Kimuri Housing Company Limited v Wambugu & another (Environment & Land Case E095 of 2021) [2024] KEELC 4740 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4740 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E095 OF 2021

JO MBOYA, J

JUNE 13, 2024

BETWEEN

KIMURI HOUSING COMPANY LIMITED ..... JUDGMENT DEBTOR

AND

JOHN KIUMI WAMBUGU ..... 1ST DECREE HOLDER

CHIEF LAND REGISTRAR-NAIROBI ..... 2ND DECREE HOLDER

RULING

1. The Plaintiff/Applicant herein has approached the court vide Notice of Motion Application dated the 16th April 2024 brought pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules and in respect of which same [Applicant] has sought for the following reliefs;

   i. .....Spent.

   ii. Pending the hearing and determination of this application, there be stay of execution of the judgment and/or decree dated the 8th February 2024.

   iii. Alternative to prayer [2] above, pending the hearing and determination of this application, status quo in respect of parcel land reference number 57/1343 [original number 57/32/801] be maintained.

   iv. Pending the hearing and determination of the intended appeal, there be stay of execution of the judgment and/or decree dated the 8th February 2024.

   v. Alternative to prayer above, the status quo in respect of parcel of land reference number 57/1343 [original number 57/32/801] be maintained pending the hearing and determination of the intended appeal against the judgment and/or decree dated the 8th February 2024.

vi. Any other or further reliefs that the court may deem just and appropriate in the circumstances.

vii. Costs of the Application be in cause.

2. The instant application is premised and anchored on various grounds which have been enumerated in the body thereof. Furthermore, the instant application is supported by the affidavit of Margaret Wambui Ngugi [Deponent] sworn on even date and to which the deponent has exhibited a total of 11 documents.

3. Upon being served with the application beforehand, the 1st Defendant/Respondent filed a Replying affidavit and in respect of which same [1st Defendant/Respondent] has contended inter-alia that the Judgment and decree of the court has since been implemented and executed; and hence the application beforehand is overtaken by events.

4. On the other hand, the 2nd Defendant/Respondent filed an elaborate grounds of opposition dated the 3rd May 2024 and wherein the 2nd Defendant/Respondent has not only enumerated the pertinent issues of law, but same has ventured forward and cited various decisions and thereafter highlighted excerpts of the holding[s] of the court attendant thereto.

5. Be that as it may, the application beforehand came up for hearing on the 15th May 2024 whereupon the advocates for the respective parties covenanted to canvass and dispose of 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.

6. Pursuant to and in line with the directions of the court, the Plaintiff/Applicant proceeded to and filed written submissions dated the 20th May 2024 whereas the 1st Defendant/Respondent filed written submissions dated the 29th May 2024. However, the 2nd Defendant/Respondent intimated to the court that same [2nd Defendant/Respondent] would be adopting and relying on the elaborate grounds of opposition filed.

7. For coherence, the written submissions [details in terms of the preceding paragraph] forms part of the record of the court.

Parties' Submissions:

a.**Applicant's Submissions:**

8. The Applicant filed written submissions dated the 20th May 2024 and wherein same [Applicant] has adopted the grounds contained in the body of the application as well as the contents of the supporting affidavit as well as the further affidavit sworn by Margaret Wambui Ngugi.

9. Furthermore, learned counsel for the Applicant has thereafter highlighted and amplified three [3] salient and pertinent issues for consideration by the court.

10. Firstly, learned counsel for the Applicant has submitted that the instant application which seeks stay of execution of the Judgment and decree of the court, has been filed without unreasonable and/or inordinate delay.

11. In any event, learned counsel has pointed out that the subject application was filed within a duration of 53 days from the date of the delivery of the impugned Judgment.

12. On the other hand, learned counsel has contended that whereas the 53 days may on the face of it appear to be unreasonable and/or inordinate, however, it behooves the court to take cognizance of

the circumstances that transpired between the delivery of Judgment and filing of the application beforehand.

13. Pertinently, learned counsel for the Applicant has submitted that upon the delivery of the Judgment of the court, the Plaintiff/Applicant herein sought to change her legal counsel and in this regard, it was incumbent upon the incoming counsel to seek for and obtain leave of the court. Instructively, counsel has pointed out that the application for leave to come on record had to be filed and thereafter be processed by the court in the usual manner.

14. Additionally, learned counsel for the Applicant has submitted that the delay attendant to the filing of the current application has been duly and adequately explained at the foot of the supplementary affidavit. In short, learned counsel for the Applicant has posited that the application has not been filed with unreasonable delay.

15. To this end, learned counsel for the Applicants has cited and relied on inter-alia the case of Chambuni vs Geminia Insurance Company Ltd [2024] KEHC 2190 [KLR] and New Nairobi United Services & Another vs Simon Mburu Kiiru [2021]eKLR, respectively.

16. Secondly, learned counsel for the Applicant has submitted that the judgment that was rendered by the court proceeded to cancel the certificate of title in favor of the Plaintiff/Applicant and also decreed that the suit property belongs to the 1st Defendant/Respondent.

17. Taking into account the nature of the orders that were granted by the court, learned counsel for the Applicant has submitted that the judgment and decree does not constitute a negative decree, either as contended by the 1st Defendant/Respondent or at all.

18. On the contrary, learned counsel for the Applicant has contended that the judgment and decree beforehand espouses positive orders and hence same [judgment] is capable of execution. In this regard, learned counsel has invited the court to find and hold that the judgment and decree are thus capable of being stayed in the manner sought at the foot of the application.

19. As pertains to what constitutes a negative decree, learned counsel for the Applicant has cited and relied on the decision in the case of David Thiongo T/a Welcome General Stores vs Market Fancy Emporium [2007]eKLR.

20. Thirdly, learned counsel for the Applicant has submitted that the dispute beforehand touches on and concerns ownership of L.R No. 57/32 [original number 57/32/801] which is being claimed by both the Plaintiff/Applicant and the 1st Defendant/Respondent.

21. Furthermore, learned counsel for the Applicant has posited that vide the judgment and decree of the court, the suit property has been decreed to belong to the 1st Defendant/Respondent and hence by virtue of such declaration, the 1st Defendant/Respondent may very well proceed and alienate the suit property albeit to the detriment of the Applicant.

22. At any rate, learned counsel for the Applicant has submitted that in the event of alienation, sale, disposal of and/or charging of the suit property by the 1st Defendant/Respondent, the Applicant herein shall be disposed to suffer substantial loss.

23. Simply put, learned counsel for the Applicant has pointed out that the sale, disposal and/or alienation of the suit property by the 1st Defendant/Respondent, [if at all] who has since been declared to be the owner thereof, shall put the suit property beyond the reach of the Applicant and thus defeat the Applicant's claim thereto.

24. In support of the submissions that the Applicant has established and demonstrated substantial loss, learned counsel for the Applicant has relied upon the holding[s] in the case of Daniel Chebutai Rochich & 2 Others Emirates Airline Ltd Civil Case No. 368 of 2001 [UR]; Antoin v Africa Virtual University [2015]eKLR; Kenya Commercial Bank Ltd vs Suncity Properties Ltd & 5 Others [2012]eKLR and Mbola [Appealing through his recognized agent John Ndambuki Kitenge] vs Masila [2024] KELC 1634 [KLR].

25. Finally, learned counsel for the Applicant has submitted that the Applicant herein has expressed her readiness and willingness to provide security for the due performance of the decree that may ultimately arise and/or ensue. In any event, counsel has pointed out that the question of security is at the discretion of the court and hence the Applicant shall be ready to abide with the orders of the court.

26. In a nutshell, learned counsel for the Applicant has implored the court to find and hold that the Applicant has established and demonstrated that same [Applicant] shall suffer substantial loss and hence the subject application is meritorious.

b. 1ST Respondent's Submissions:

27. The 1st Respondent filed written submissions dated the 29th May 2024 and in respect of which same [1st Respondent] has raised and highlighted and canvassed three [3] salient issues for consideration by the court.

28. First and foremost, learned counsel for the 1st Respondent has submitted that the honorable court is Functus officio and thus divested of the requisite jurisdiction to entertain and adjudicate upon the subject application seeking for stay of execution pending the hearing and determination of the intended appeal.

29. According to counsel for the 1st Respondent, the current application has been filed long after the informal order of stay which was granted by the court has lapsed. For good measure, learned counsel for the 1st Respondent posits that the application ought to have been filed during the existence of the informal order of stay and not otherwise.

30. Furthermore, learned counsel for the 1st Respondent has contended that taking into account the obtaining circumstances, the Applicant herein ought and should have approached the honorable Court of Appeal pursuant to Rule 5[2][b] of the Court of Appeal and not otherwise.

31. To buttress the foregoing submissions, namely, that the court is Functus officio and thus can not be able to entertain the subject application, learned counsel for the 1st Respondent has cited inter-alia the decisions in the case of Serve In love Africa [Sila] Trust vs Abraham Kiptarus Kiptoo and 2 Others [2019]eKLR, George Awuor Okulo vs Chaina Wuyi Co. Ltd; Jack Baraza Baraza & Another third party [2021]eKLR, respectively.

32. Secondly, learned counsel for the 1st Defendant has submitted that the Applicant herein has failed to demonstrate the existence of irreparable loss that same [Applicant] shall be disposed to suffer, if the orders of stay sought for are not granted.

33. Additionally, learned counsel for the 1st Respondent has posited that the 1st Respondent has since entered upon and taken over possession of the suit property and hence the orders of stay of Execution have been overtaken by events.

34. Thirdly, learned counsel for the 1st Respondent has submitted that the Applicant herein has failed to demonstrate her readiness to offer and provide security for the due performance of the decree that may arise and/or ensue.

35. Furthermore, learned counsel has pointed out that provisions of security is a critical ingredient to be considered by the court prior to and before decreeing an order of stay of execution pending appeal.

36. To buttress the submissions pertaining to and concerning provision of security, learned counsel for the 1st Respondent has cited and relied upon on inter-alia the holding in the case of Harun C Sharma vs Ashama Raikundalia T/a Raikundalia & Co Advocate [2014]eKLR, focin Motor Cycle Co Ltd vs Ann Wambui Wangui & Another [2018]eKLR and Paskal Otieno Amoke vs Collins Omondi Omollo [2022]eKLR, respectively.

37. According to counsel for the 1st Respondent, the Applicant herein has failed to meet and/or satisfy the ingredients underpinned by the provisions of Order 42 Rule 6[2] of the Civil Procedure Rules, 2010; and hence the application ought to be dismissed.

C. 2ND Respondent's Submissions:

38. As pointed out elsewhere herein before, the 2nd Respondent filed grounds of opposition and in respect of which same quoted various excerpts from decisions whose details have been enumerated on the face of the said grounds of opposition.

39. Nevertheless, the 2nd Respondent did not file any written submissions or at all. Further and in any event, learned counsel for the 2nd Respondent intimated to the court that same [learned counsel for the 2nd Respondent] shall be adopting the said grounds.

40. Notably and for good measure, the only written submissions on record are the ones filed by the Applicant and the 1st Defendant/Respondent and whose details have been highlighted elsewhere herein before.

Issues for Determination:

41. Having evaluated the Notice of Motion Application; the Affidavit in Support thereto and the Responses by the Respondents and upon consideration of the written submission filed, the following issues do emerge [crystalize] and are thus worthy of determination.

    i. Whether this court is Functus official and thus divested of the requisite Jurisdiction to entertain the application or otherwise.

    ii. Whether the Application beforehand has been filed with unreasonable and inordinate delay or otherwise.

    iii. Whether the Applicant has demonstrated the likelihood of substantial loss occurring, if the orders sought are not granted.

    iv. What remedies/orders, if any; are appropriate.

ANALLYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether this court is Functus official and thus divested of the requisite jurisdiction to entertain the application or otherwise.

42. Learned counsel for the 1st Defendant/Respondent has contended that this court is Fanctus officio and thus divested of the requisite jurisdiction to entertain and adjudicate upon the subject application which essentially seeks for an order of stay of execution pending the hearing and determination of the intended appeal.

43. The gravamen of the arguments by and on behalf of the 1st Respondent is to the effect that the Applicant herein had hitherto procured and obtained an informal order of stay of execution and which order was granted on the date when the judgment was delivered.

44. Furthermore, learned counsel for the 1st Respondent has posited that if the Applicant was desirous to apply for an order of stay formally, then same [Applicant] ought to have filed the formal application during the existence of the informal order of stay and not otherwise.

45. Put differently, what I hear learned counsel for the 1st Respondent to be saying is that the current application for stay of execution ought and should have been filed prior to and before the lapse of the informal order of stay.

46. Consequently and in the view of learned counsel for the 1st Respondent, the filing of the current application long after the lapse of the informal order of stay divest and/or deprives this Honourable court of jurisdiction to entertain and adjudicate upon the application beforehand.

47. Suffice it to point out that learned counsel for the Applicant did not file any rejoinder submissions to respond to and/or controvert the submissions adverted to by and on behalf of the 1st Respondent.

48. Nevertheless, the issue that has been raised and canvassed by learned counsel for the 1st Respondent is a question or issue of law and hence the fact that the Applicant did not file rejoinder submissions thereto does not diminish the competence of this court to appraise the issue and resolve same.

49. Be that as it may, it is my humble view that the grant and/or issuance of an informal order of stay of execution is an exercise of discretion by the court and which discretion is underpinned by the provisions of Order 42 Rule 6[5] of the Civil Procedure Rules 2010.

50. For good measure, the provisions of Order 42 Rule 6[5] of the Civil Procedure Rules, 2010, provides 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) 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.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

51. My understanding of the said provisions is to the effect that same provides an interim window to be invoked and applied by the court at the time of the delivery of the judgment under reference. For good measure, I beg to repeat that it is an interim widow and at that point in time the court is not called upon to calibrate on the ingredients underpinned by the provisions of Order 42 Rule 6[2] of the Civil Procedure Rules 2010.

52. Additionally, the fact that a court shall have invoked and applied the provisions of Order 42 Rule 6[5] [supra] does not in any way limit, restrict and/or oust the jurisdiction of the court to entertain and adjudicate upon a formal application for stay of execution. Quite clearly the jurisdiction bestowed upon the court by the two [2] sets of provisions highlighted in the preceding paragraphs are mutually exclusive.

53. Other than the foregoing, it is also not lost on this court that an Applicant who has procured and obtained and informal order of stay pursuant to Order 42 Rule 6[5] of the Civil Procedure Rules 2010, is at liberty to file and mount a formal application for stay and the filing of such a formal application is not restricted by the previous informal order.

54. In any event, there is no gainsaying that the Applicant is at liberty to file the formal application for stay of execution pending appeal, at any time from the date of delivery of the judgment sought to be impugned and same can be filed during the subsistence of the interim orders of stay or even after the lapse of the interim orders of stay.

55. Nevertheless, the guiding parameters to be observed and complied with is to the effect that the formal application, if any, is being filed, same [Application] ought to be filed timeously and with due promptitude.

56. Put differently, the formal application for stay of execution, in terms of Order 42 Rule 6[2] of the Civil Procedure Rules, 2010 ought to be filed without unreasonable delay and/or inordinate delay. However, there is no statutory stipulation as to whether same [formal application] should be filed during the lifespan of the informal order of stay.

57. To my mind, the contention by and on behalf of the 1st Respondent is not only misleading but constitutes an erroneous understanding of the provisions of Order 42 Rule 6[2] as read together with Order 42 Rule 6[5] of the Civil Procedure Rule, 2010.

58. On the other hand, it is also important to point out and underscore that the concept of functus officio only arises and/or suffice where the designated court has dealt with the dispute beforehand with finality and not otherwise. Instructively, the concept of functus officio could only be invoked and applied if this court had entertained and adjudicated upon a formal application for stay of execution pending appeal and disposed of same.

59. In such a scenario, the Applicant would thus not be at liberty to bring forth and/or file another Application for stay of execution pending appeal. Quite clearly, if that were the position, [which is not the case herein] the concept of functus officio as well as the doctrine of Res-Judicata would suffice.

60. However, I have pointed out elsewhere that this court has never entertained and adjudicated upon a formal application for stay of execution pending appeal and thus the concept of functus officio has been misunderstood and misapplied by learned counsel for the 1st Defendant/Respondent.

61. Before departing from this issue, it is apposite to take cognizance of the holding of the Court of Appeal in the case of Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR, where the court stated and observed as hereunder;

> " Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of CHANDLER vs ALBERTA ASSOCIATION OF ARCHITECTS [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);
>
> "The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In re St. Nazaire Co., (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:
>
> 1. Where there had been a slip in drawing it up, and,
>
> 2. Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. vs. J.O. Rose Engineering Corp., [1934] S.C.R. 186"

62. From the foregoing analysis, my answer to issue number one[1] is twofold. Firstly, this court is possessed and seized of the requisite jurisdiction to entertain and adjudicate upon the subject application which essentially seeks an order of stay of execution pending the hearing of the intended appeal.

63. Secondly, the concept of functus officio, which has been invoked and relied upon by the 1st Respondent does not apply as pertains to the circumstances obtaining in respect of the instant matter.

ISSUE NUMBER 2

Whether the Application beforehand has been filed with unreasonable and in ordinate delay or otherwise.

64. The other issue that has also been raised and canvassed by and on behalf of the 1st Respondent is to the effect that the instant application has been filed and mounted with unreasonable and inordinate delay. In this respect, it has been argued that the Applicant is non-suited on the basis of delay and by extension on the basis of the Doctrine of Latches.

65. On the contrary, learned counsel for the Applicant has submitted that the duration and/or timeline that was taken prior to and before the filing of the application has been duly accounted for and explained at the foot of the supplementary affidavit filed by Margret Wambui Ngugi.

66. Pertinently, learned counsel for the Applicant pointed out that upon the delivery of the judgment of the court, the Plaintiff/Applicant developed misgivings on the part of her previous advocates and thus same [Applicant] sought to change representation.

67. Additionally, learned counsel for the Applicant has posited that owing to the fact that judgment had already been entered and/or delivered, it was incumbent upon him [learned counsel] for the Applicant to file an application for leave to come on record in accordance with the provisions of Order 9 Rule 9 of the Civil Procedure Rules 2010.

68. In any event, counsel has submitted that upon the filing of the application for leave to come on record same [application] had to be processed and disposed of by the court and thus the duration taken by the court to entertain the application for leave cannot be deployed in the computation of time taken to file the instant application.

69. Furthermore, learned counsel for the Applicant has also submitted that upon obtaining the leave to come on record and file notice of change same [counsel for the Applicant] acted with due diligence and thereafter filed the current application.

70. In a nutshell, learned counsel for the Applicant has posited that the entirety of the duration that was taken to file and lodge the application beforehand has been duly identified and thereafter accounted for. In this regard, counsel has submitted that the duration beforehand was therefore neither unreasonable nor inordinate.

71. Having taken cognizance of the rival submissions by the advocates for the respective parties as pertains to whether or not the application was filed with unreasonable delay, I beg to point out that the 53 days taken prior to and before the filing of the instant application may ex-facie appear to be unreasonable and inordinate.

72. However, the critical question to be taken into account and addressed relates to whether or not the duration of delay has been accounted for and explained. For good measure, it is trite and established that the determination of whether or not the duration taken before moving the court is unreasonable and inordinate is dependent on the explanation[if any] that has been availed by the Applicant.

73. To my mind, the Applicant beforehand has accounted for and explained the circumstances attendant to the delay in the filing of the current application. Instructively, there is no gainsaying that it was incumbent upon the incoming advocate for the Applicant to seek for and obtain leave in accordance with the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010.

74. Other than the foregoing, the Applicant herein has indeed filed a supplementary affidavit and in respect of which same [Applicant] has proffered cogent and plausible explanation for the delay.

75. In the circumstances, it is my finding and holding that the Applicant has indeed accounted for and explained the delay attendant to the filing of the subject application. In this regard, I hold that the application beforehand has not been filed with unreasonable and/or inordinate delay, in the manner contended by the Respondents.

76. To buttress the exposition of the law, [details in terms of the preceding paragraph] it suffices to adopt and reiterate the succinct holding of the Court of Appeal in the case of *Njoroge vs Kimani [Civil Application No. E049 of 2022*] [2022 KECA 1188] [KLR], where the court stated as hereunder;

> 12. In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory

explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success. Condonation cannot be had for the mere asking. An applicant is required to make out a case entitling him to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.

13. Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays.

ISSUE NUMBER 3

Whether the Applicant has demonstrated the likelihood of substantial loss arising; if the orders sought are not granted.

77. Substantial loss in its various dimensions and/or perspectives, has been held to be the basis and/or foundation upon which an order of stay of execution pending appeal does issue.

78. To this end, it is apposite to recall and reiterate 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.

79. Guided by the foregoing holding, it is imperative to revert back and discern whether the factual situation obtaining in respect of the instant matter demonstrate[s] the likelihood of substantial loss accruing and/or arising, in the event the orders sought are not granted.

80. To start with, learned counsel for the Applicant has contended that the dispute beforehand touches on and concerns ownership of the suit property which has since been declared to belong to the 1st Defendant/Respondent.

81. Additionally, it has been contended on behalf of the Applicant that taking into account the terms of the judgment herein, the 1st Defendant has been constituted as the lawful owner of the suit property and hence same [1st Defendant/Respondent] is thereafter at liberty to sell, dispose of, alienate and/or charge the suit property; which actions, if taken will put the suit property beyond the reach of the Applicant.

82. On the other hand, learned counsel for the 1st Respondent has adverted to the concept of irreparable loss and wherein same [learned counsel for the 1st Defendant/Respondent] contends that the Applicant has not demonstrated a likelihood that same shall suffer irreparable loss.

83. At any rate, learned counsel for the 1st Respondent has posited that the judgment and decree of the court has since been executed and further, that the 1st Defendant/Respondent has since taken possession of the suit property.

84. Arising from the foregoing, learned counsel for the 1st Defendant/Respondent has therefore invited the court to find and hold that the Applicant has neither demonstrated nor shown that same [Applicant] shall suffer irreparable loss.

85. Firstly, I beg to point out and underscore that the concept of irreparable loss which had been adverted to and highlighted by learned counsel for the 1st Respondent is alien to a matter concerning grant of stay of execution pending appeal or intended appeal. [See Order 42 Rule 6[2] of The Civil Procedure Rules, 2010].

86. Furthermore, it is not lost on this court that the concept of irreparable loss only applies to and is taken cognizance of in matters pertaining to temporary injunction which is contra distinct from stay of execution pending appeal. [See Nguruman Ltd vs Jan Bonde Nielsen [2014]eKLR].

87. Other than the foregoing, the critical question to be addressed and answered touches on what may have happen to the suit property if the orders sought are not granted.

88. Put differently, what are the powers that a registered owner of land have over and in respect of the designated property. In this regard, there is no gainsaying that once a person [the 1st Defendant/Respondent not excepted] is decreed as the owner of the land then same is imbued with the rights and privileges underpinned by the provisions of Section 24 and 25 of the *Land Registration Act*, 2012. [See also the holding of the court in Mohanson Kenya Ltd vs Registrar of Titles [2017]eKLR].

89. To my mind, there is no gainsaying that the 1st Defendant/Respondent herein having been declared to be the lawful and legitimate owner of the suit property is possessed of the mandate and/or authority to sell, dispose of, alienate and/or charge the suit property.

90. In the event of the 1st Defendant/Respondent doing any of the acts [details in terms of the preceding paragraph], then no doubt the suit property would be put beyond the reach of the Applicant in the event the intended appeal succeeds.

91. Based on the foregoing, I find and hold that the Applicant herein has placed before the court cogent and plausible evidence to demonstrate that substantial loss is likely to accrue and/or arise in the event that some intervention is not made to preserve and/or conserve the status of the suit property.

92. Be that as it may, the question as to the nature of the orders that are available for purposes of preserving and conserving the status of the suit property are the subject of the next issue. Consequently, I shall venture forward to discuss the appropriate orders, [if any], to be issued hereinafter.

ISSUE NUMBER 4

What remedies/orders; if any, are appropriate

93. To start with, it is imperative to point out and underscore that this court delivered a judgment as pertains to ownership of the suit property on the 8th February 2024 and whereupon the court found and held that the 1st Defendant/Respondent is the lawful and legitimate owner of the suit property.

94. Arising from the judgment and decree of the court, it is therefore common ground that until and unless same [judgment] is set aside by the Court of Appeal, the 1st Defendant/Respondent remains the lawful and legitimate owner of the suit property.

95. Furthermore, it has been contended that following the delivery of the judgment, the 1st Defendant/ Respondent has since taken possession of the suit property and has commenced the process of fencing same [suit property] with a perimeter wall fence. [See the contents of the replying affidavit].

96. On the other hand, learned counsel for the Applicant has argued and posited that by virtue of being the declared owner of the suit property, the 1st Defendant/Respondent may very well venture forward and inter-alia, sell/ alienate the suit Property; and hence the need to preserve the status of the suit property.

97. I have anxiously reviewed the submissions on record and I am of the view, that an order of stay of execution pending the hearing and determination of the intended appeal in the manner sought for by the Applicant may generate confusion as pertains to who should have possession or remain in possession of the suit property during the pendency of the intended appeal.

98. Moreover, it is not the business of the court to create a conundrum and/or controversy which would then leave the respective parties in a state of dilemma or ambivalence.

99. Taking into account the foregoing observations, I hold the view that the best orders that suffice and which in my humble view would serve the interests of both parties is to grant an order of status quo albeit on clear terms.

100. Put differently, I am not persuaded to grant an order of stay of execution pending the hearing and determination of the intended appeal, but I am inclined to grant an order for the maintenance of status quo to ensure that the suit property is not alienated, disposed of, sold and/or otherwise charged during the pendency of the intended appeal.

Final Disposition:

101. From the foregoing analysis, [details in terms of the preceding paragraphs], it must have become crystal clear that there is need to strike a delicate balance between the competing interests of the parties beforehand.

102. For coherence, whereas a judgment creditor [The First Defendant herein] ought to be allowed to partake of and benefit from the fruits of the Judgment, such benefits ought not to compromise the undoubted rights of the Judgment debtor who is desirous to pursue an appeal in accordance with the provisions of Article 48 of *the Constitution* 2010.

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

    i. The Application dated the 16th April 2024 be and is hereby allowed as hereunder;

        a. there be and is hereby granted and order of status quo to conserve and preserve the status of the suit property and in particular same [suit property] shall not be sold, disposed of, alienated and/or otherwise charged.

        b. Nevertheless, the 1st Defendant shall have possession, occupation and use of the suit property during the pendency of the intended appeal.

    ii. The Applicant herein shall furnish security for the due performance of the decree that may ensue by depositing the sum of Kes.1, 000, 000/= Only, in

an Escrow account in the names of the respective advocates and same to be deposited within 45 days from the date hereto.

iii. In default to comply with clause [ii] herein above, the orders of status quo shall automatically lapse and the 1st Defendant shall be at liberty to actualize the terms of the decree of the court.

iv. Costs of the Application shall abide the outcome of the intended appeal.

v. Either party shall be at liberty to apply.

104. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH __DAY OF JUNE 2024__.

OGUTTU MBOYA,

JUDGE

In the presence of:

Benson – court assistant

Mr. Kalii h/b for Mr. Eric K mutual SC for the Plaintiff/Applicant

Mr. Emmanuel Eredi for the 1st Defendant/Respondent

Mr. Allan Kamau [Principal Litigation Counsel] for the 2nd *Defendant/Respondent*