African Orthodox Church of Kenya Registered Trustees & another v Orthodox Archbishoprtc of Kenya and Irinoupolis Limited- & another (Environment & Land Case 525 of 2015) [2024] KEELC 4919 (KLR) (24 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4919 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 525 OF 2015

JO MBOYA, J

JUNE 24, 2024

BETWEEN

THE AFRICAN ORTHODOX CHURCH OF KENYA REGISTERED TRUSTEES ..... 1ST PLAINTIFF

FATHER NTCHOLAS MUKOMA GACHEGE FATHER MOSES NGUGT GICHUHI TATHER PETER NG'ANG'A MICHARA FPED KAGO KABUCHI (SUING FOR AND ON BEHALF OF THE AFRICAN ORTHODOX CHURCH OF KENYA) ..... 2ND PLAINTIFF

AND

THE ORTHODOX ARCHBISHOPRTC OF KENYA AND IRINOUPOLIS LIMITED- ..... 1ST DEFENDANT

ORTHODOX TOWERS MANAGEMENT COMPANY LIMITED .... 2ND DEFENDANT

RULING

1. The Defendants/Applicants have approached the Honorable court vide the Notice of Motion Application dated the 18th April 2024 brought pursuant to the provisions of Sections 1A, 1B and 3B of the *Civil Procedure Act*; Order 42 Rule 6 of the *Civil procedure Rules* and Order 51 Rule 1 *Civil Procedure Rules*, 2010 and wherein the Applicants have sought for the following reliefs;

   i. .....Spent.

   ii. That pending the hearing and determination of this Application inter-partes, this Honorable court be pleased to stay execution of the order of this Honorable court made on the 29th February 2024.

iii. That pending the hearing and determination of the appeal, this Honorable court be pleased to stay execution of the order of this Honorable court made on the 29th February 2024.

iv. That the Applicants be allowed to provide reasonable security for costs.

v. That costs of this Application be provided for.

2. The instant application is premised on various grounds which have been amplified at the foot thereof. Furthermore, the application is supported by the affidavit of Makarios Andreas Tillyrides sworn on the 18th April 2024 and a Further supporting affidavit sworn by the same deponent.

3. Upon being served with the application beforehand, the Plaintiff/Respondent filed Grounds of opposition dated the 2nd May 2024 and in respect of which same [the 1st Plaintiff/Respondent] has contended *inter-alia* that the application beforehand has been made in vacuum insofar as there is no valid notice of appeal that has been filed by and on behalf of the Applicants herein or otherwise.

4. It is imperative to point out that the application beforehand came for hearing on the 22nd May 2024 when the advocates for the respective parties covenanted to canvass the application by way of written submissions. Consequently and in this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.

5. Pursuant to and in line with the directions of the court, the Applicants' proceeded to and filed written submissions dated the 10th June 2024 and whereas the Respondent filed written submissions dated 14th June 2024. For coherence, the two [2] sets of written submissions form part of the record of the court.

Parties' Submissions:

a. Applicants' Submissions:

6. The Applicants herein filed written submissions dated the 10th June 2024, and wherein same [Applicant] has reiterated the grounds contained at the foot of the application as well as the averments in the supporting affidavit and the supplementary affidavit, respectively.

7. Furthermore, learned counsel for the Applicants has thereafter highlighted four [4] salient issues for consideration by the court.

8. Firstly, learned counsel for the Applicants has submitted that the appeal against the ruling and orders of this court made on the 29th February 2024, lies as of right and not with Leave of the Honourable Court. In this regard, learned counsel for the Applicants has contended that no leave to appeal was therefore required at all.

9. Additionally, learned counsel for the Applicants has submitted that a right of appeal is a constitutional right and hence same cannot be taken away from[sic] an Applicant who is desirous to pursue such an undoubted right of appeal.

10. To this end, learned counsel for the Applicants has cited and relied on *inter-alia* the decision in the case of *James Wangalwa & Another v Agnes Naliaka Chesetu* Bungoma High Court Misc. App No. 42 of 2001 and *Edward Kamau & Another v Hanna Mukui Gichiki & Another* [2015]eKLR.

11. Secondly, learned counsel for the Applicant has submitted that following the delivery of the ruling on the 29th February 2024, the Applicants herein felt aggrieved and/or dissatisfied and thereafter same [Applicants] proceeded to and filed a notice of appeal.

12. On the other hand, learned counsel for the Applicants has submitted that the Notice of appeal was thereafter served upon the respondent herein. In any event, it has been contended that the Notice of appeal which was filed and served accords with the law and hence same is valid for all intents and purposes.

13. Thirdly, learned counsel for the Applicants has submitted that the application beforehand is not barred and/or prohibited by the doctrine of Res-Judicata, either in the manner contended by the Respondent or at all. For good measure, learned counsel for the Applicants has posited that this is the 1st application which has been filed by and on behalf of the Applicants seeking for an order of stay of execution pending appeal.

14. To the extent that this is the first application seeking stay of execution pending appeal, learned counsel for the Applicants has thus contended that the doctrine of res-judicata is therefore irrelevant and inapplicable.

15. Fourthly, learned counsel for the Applicants has submitted that the Applicants herein have met and satisfied the requisite threshold to warrant the grant of the orders sought. For good measure, it has been contended that the execution of the terms of the ruling rendered on the 29th February 2024, shall cause and/or occasion grave injustice to the Applicants herein.

16. Other than the foregoing, the Applicants have also contended that the execution and/or implementation of the orders issued on the 29th February 2024 ought to await the promulgation of the new constitution of the church and hence there exists sufficient basis to warrant the grant of the orders of stay.

17. To buttress the submissions that the Applicants have satisfied the ingredient[s] to warrant the grant of the orders sought, learned counsel for the Applicants has cited and relied on the holding in the case of African Safari Club versus Safe Rental ltd Court of Appeal Civil Application no. 53 of 2010.

18. Arising from the foregoing, learned counsel for the Applicants has therefore implored the court to find and hold that the Applicants have established the requisite conditions to warrant the grant of the orders sought at the foot of the instant application.

b. Respondent's Submissions:

19. The Respondent has filed written submissions dated the 14th June 2024 and wherein same [1st Plaintiff/Respondent] has adopted and highlighted the issues contained at the foot of the grounds of opposition dated the 2nd May 2024.

20. On the other hand, learned counsel for the Respondent has ventured forward and canvassed three [3] pertinent issues for consideration and determination by the court. First and foremost, learned counsel for the Respondent has submitted that the ruling of the court rendered on the 29th February 2024 does not confer and/or bestow upon the Applicants herein a right of appeal. For good measure, learned counsel for the Respondent has posited that an appeal could only arise pursuant to leave of the court and not otherwise.

21. Additionally, learned counsel for the Respondent has pointed out that no leave has since been sought for and/or obtained and hence the Notice of appeal which was filed by and on behalf of the Applicants herein has been filed in vacuum.

22. Further and at any rate, it has been submitted that in the absence of leave to appeal having been sought for and obtained, the Applicants herein have neither demonstrated a sufficient cause nor basis to warrant the grant of the orders of stay either in the manner sought or at all.

23. To anchor the submissions that the Notice of appeal has been filed in vacuum, learned counsel for the Respondent has cited and relied on *inter-alia* the holding in the case of *Attorney General v Bala* [2023] KECA 117 [KLR]; *Peter Nyaga Muvake v Joseph Mutunga* [2015]eKLR; *Nyutu Agrovet Ltd v Airtel Networks Ltd* [2015]eKLR; *Mbaya v Kamau & Another* [2023] KEHC 24945 [KLR]; *Avtar Sing Bhara & Another v Chief Land Registrar & 3 Others* [2022] KEELC 2672 [KLR] and *Kakuta Maimai Hamisi v Peris Psi Tobiko & 2 Others* [2013]eKLR, respectively.

24. Secondly, learned counsel for the Respondent has also submitted that the Applicants herein have neither established nor demonstrated that substantial loss is likely to accrue and/or arise, if the orders sought are not granted.

25. At any rate, learned counsel for the Respondent has posited that the burden of satisfying the ingredients espoused and/or articulated under Order 42 Rule 6[2] of the *Civil Procedure Rules* 2010 lies on the shoulders of the Applicant herein. Nevertheless, it has been posited that the Applicant has neither demonstrated nor proved the said ingredients.

26. On the other hand, learned counsel for the Respondent has also submitted that the fact that execution has been commenced or is likely to be commenced, does not by itself constitute substantial loss. For good measure, learned counsel for the Respondent has submitted that it behooves the Applicants herein to venture forward and establish the circumstances that are likely to occasion substantial loss, if the orders are not granted.

27. To buttress the submissions pertaining to the burden of proof and satisfaction of substantial loss, learned counsel for the Respondent has cited and relied on the decision in the case of *Winfred Nyawira Maina v Peterson Onyiego Gichana* [2015]eKLR and *James Wangalwa & Another v Ages Naliaka Cheseto* [2012]eKLR, respectively.

28. Thirdly, learned counsel for the Respondent has submitted that the application beforehand is barred and prohibited by the doctrine of res-judicata and the provisions of Section 7 of the *Civil Procedure Act*.

29. According to learned counsel for the Respondent, the Applicants herein sought for an order of stay of the Judgment which was rendered on the 21st July 2022; but which order was declined by the court. In this regard, it has been contended that insofar as the orders of stay was declined the Applicants herein cannot now file or lodge the current application.

30. Other than the foregoing, learned counsel for the Respondent has also submitted that the Applicants herein were granted liberty to file a formal application for stay of execution of the ruling adopting the mediation agreement as a judgment of the court, but same [Applicants] failed to file the requisite application.

31. Based on the foregoing, learned counsel for the Respondent has therefor contended that the current application, which essentially seeks an order of stay of execution pending the hearing and determination of the intended appeal, is therefore res-judicata.

32. To highlight the contention that the application beforehand is barred by the doctrine of res-judicata, learned counsel for the Respondent has cited and relied on the holding in the case of *Mwangi Njango v Meshack Mbogo Wambugu & Another* Nairobi HCC 2340 of 1991 [UR] and *Joseph Odhiambo v Nyakundi Omari* [2016]eKLR

33. Premised on the foregoing submissions, learned counsel for the Respondent has therefore invited the court to find and hold that the application beforehand is not only premature and misconceived but same is similarly devoid of merits.

Issues for Determination:

34. Having reviewed the Notice of motion application dated the 18th April 2024 and the response thereto; and upon consideration of the written submissions filed on behalf of the respective parties, the following issues emerge [crystalize] and are thus worthy of determination;

    i. Whether the Notice of Appeal filed by and on behalf of the Applicants herein is valid or otherwise.

    ii. Whether the Applicants have established and demonstrated a sufficient cause which is an integral ingredient in an application for stay of application pending appeal.

    iii. Whether the Applicants have demonstrated that Substantial loss is likely to arise and/or accrue unless the orders sought are granted.

Analysis and Determination

Issue Number 1

Whether the Notice of Appeal filed by and on behalf of the Applicants herein is valid or otherwise.

35. Learned counsel for the Applicants has submitted that upon the delivery of the ruling of this court on the 29th February 2024, the Applicants herein felt aggrieved and thus instructed same [learned counsel] to file and serve the requisite Notice of appeal.

36. Furthermore, learned counsel for the Applicants has submitted that upon receipt of the instructions same [learned counsel] proceeded to and lodged a notice of appeal within the prescribed timelines. For good measure, a copy of the notice of appeal has been annexed to both the supporting affidavit and the further affidavit filed on behalf of the Applicants.

37. Other than the foregoing, the learned counsel for the Applicants has also contended that the orders arising from the ruling of the court delivered on the 29th February 2024, were/are appealable as of right. In this regard, it has been posited that no leave was therefore needed or at all.

38. Based on the foregoing position, learned counsel for the Applicants has therefore invited this court to find and hold that the notice of appeal which was filed and served is valid for all intent and purposes.

39. Having considered the submissions by and on behalf of the Applicants herein and as pertains to the validity of the notice of appeal, I beg to take the following position. Firstly, it is important to point out that a notice of appeal is a document that is filed by any person who is aggrieved and dissatisfied with a decision of the designated superior court. Instructively, the filing and service of a notice of appeal is regulated by the provisions of Rule 77 of the *Court of Appeal Rules* 2022.

40. Furthermore, it is not lost on this court that once a notice of appeal has been filed in accordance with the provisions of the Court of Appeal rules, 2022; this court is obliged to take the notice of appeal as valid until and unless same has been invalidated by the a decision of the court of appeal in accordance with the provisions of Rule 86 of the *Court of Appeal Rules*, 2022.

41. For the avoidance of doubt, once a notice of appeal is filed by the claimant or such other party, this court or such other court affected by such notice of appeal is obligated to deem same as valid. To this end, the provisions of Order 42 Rule 6[4] of the *Civil Procedure Rules* suffices.

42. For ease of reference, the provisions of Order 42 Rule 6[4] are reproduced as hereunder;

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

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) 4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

43. Secondly and as pertains to the question of the the validity of the Notice of appeal, it is imperative to point out that the only court that is seized of the requisite jurisdiction to interrogate the validity or otherwise of the notice of appeal is the court of appeal. Simply put, the invitation by the Applicants herein and wherein same are seeking to have this court declare the notice of appeal as valid, is misconceived.

44. Suffice it to point out that jurisdiction is critical and paramount and a court without jurisdiction cannot engage itself with a question and/or issue that certainly falls outside her jurisdiction.

45. To buttress the foregoing exposition, it suffices to take cognizance of the holding of the Supreme Court of Kenya [the apex court] *In the Matter of the Interim Independent Electoral Commission* (Applicant) (Constitutional Application 2 of 2011) [2011] KESC 1 (KLR) (20 December 2011) (Ruling), where the court held as hereunder;

> [29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the *Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):
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> > "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the

material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."

[30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the *Constitution*.

46. Likewise, the significance of Jurisdiction was also amplified by the Supreme court in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, where the court 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.

47. Flowing from the foregoing, it is my finding and holding that this court is not seized of the requisite jurisdiction to interrogate the validity or otherwise, of the Notice of appeal and to return a finding that same [Notice of appeal] is valid in the manner posited by the Applicants herein.

Issue Number 2

Whether the Applicants has established and demonstrated a sufficient cause which is an integral ingredient in an application for stay of application pending appeal.

48. Having disposed of the issue pertaining to the validity of the notice of appeal, it is now appropriate and expedient to venture forward and discuss the question pertaining to the existence of sufficient cause and/or basis.

49. Pertinently, it is worth stating that any party, the Applicants herein not excepted, who is keen to partake of an order of stay of execution pending appeal is obliged to demonstrate the existence of a sufficient cause.

50. Given the significance and criticality of sufficient cause to an application like the one beforehand, it is imperative to discern what then sufficient cause denotes. To this end, it suffices to interrogate and discern the meaning and tenor of sufficient cause.

51. As pertains to the import, meaning and tenor of sufficient cause, I beg to adopt and reiterate the holding of the Court in *Kimani Wachira v Bildad Wachira* [2016]eKLR, where the court held as hereunder;

> 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 v The Chairman Bunju Village Government & Others*[9] discussing what constitutes sufficient cause had this to say:-
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> > "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)
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> In *Daphene Parry v Murray Alexander Carson*[10] the court had the following to say:-
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> > '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, .

52. My understanding of sufficient cause is to the effect that same [sufficient cause] is incapable of a finite definition. However, broadly speaking the term sufficient cause denotes good faith, proper use of Court process, merit and bona-fides in the endeavor and/or actions that is [are] being brought before a court of law.

53. Duly guided by the excerpt reproduced in the preceding paragraph, coupled with the observation by the court [*supra*] it is now apposite to revert back to the matter beforehand and to discern[decipher] whether the Applicants has established a sufficient cause. To start with, the ruling which was delivered on the 29th February 2024 and which is intended to be appealed against arose out of an application which was brought pursuant to the provisions of Sections 1A, 1B, 3A and 98 of the *Civil procedure Act*, Chapter 21 Laws of Kenya.

54. To the extent that the ruling in question arose from an application premised on the provisions [details highlighted in the preceding paragraphs], there is no gainsaying that no appeal arises as of right against the said ruling. For good measure, the provisions of the law which attract automatic right of appeal are clearly espoused [delineated] vide Section 75 of the *Civil Procedure Act* as read together with Order 43 of the *Civil Procedure Rules*, 2010.

55. To the extent that no right of appeal attached to the ruling rendered on the 29th February 2024, it was therefore incumbent upon the Applicants to seek for and obtain leave to appeal. However, it is not lost on this court that no such leave was ever sought for and/or obtained by the Applicants.

56. Notwithstanding the foregoing, the Applicants are before the court and same are contending that an order of stay of execution ought and should be issued. To my mind, the issuance of an order for stay of execution does not arise for the mere asking, albeit without demonstration of sufficient cause.

57. At any rate, it is imperative to underscore that where leave to appeal is required but same is not procured in accordance of the law then the resultant proceedings arising therefrom [including an application for stay] like the one beforehand would be legally untenable.

58. To this end, I find succour [solace] in the holding of the Court of Appeal in the case of *Attorney General v Bala* (Civil Appeal 223 of 2017) [2023] KECA 117 (KLR) (3 February 2023) (Judgment), where the court held as hereunder;

> 14. The right to appeal is a creature of statute and an appeal can be presented, only: (i) by a party in the suit if he is aggrieved by the judgment; or (ii) by a person who is not a party but who is aggrieved by the judgment if he seeks and gets leave of the court to prefer an appeal against the judgment.
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> Unless a right of appeal is clearly and expressly given by statute, it does not exist. Whereas a litigant has a right to institute any suit of a civil nature in some court or another, no right of appeal can be given except by express words. In other words, a right of appeal infers in no one and therefore an appeal for its maintainability must have the clear authority of law. The right of appeal, which is a statutory right, can be conditional or qualified. If the statute does not create any right of appeal, no appeal can be filed.
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> 15. What is legislatively not permitted cannot be read by implication, not in respect of right of appeal, as it "is a creature of statute." An appeal, as is well known, is the right of entering a superior court invoking its aid and interposition to redress an error of the court below. The central idea behind filing of an appeal revolves round the right as contradistinguished from the procedure laid down therefor. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute.

59. Simply put and without belaboring the point, in the absence of leave to appeal, it then means that the actions and endeavors by and on behalf of the Applicants herein are ex-facie lacking in bona-fides.

60. Other than the question of leave to appeal [which has been discussed in the preceding paragraphs], there is also the aspects pertaining to the fact that the judgment which is being executed pursuant to the ruling rendered on the 29th February 2024 arose out of a mediation process which was consented to by both parties.

61. Furthermore, after both parties participated in the mediation proceedings, the mediator generated a mediation agreement and which agreement was duly signed by all the parties. Subsequently, the mediation agreement was thereafter filed with the court.

62. Moreover, on the 21st July 2022, this court adopted the mediation agreement and constituted same as a Judgment of the court. Pertinently, the judgment which is being implemented by dint of the ruling rendered on the 29th February 2024, is actually a consent Judgment, taking into account the provisions of Section[s] 59 A-D of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.

63. Additionally, there is no gainsaying that the terms of the mediation agreement and the resultant Judgment that arose therefrom, have not been impugned and/or impeached. Pertinently, there is no gainsaying that the Applicants are not aggrieved by the judgment.

64. To the extent that the mediation agreement and the resultant judgment have neither been impugned nor impeached, the question that does arise is whether the Applicants herein are genuine in their application before the court, which is merely intended to stay the implementation of a judgment which same [Applicants] are not aggrieved by.

65. Yet again, it is my humble view that the Applicants before the court are merely playing ping pong games or lottery with the due process of the court. In this regard, what becomes apparent is that the Applicants herein have mounted the subject application for ulterior purposes and hence no sufficient cause has been established.

Issue Number 3

Whether the Applicants have demonstrated that substantial loss is likely to arise and/or accrue unless the orders sought are granted.

66. The Application before the court touches on and concerns grant of an order of stay of execution pending appeal. To the extent that same touches on stay pending appeal, it suffices to point out that the Applicants herein were also called upon to demonstrate that there is a likelihood of substantial loss arising unless the orders sought are not granted.

67. Further and in any event, it has been stated and held times without number that substantial loss is the cornerstone to the granting of an order of stay of execution pending an appeal. In this regard, it is incumbent upon the Applicant to not only implead substantial loss in the application but also to venture forward and avail evidence towards demonstrating, nay, substantiating substantial loss.

68. To this end, it suffices to take cognizance of the holding in the case of *Kenya Shell Ltd versus Benjamin Karuga Kibiru & Another* [1986]eKLR, where the court stated as hereunder;

> 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.
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> Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.

69. Furthermore, the necessity to implead and establish substantial loss was also highlighted in the case of *Machira t/a Machira & Co Advocates v East African Standard* [2002] eKLR, where the court stated and observed as hereunder;

> In attempting to convince a court that substantial loss is likely to be suffered so that whatever he intends to achieve by his intended recourse to some other authority will be nugatory if ultimately he prevails, the applicant is under a duty to do more than merely repeating to the court words of the relevant statutory rule or general words used in some judgment or ruling of a court in a decided case cited as a judicial precedent to guide. It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do.

70. Back to the matter beforehand. Has the Applicant herein demonstrated any scintilla of substantial loss that is likely arise and/or accrue if the orders sought are not granted? Sadly, no singular evidence has

been tendered and/or placed before the court to demonstrate [highlight] the nature or kind of loss, let alone substantial loss that is likely to accrue to the Applicants.

71. To start with, the mediation agreement and the resultant judgment, confirmed that the suit properties belong to the 1st Plaintiff/Respondent and directed that same be transferred and registered in her [1st Plaintiff/Respondent's] name.

72. I have pointed out elsewhere herein before that the terms of the mediation agreement and the resultant judgment have neither been impugned nor impeached. Notably and in this regard, there is consensus that the properties belong to the 1st Plaintiff/Respondent.

73. Secondly, the deponent of the supporting affidavit and the further affidavit states and avers that same is [sic] the Arch Bishop of the 1st Plaintiff herein. The question that does arise, is that if the deponent is the Arch Bishop of the 1st Plaintiff and the properties are being transferred to and in favor of the 1st Plaintiff, then what loss shall accrue and/or arise.

74. To my mind, there seems to be something sinister, nay ulterior in the Arch Bishop of the 1st Plaintiff refusing and/or contesting a process that is intended to vest the 1st Plaintiff/Respondent with ownership of the suit properties. In ordinary circumstances, the Arch Bishop would be deemed to be supportive of action[s] and endeavors that are beneficial to the 1st Plaintiff and I may add, to himself by association with the First Plaintiff herein,

75. Thirdly, though the Applicants herein have contended that same are apprehensive that serious detriment and loss will arise unless the orders of stay are granted, no evidence has been tendered and/or availed to substantiate the said allegations and/or averments.

76. For good measure, there is no gainsaying that it was incumbent upon the Applicants herein to discharge the burden of proof placed on their shoulders and to demonstrate that substantial loss will arise and/or accrue. However, in the instant case, the Applicants have not discharged the burden of proof, save for the omnibus allegation[s] that have been thrown on the face of the Court. [See Sections 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya].

77. Finally, it is also not lost on this court that execution and implementation of court decrees and orders is a lawful process and hence the execution per-se, without more cannot by itself amounts to substantial loss.

78. To buttress the foregoing exposition, I beg to adopt and reiterate the holding of the Court in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto*[2012]eKLR, where the court stated and held thus;

> 11. 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1 KLR 867, and also in the case of *Mukuma v Abuoga* quoted above. The last case, referring to the exercise of discretion by

the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the *CPR* and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

> "...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."

79. Without belaboring the point, my answer to issue number three [3] is to the effect that the Applicants herein have neither demonstrated nor established the likelihood of substantial loss arising and/or accruing, if the orders of stay are not granted.

80. To the contrary, the execution and/or implementation of the ruling of the court rendered on the 29th February 2024 shall go a long way in actualizing the terms of the mediation agreement and the resultant judgment that arose therefrom. Consequently, the implementation under reference shall bring the dispute beforehand to a close.

Final Disposition:

81. Flowing from the discussion [whose details are highlighted in the preceding paragraphs], I come to the conclusion that the application by and on behalf of the Applicants herein is not only mischievous, but same is devoid of merits.

82. Consequently and in the premises, the application dated the 18th April 2024; be and is hereby dismissed with costs to the 1st Plaintiff/Respondent.

83. Furthermore, the Interim Order[s] which were hitherto granted in favour of the Applicant[s] be and is hereby vacated.

84. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24th DAY OF JUNE 2024.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant.

Ms Christine Githii for the Defendants/Applicants.

Mr. A. Mwangi h/b for Mr. Arthur Ingutia for the 1st Plaintiff/Respondent.

N/A for the 2nd Plaintiff/ Respondent.