA - 1" is a true copy of an extract of the Judgment Notice by email.

b. The Judgment herein was virtually delivered on 10th May 2023 as scheduled.

c. The Plaintiffs/Applicants had at Paragraph 2 of the Affidavit in support of the: Application admitted to knowledge of the Judgment and the timelines to lodge a Notice of Appeal.

d. A copy of the Judgment was available for collection by the parties on or before 30th May 2023.

e. By a letter dated 16th June 2023, his advocates shared the draft decree with Counsel for the Plaintiffs/Applicants. The letter was duly acknowledged but elicited no response. Produced and shown to him marked as "SA - 2" was a true copy of the Letter.

f. In any event, the Plaintiffs/Applicants inferred to knowledge of the findings of the Court. Nothing precluded the Applicant from lodging a Notice of Appeal awaiting receipt of a hard copy of the Judgment.

g. The Application had been filed on 31st July 2023, more than 80 days after the Judgment herein was delivered.

h. The delay was inordinate and had not been sufficiently explained, or at all. There was no material put forward to explain such a delay for this Court to exercise its discretion.

    i. The Plaintiffs/Applicants had also not shown what substantial loss he would suffer if an order of stay of execution is not granted.

j. The Defendant/Respondent would be highly prejudiced if this Application was allowed as he and the other administrators of the estate of Hussein Karimbhai Anjawalla were bound by the law to complete discharging their duties of collecting, administering,and distributing to the beneficiaries the net assets of the said estate, which process had thus far been hampered and restricted by this suit.

k. He prayed that the Application be dismissed with costs to the Defendant/Respondent.

IV. Submissions

6. On 2nd November, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 31st July, 2023 be disposed of by way of written submissions. Pursuant to that and by the time of penning down this Ruling, the Honourable Court could only assess the submissions filed by the Defendant/Respondent. On 27th February, 2024 a ruling date was reserved on 10th May, 2023 by Court accordingly.

A. The Written submissions of the Defendant/ Respondent

7. The Defendant/Respondent through the Law firm of Messrs. Daly Inamdar Advocates LLP filed his written submissions dated 27th February, 2024. M/s. Baraza Advocate commenced by stating that these were the written submissions by the Defendant/Respondent with respect to the Plaintiffs/Applicants Application dated 31st July 2023 seeking leave to file their Notice of Appeal, against the Judgment delivered by this Court, out of time. The Application was opposed through the averments sworn through a filed Replying Affidavit deponed by Salim Anjarwalla on 26th October 2023 and filed in Court on even date. As of the date of these submissions, they were yet to be served with the Plaintiffs' submissions.

8. In support of these submissions, the Defendant/Respondent annexed two (2) decisions by the Court of Appeal; "Church of God East Africa & another – Versus - Dinah Buluma [2019]eKLR (Church of God case)" and "Turea *Limited t/a Dr. Mattress – Versus - Mohamed (Civil Application E030 of 2022*) [2022] KECA 1271 (KLR) (18 November 2022) (Ruling) (Turea Limited case)" where the

Court in declining to exercise its discretion in favour of the Applicant cited various decisions that the Respondent had highlighted as appropriate through these submissions and on the face of the annexed Authorities.

9. On the legal analysis and the discretion of this Court to extend time, the Learned Counsel submitted that the Plaintiffs/Applicants, despite admitting their knowledge on the timelines to file the Notice of Appeal at ground (a) of the Application and Paragraph 2 of the Affidavit deponed by Davis Mwatela in support of the Application, failed to do so within such timelines. The Learned Counsel relied on the decision in "Ratnam - Versus - Cumarasamy (1964) 3 All ER 933" as cited the Church of God case as follows:

> " The rules of court must, prima facie be obeyed and in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise discretion. If the laws were otherwise a party in breach would have unqualified right to an extension of time which would defeat the purpose of the rules which is to provide for a time table for the conduct of litigation."

10. The Learned Counsel invited this Court to consider the factors spelt out in the Court of Appeal decision in "Turea *Limited t/a Dr. Mattress – Versus - Mohamed (Civil Application E030 of 2022*) [2022] KECA 1271 (KLR) (18 November 2022)" in exercising its discretion as hereunder;

> " The discretion of this Court to extend time under Rule 4 is unfettered but must still be exercised judiciously. The factors that govern the exercise of the discretion to extend time under the said Rule were well stated in the case of Leo Sila Mutiso – Versus - Rose Hellen Wangare Mwangi Civil Application No. Nai 255 of 1997 (ur) as being the length of the delay; the reason for the delay; the chances of the appeal succeeding if the application is granted; and the degree of prejudice to the Respondent if the application is granted. Similar factors were also stated by the Supreme Court of Kenya in Nicholas Kiptoo Arap Salat – Versus - IEBC[supra]."

11. On whether there had been unreasonable delay in filing the Notice of Appeal and the present Application, the Learned Counsel relied on the case of "Church of God case" where the Court stated thus;

> " Subject to the law on limitation period, whereas the law does not set the minimum or maximum period of delay, in my view, an applicant is expected to account for every single day of the delay."

12. Judgment herein was delivered on 10th May 2023. The Plaintiffs/Applicants had only sought to file the draft Notice of Appeal dated 31st July 2023 by an application of even date, 80 days after delivery of Judgment. The Plaintiffs/Applicants had hot attempted to explain the delay. Indeed, he casually stated at paragraph 3 of the Grounds replicated in the Supporting Affidavit thus:

> " The delay was occasioned by the delay which occurred during the process of obtaining a copy of the Judgment from the Court to my office and obtaining instructions to appeal"

13. The Defendant/Respondent served the Plaintiffs/Applicants and counsel on record with the Draft Decree on 16th June 2023. It could therefore not be purported that a copy of the Judgment was not ready for collection as the Defendant managed to obtain a copy of the typed Judgement soon after the same was delivered, drafted the Decree, and even exchanged the Decree with the Plaintiffs/Applicants.

Even after the prompt effected by the Decree, the Plaintiff only brought the Application 45 days thereafter. On this point, the Learned Counsel relied on the decision in "Dilpack Kenya Limited - Versus - William Muthama Kitonyi [2018] eKLR" as quoted in the Church of God case where the High Court in considering an application for extension of time correctly stated:

> " What then is the explanation for the default in this matter. The only reason given by the Applicant for not taking action within the prescribed time is that of inadvertence. However, the nature of the inadvertence is not explained at all."

14. The Plaintiffs/Applicants had barely forwarded any explanation for the delay. The Supporting Affidavit never gave an account of the 80 days taken between delivery of Judgment to filing the Application. It was not only ambiguous but also contradictory on whether it was caused by the litigant or by Counsel on record. The Court of Appeal in the "Turea Limited case" faced with a situation where the delay was not explained held thus:-

> " While the period of delay may not be inordinate, I am of the view that it is inexcusable, as the explanation proffered by the Applicant is not substantiated in any way"

15. According to the Learned Counsel, it his case the delay was not only inordinate but had also not been substantiated. For the reasons above, they asked that the Court find the delay inexcusable.

16. On whether the Appeal had high chances of success and whether the Defendant/Respondent shall suffer any prejudice. The Learned Counsel relied on the decision in the case of:- "Mugo – Versus - Wanjiru [1970] EA 481, 483", as cited in the "Church of God case" where Spry V-P said:

> " .....I do not think the fact that an appeal appears likely to succeed can of itself amount to 'sufficient reason. Normally, I think the sufficient reason must relate to the inability or failure to take the particular step it time, but I am not prepared to say that no other consideration may be invoked."

17. Considering the Plaintiffs/Applicants unexplained delay as submitted above, the Court had sufficient grounds to dismiss the Application without considering any other factors. In any event; the claim subject of the Judgment delivered herein was a claim for adverse possession. The same failed on the sole ground that the Plaintiffs/Applicants occupation on the suit property was permissive as he was an employee of the Defendant/Respondent. The clear finding by the Court had no chance of being overturned on appeal. The Court in its Judgement and Decree issued orders that the Plaintiff vacates the suit property within 90 days of the date of delivery of Judgment. This had followed years of a Court order for maintenance of status quo at the suit property.

18. The Defendant/Respondent would be highly prejudiced if this Application was allowed as the administrators of the estate of Hussein Karimbhai Anjarwalla were bound by the law to complete discharging their duties of collecting, administering, and distributing to the beneficiaries the net assets of the said estate, which process had thus far been hampered and restricted by the pendency of this matter. The Defendant as a successful litigant should not be prevented from enjoying the fruits of the Judgment.

19. In conclusion, the Learned Counsel submitted failure by the Plaintiff to observe timelines, albeit deliberately and without sufficient reason as shall be submitted hereunder, speaks to a clear abuse of the Court process and an afterthought to delay the fulfilment of the Judgment delivered herein. They

relied on the Court of Appeal decision of the case of:-"Habo Agencies Limited – Versus – Wilfred Odhiambo Musingo [2015] eKLR", where it was held;

> " Rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain, and even-banded. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules.

20. Having fully demonstrated that the Plaintiffs/Applicants' application lacked merit, the Learned Counsel urged that this Court dismissed the claim as prayed with costs to the Defendant/Respondent.

V. Analysis & Determination.

21. I have carefully read and considered the pleadings herein by the Plaintiff/Applicant, the written Submissions, the myriad of cases cited herein by parties by the Defendant/Respondent, the relevant provisions of *the Constitution* of Kenya, 2010 and the statures.

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

    a. Whether leave should be granted to the Plaintiffs/Applicants to file notice of appeal out of time?

    b. Whether the Notice of Motion application dated 31st July, 2023 seeking to stay execution of the Judgment and decree made by Justice L. L. Naikuni on 10th May, 2023 pending Appeal is merited?

    c. Who will bear the Costs of Notice of Motion application dated 31st July, 2023.

    ISSUE No. a). Whether leave should be granted to the Plaintiffs/Applicants to file notice of appeal out of time?

23. Under this sub - heading, and as matter of entry point to the elaborate analysis to the framed issues, the Honourable Court deciphers that the main substrata in this matter is two fold. First, it is whether the Plaintiffs/Applicants should be granted leave to institute an appeal against the Judgement of this Court which was delivered in favour of the Defendant/Respondent out of time. Secondly, is upon being granted the leave sought for enlargement of time, they be granted stay of execution to the Decree of this Court pending the hearing and determination of the appeal before the Court of Appeal. Thus, the Honourable Court will be distinctively dealing with each of these legal issues.

24. While considering the issue of enlargement of time, I have given due consideration to the pleadings and submissions filed in this application. The issue for determination is whether the Plaintiffs/Applicants' prayer for extension of time should be granted. The legal mandate on enlargement of time is derived from several provision of statures. They include the provision of Section 95 of the *Civil Procedure Act*, Cap. 21; Order 50 Rules 6 and 7 of the Civil Procedure Rules, 2010 and Rule 4 of the *Appellate Jurisdiction Act*, Cap. 9 rules which allows the court, for sufficient reasons, to extend the timelines in the Rules.

    Section 95 provides that:-

    "Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired"

25. From these provisions of statures, it is clear that the Court has unfettered discretionary powers to extend time depending on the facts of each case so long as it is exercised judicially. The factors to be considered when determining an application for extension of time are found in various judicial pronouncements of the courts. The Honourable Court will refer to just a few of these decisions. In the case of:- "Paul Wanjohi Mathenge – Versus - Duncan Gichane Mathenge [2013] eKLR" this court discussed those factors as follows:-

> " The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance..."

26. Additionally, the Supreme Court case of:- "Nicholas Kiptoo Arap Korir Salat – Versus - Independent Electoral and Boundaries Commission & 7 others [2014] eKLR" laid down the principles that govern the exercise of discretion in applications for extension of time as follows:

> " 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
>
> 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
>
> 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
>
> 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
>
> 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
>
> 6. Whether the application has been brought without undue delay; and
>
> 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

27. In the instant case, the court has factored these legal principles against the exercise of its discretionary jurisdiction when determining an application for extension of time. The first question to be answered is whether the Plaintiffs/Applicants have tendered a satisfactory explanation for the delay in filing the notice of appeal. Fundamentally, from the surrounding facts and inferences, the issue of computation of time here becomes imperative. The Judgment which the Plaintiffs/Applicants intends to appeal against was delivered on 10th May, 2023. The period for filing the notice of appeal lapsed on about 17th May, 2023 which is seven days after the delivery of the decision being appealed to. This leads to the Period of delay was proximately 82 days. The explanation tendered by the Plaintiffs/Applicants is that they were pursuing the certified copies of the proceedings and the Judgment. It must also be seen that parties on their part were not careless. The Plaintiffs/Applicants herein moved within reasonable time to follow up with the Court registry to get the same. Indeed, they instructed their Counsel to file the instant application without unreasonable delay. In my own view, the delay cannot therefore be said to be inordinate in the circumstances. Therefore, I hold that the explanation tendered by the

Plaintiffs/Applicants is not only plausible, cogent but also sufficient considering the delay period was only 82 days. Additionally, I have noted that the delay was occasioned by the fault of the Court registry. It would be unfair toe blame the Plaintiffs/Applicants for the said delay. Without evidence to the contrary, I am unable to find carelessness in the actions of the Plaintiffs/Applicants.

28. The next question is whether there will be any prejudice suffered by the Defendant/Respondent if the orders are granted. Whereas the Plaintiffs/Applicants is of the view that no prejudice will be suffered by the Defendant/Respondent, it is the Defendant/Respondent's submission that this will be in two – fold. First, that the estate of the deceased would be affected in failing to fully exercise their legal mandate in the administration of the said estate and secondly, the Legal Administrators will be denied and/or deprived from enjoying the fruits of their Judgment if the orders sought were to be granted. Undoubtedly, the argument advanced by the Defendant/Respondent may be indeed sound and true. However, this being a Court of Justice where there ought to be a balance of the interest of all parties, it behoves logic, equity and conscience that substantive justice demands that a party is accorded every reasonable and available opportunity to ventilate their grievances within the available ranks of our judicial system. That is what the Plaintiffs/Applicants seeks to do here. They ought to be heard and granted the orders sought. As for deferring the enjoyment of the fruits of the Judgment by the Defendant/Respondent, it is my view that nothing bars the Defendant/Respondent from realizing his decree if no orders of stay are issued. The availability of this avenue to the Defendant/Respondent therefore cures the prejudice that might be visited on him, as he puts it. It therefore follows that the application for extension of time has merit and thus I procced to allow it.

ISSUE No. b). Whether the Notice of Motion application dated 31st July, 2023 seeking to stay execution of the Judgment and decree made by Justice L. L. Naikuni on 10th May, 2023 pending Appeal is merited?

29. Under this Sub – heading, the main issue is on whether or not to grant stay of execution of this Court's Judgement pending the hearing of the appeal. The law concerning stay of execution pending Appeal is found in under the provision of Order 42 Rule 6 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.

30. Stay of execution pending appeal is a discretionary power bestowed upon this court by the law. At the very initial stages of building jurisprudence in this area of law, 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."

31. 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*, Cap. 21 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* or in the interpretation of any of its provisions.

32. 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."

33. Legally speaking, there are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 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.

34. 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 pending Appeal.

ii. What orders this Court should make

35. 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".

36. 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.

37. 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."

38. 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."

39. 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)"}.

40. As F. Gikonyo J stated in "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…"

41. Now, applying these principles to the instant case. The Plaintiffs/Applicants herein filed an application dated 31st July, 2023 seeking orders to stay the Judgement in this matter delivered by this Honourable Court on 10th May, 2023 in favour of the Defendant/Respondent herein. He failed to file a notice of appeal within the prescribed period because he was seeking the copy of the Judgment and the copies of the proceedings since he was not satisfied with the Court's decision. Annexed in the affidavit and marked as "DMD – 1" is a copy of the draft notice of appeal. His advocates have requested for certified copies of proceedings and judgment which were the reason for the delay. Annexed in the affidavit and marked as "DMD – 2" is a copy of the letter requesting copies of the proceedings.

42. On the other hand, while vehemently opposing this application, the Defendant/Respondent mounted such a strong argument against the Plaintiffs/Applicants from being granted the orders of stay of execution. He argued that by an email dated 28th April 2023, this Court issued a Notice of Delivery of Judgment scheduled for 10th May 2023. To him, the said Notice was issued to both Law firms of advocates on record for the parties through the official email addresses provided in the pleadings filed by the respective parties. Produced and shown to marked as "SA - 1" is a true copy of an extract of the Judgment Notice by email.

43. According to the Defendant/Respondent, the Judgment herein was virtually delivered on 10th May 2023 as scheduled. The Plaintiffs/Applicants have at paragraph 2 of the Affidavit in support of the: Application admitted to knowledge of the Judgment and the timelines to lodge a Notice of Appeal. A copy of the Judgment was available for collection by the parties on or before 30th May 2023. By a letter dated 16th June 2023, his advocates shared the draft decree with Counsel for the Applicant. The letter was duly acknowledged but elicited no response. Produced and shown to him marked as "SA - 2" is a true copy of the Letter. In any event, the Plaintiffs/Applicants inferred to knowledge of the findings of the Court. Nothing precluded the Plaintiffs/Applicants from lodging a Notice of Appeal awaiting receipt of a hard copy of the Judgment.

44. The Defendant/Respondent has further averred that the application has been filed on 31st July 2023, more than 80 days after Judgment herein was delivered. According to the Defendant/Respondent, the delay is inordinate and has not been sufficiently explained, or at all. There is no material put forward to explain such a delay for this Court to exercise its discretion. The Applicant has also not shown what substantial loss he will suffer if an order of stay of execution is not granted.

45. 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 Applicants 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.

46. Regarding the pre-requisite in Order 42 Rule 6, that is substantial loss occurring to the Applicant, the court has already referred the consideration to be made in the case of "Kenya Shell Limited –Versus - Benjamin Karuga Kigibu & Ruth Wairimu (Supra)". There is a Judgement and Decree hanging under the neck of the Plaintiffs/Applicants where they risk of being evicted from the suit property anytime and hence become destitute with his family. Thus, without belabouring the point and hence appearing to be sitting as an appellate court on my own Judgement, I find that the Plaintiffs/Applicants have proved that they will suffer substantially if the orders for stay of the execution are not granted as prayed.

47. The second issue to determine is where the application for stay of execution was made without inordinate delay. From the record, the Judgment being appealed against was delivered on 10th May, 2023 and the application herein was filed on 31st July, 2023, the draft notice of appeal on 31st July, 2023. The Defendant/Respondent argued that the Application had been filed on 31st July 2023, more than 80 days after judgment herein was delivered. This application was filed after about 3 months after the Judgment. In this Honourable Court's opinion, the application was made timeously without any delay. The application was therefore made and filed expeditiously and without undue delay.

48. 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. Has made no provisions for security in his application.

49. However, this court 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.

50. In 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."

51. 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 Order 42 Rule 6. This Court observes that in this matter there was a proposal made by the Honourable Court on pure humanitarian grounds for a sum of Kenya Shillings Three Million (Kshs. 3,000,000/-) under the provision of Article 43 of *the Constitution* of Kenya, 2010 in its Judgment of 10th May, 2023 to be paid to the 1st Plaintiff/Applicant by the Defendant and that an order for eviction to the Plaintiffs to vacate the suit property and the dismissal of the Plaintiffs' case. Interestingly, for no apparent reason or good cause, none of the parties herein have touched on this pertinent issue at all.

52. The Court observed in the case of: "Gianfranco Manenthi & Another – Versus - Africa Merchant Assurance Company Ltd [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)

53. As already demonstrated in "James Wangalwa & Another vs. 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 Plaintiffs/Applicants herein, though they brought this Application without undue delay and adequately demonstrated the substantial loss that they would suffer and he failed to state to the Court how he plans to security as stipulated by sub-rule 2b.

54. The end result is that I grant the order for stay of execution on condition that the Plaintiffs/Applicants shall furnish security equivalent to half the decretal sum in a fixed interest earning account accessed by both the Plaintiffs and Defendant's advocate within 14 days after the delivery of this ruling.

ISSUE No. c). Who will bear the Costs of Notice of Motion application dated 31st July, 2023.

55. 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" eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).

56. 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. In this case, this Honourable Court has reserved its discretion in not awarding costs.

VI. Conclusion & Disposition

57. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the application, this court arrives at the following decision and makes below order:-

__**a. THAT__ the Notice of Motion application dated 31st July, 2023 be and is found to have merit hence it is hereby allowed in its entirety but upon fulfilment of stated Pre - conditions herein.

__b. THAT**__ this Honourable Court do hereby issue an order to stay the execution of its Judgment and subsequent decree/ order arising from the Judgment of the Honourable Justice L. L. Naikuni delivered on 10th May, 2023 pending the hearing and determination of the intended appeal in the Court of Appeal.

c. __ **THAT**__ leave do and is hereby granted to the Plaintiff/Applicant to file their Notice of Appeal out of time.

__d. THAT__ an order be and do hereby issue that the draft Notice of Appeal filed herein be deemed as dully filed upon payment of the requisite court fees/charges.

__e. THAT**__ the Plaintiffs/Applicants within the next 45 days from the date of delivery of this Ruling to furnish a tangible security for the due performance of the Decree pending the hearing and final determination of the impugned appeal.

__f. THAT__ there shall be no orders as to costs.

IT IS SO ORDERED ACCORDINGLY

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS .....17TH .....DAY OF .....MAY.....2024.

.....**.....**

HON. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

a. M/s. Firdaus Mbula, the Court Assistant.

b. M/s. Kyalo Advocate holding brief for Mr. Shimaka for the 1st Plaintiff/1st Applicant

c. M/s. Baraza Advocate for the Defendant/ Respondent

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