Kariuki v Opiyo & another (Environment and Land Appeal E004 of 2024) [2024] KEELC 4881 (KLR) (10 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4881 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL E004 OF 2024

LL NAIKUNI, J

JUNE 10, 2024

BETWEEN

DENNIS MUGAMBI KARIUKI ..... APPLICANT

AND

LILIAN NJOKI OPIYO ..... 1ST RESPONDENT

MARGARET GACHIMA ..... 2ND RESPONDENT

RULING

I. Introduction

1. Before this Honourable Court for determination is an application by the Tenant/Applicant - Dennis Mugambi Kariuki dated 9th February, 2024. It was brought under the provisions of Sections 3, 3A and 63 of the *Civil Procedure Act*, Cap 21, Order 40, Rules 1, 2 and 4 of the Civil Procedure Rules, 2010, the Restriction Act and the *Auctioneers Act*.

2. Upon service, the 1st Respondent, M/s. Lillian Njoki Opiyo responded by filing eight (8) Paragraphed Replying Affidavit. The Honourable Court shall be dealing with the said issues at a later stage in this Ruling.

3. It is instructive to note that the Tenant/Applicant was acting in person after disengaging his Advocate who had been previously on record for him during the Rent Restriction Tribunal (Herein after referred to as "the Tribunal"). Thus, one would appreciate there exists some conflicting and confusing parameters detected emanating from the filed pleadings. For instance, although there exists a Memorandum of Appeal of an appeal and which ideally ought to be germinating from the decision by the Rent Restriction Tribunal, the orders sought in the application are in the nature which are sought from an ordinary suit. Yet, on the contrary, there exists no suit at all instituted by the Tenant/Applicant. It behoves logic whether the Tenant/Applicant is seeking for temporary inactive orders pending the determination of the suit or appeal. These are very distinct orders in the strict sense of the

word. Nonetheless, in all fairness, Equity and Conscience, the Honourable Court will just proceed on and make a determination of the application on its merit.

II. The Tenant/Applicant's case

4. The Tenant/Applicant sought the following prayers by the abovementioned application as follows.

    a. Spent.

    b. That orders issued ex - parte on 6th February 2024 by Janice K. Ikingi, Deputy Chairman Rent Restriction Tribunal Case No. E203 of 2024 be set side/ vacated and/or discharged pending the hearing and determination of this appeal.

    c. That the Tenant be given a chance to testify and cross examine witness.

    d. That pending the hearing and determination of this suit, a temporary injunction is issued restraining the Respondents by themselves, their agents, assigns and employees from evicting, harassing, trespassing, locking, attaching or auctioning goods or otherwise interfering with the Tenant/Applicant's occupation of the suit premises Plot No. CR 31419 Subdivision No.7156 Kiembeni Blue Estate Phase 1 Mombasa.

    e. That the tenant be allowed to adduce his evidence and cross examine the respondent's and witness.

    f. That the OCS Kiembeni Police Station to ensure compliance.

    g. That any other orders or further reliefs that this Honourable Tribunal may deem just and fit to grant.

    h. That Costs of the suit.

5. The application is premised on the grounds, testimonial facts and the averments made out under the 20 Paragraphed Supporting Affidavit sworn by the said Dennis Mugambi Kariukiand the 13 annextures marked as "DMK - 1" annexed herein. He deponed that:-

    a. He was a male adult of sound mind and understanding and the Tenant/Applicant in this suit.

    b. The Tenant/Applicant owned and managed by the 2nd Respondent/Land – Lord.

    c. The matter proceeded with out his knowledge and undefended due to the negligence of the Advocate on record.

    d. He came to know about the orders by the Court on 7th February, 2024 upon perusing of the Court file and after realizing his Advocate never attended to the matter.

    e. Upon asking the Advocate the reason for not attending the case, he stated not being well and had been admitted in hospital. The Tenant/Applicant had instructed his Advocate on record to fix the matter for another date as the 6th February, 2024 he would be unavailable due to other pressing issues.

    f. The Tenant/Applicant never blamed Court since it was his Advocate who had failed to attend court and the Court proceeded to issue the orders accordingly.

g. The matter proceeded undefended and orders for levy of distress and eviction were issued. He prayed to be accorded an opportunity to testify and defend himself.

h. The 1st Respondent was claiming illegal and unlawful rent arrears in the name of eviction.

i. The notice to vacate was too short for him and his family. He thus requested for more months to enable him look for another house near the school where his children were schooling. The family were under imminent threat of being evicted and had no alternative accommodation.

j. On 8th February, 2024 the Respondents allegedly attempted to evict him from the suit property with the assistance form goons who were after the vacant possession of the suit property.

k. He sought a chance to defend himself in RRT E203 of 2023 and also to cross examine the witnesses of the Respondents.

l. If the orders sought were not granted, his children education will be affected negatively. Furthermore, he would suffer a great miscarriage of justice and irreparable damage.

III. The Respondent's case

6. In reply to the Notice of Motion application dated 9th February, 2024, the 1st Respondent; Lilian Njoki Opiyo filed and served an eight (8) Replying Affidavit sworn on 28th March, 2024 and with one annexture marked as "A". She deponed the following:

a. That the said application lacked bona fide, made in bad faith, frivolous, vexatious and made with the sole intention of frustrating her as she was not in support of the Applicant's continuous occupation of the suit property without paying rent.

b. That she adopted the statements made in her affidavit sworn on 29th February, 024 to avoid replication of statements.

c. Further, she emphasized the following:

i. Since the applicant filed the civil case - RRT E203 of 2023, it was incumbent upon him to track the status of the court proceedings.

ii. The Tenant/Applicant was present in court on 1st February, 2024 when the hearing date of 6th February, 2024 was fixed.

iii. On the same date of 1st February, 2024, the Counsel Manguro was holding brief for his advocate who had then not officially come on record.

iv. The hearing date of 6th February, 2024 was fixed in the presence of the Tenant/Applicant and his counsel.

v. On the hearing date of 6th February, 2024 the Tenant/Applicant and his advocate failed to attend and instead the advocate on record sent their clerk to represent the Applicant.

d. The applicant had no arguable case and it ought to be dismissed

IV. Submissions

7. On 4th April, 2024 while all the parties were present in Court, they were directed to dispose off the application dated 9th February, 2024 via written submissions. Pursuant to that only the Respondent

filed their submissions. Unfortunately, at the time of writing the ruling there was no submissions filed by the Tenant/Applicant as per the court's direction.

A. The Written Submissions by the Respondent.

8. While opposing the application by the Tenant/Applicant herein, through their Learned Counsel the law firm of Messrs. Odongo B. O & Company Advocates filed a written Submissions dated 15th May, 2024. Mr. Odongo Advocate commenced his submissions by providing a brief background of the case. He stated that what was before Court was their application dated 9th February, 2024. It had been heard "Ex – Parte" on 13th February, 2024 and fixed for "Inter Parte" on 4th April, 2024. On the material date, while Mr. Mbugua Advocate held brief for Mr. Mugo for the Tenant/Applicant the Respondent's brief was held by Mr. Odhiambo Advocate and directions were granted to dispose off the application by way of written submissions.

9. The Learned Counsel submitted that the application was opposed as already stated out from the filed Replying Affidavit under the following grounds.

    a. The Tenant/Applicant was before the Tribunal in accompany of his Advocate when the hearing date was fixed. Thus, the allegations of not having been informed of the date was misplaced.

    b. On the 6th February, 2024 when the case was fixed for hearing, the Tenant/Applicant's Advocate send a representation.

    c. The pleadings filed are rather confusing as there is no Memorandum of Appeal, the provisions cited are not of an appeal and the prayers sough are for an ordinary suit and not an appeal.

    d. The prayers the Tenant/Applicant was seeking were available before the Tribunal under the provision of Section 5 (1) (m) of the *Rent Restriction Act*, Cap. 296 as the orders being challenged has not yet been executed.

    e. Besides, the orders being sought under Prayers 2, 3, 4 and 5 of the application could not be granted at an application stage as it amount to allowing the main Appeal, if at all any was filed. Further, it amount to this Court micro – managing the proceedings of the Tribunal. As noted there was no suit pending.

    f. Prayer number 6 would only be granted under the provision of the *national Police Service Act* after convincing the Court that the protection of police was necessary.

    g. The application was incompetent and abuse of the due process of Court all intended to frustrate the Respondent from receiving rent from the suit premises. Thus, the Learned Court urged Court to dismiss it with Costs.

IV. Analysis and Determination

10. The court has meticulously considered the instant application dated 9th February, 2024 filed by the Applicant herein, the provisions of *the Constitution* of Kenya, 2010, the statutes and subsidiary legislations.

11. For the purpose of arriving at an informed, just and fair decision, the Honourable court has framed (3) salient issues for determination as follows:

    a. Whether this instant application dated 9th February, 2024 has any merit or not?

b. Whether the parties were entitled to the reliefs sought?

c. Who bears the costs of this application?

ISSUE No. a). Whether this instant application dated 9th February, 2024 has any merit or not?

12. Under this sub heading and as already indicated above from the filed pleadings, the Honourable Court deciphers whether this application has any merit or not. From the very onset, the answer to this query is in the negative and shall be elaborated herein below. In saying so, and that this being supposedly an appeal which germinates from a decision from the Tribunal, the Honourable Court has felt it needful to re – evaluate and re – assess the evidence from the Tribunal. In so doing the Court is guided by the decision of "Kenya Ports Authority – Versus - Kuston (Kenya Ltd, (2009) 2 EA 212" this Court stated as follows regarding the duty of first appellate court:-

> " This being a first appeal to this Court, the duty of the court, is to reconsider the evidence, evaluate and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect..."

13. Indeed, the Honourable Court will critically assessed each and every relief sought from the instant application by the tenant/Applicant herein on their own merit. Thus, on the brief facts of the case, the Learned Counsel for the Respondent has adequately and accurately been of great assistance to the Court. The Learned Counsel averred that what was before Court was their application dated 9th February, 2024. It was heard "Ex – Parte" on 13th February, 2024 and fixed for "Inter Parte" on 4th April, 2024. On the material date, while Mr. Mbugua Advocate held brief for Mr. Mugo for the Tenant/ Applicant the Respondent's brief was held by Mr. Odhiambo Advocate and directions were granted to dispose off the application by way of written submissions.

14. The said application vehemently opposed as stated out from the filed Replying Affidavit under the following grounds:-

a. The Tenant/Applicant was before the Tribunal in accompany of his Advocate when the hearing date was fixed. Thus, according to the Respondent, the allegations of not having been informed of the date was misplaced.

b. On the 6th February, 2024 when the case was fixed for hearing, the Tenant/Applicant's Advocate send a representation.

c. The pleadings filed are rather confusing as there is no Memorandum of Appeal, the provisions cited are not of an appeal and the prayers sough are for an ordinary suit and not an appeal.

d. The prayers the Tenant/Applicant was seeking were available before the Tribunal under the provision of Section 5 (1) (m) of the *Rent Restriction Act*, Cap. 296 as the orders being challenged has not yet been executed.

e. Besides, the orders being sought under Prayers 2, 3, 4 and 5 of the application could not be granted at an application stage as it amount to allowing the main Appeal, if at all any was filed. Further, it amount to this Court micro – managing the proceedings of the Tribunal. As noted there was no suit pending.

f. Prayer number 6 would only be granted under the provision of the *national Police Service Act* after convincing the Court that the protection of police was necessary.

g. The application was incompetent and abuse of the due process of Court all intended to frustrate the Respondent from receiving rent from the suit premises. Thus, the Learned Court urged Court to dismiss it with Costs.

15. Based on these assertion by the Respondent, a few issues come to play. Was this an appeal or an ordinary suit? I fully concur that this is not a suit, I disagree with the Learned Counsel for the Respondent that there exists no appeal by the Tenant/Applicant. Accordingly, an appeal before this Court from any statutory sub – ordinate body ought to be brought before this Court by way of filing a Memorandum of Appeal under the provision of Section 79B of the *Civil Procedure Act*, 2010 and thereafter filing of Records of appeal. Subsequently, the directions of this Court are provided under the provision of Order 42 Rules, 11, 13 and 16 of the Civil procedure Rules, 2010 on how to dispose off the said appeal. From the records, the Tenant/Applicant filed a Memorandum of Appeal dated 9th February, 2024.

16. All said and done, it is rather evident that the suit is still a life and kicking before the Tribunal as the orders being challenged have not yet been executed by the Respondent. The provision of Section 5 of the *Rent Restriction Act*, Cap. 296. This very significant and expansive provision of the law provides what are the legal mandate and powers upon which the Tribunal should operate and embark on in its functionalities. In other words, its spells out the actual jurisdiction of the Tribunal.

17. Thus, I fully concur with the Learned Counsel for the Respondent to the effect that the orders being sought under Prayers 2, 3, 4 and 5 of the application are not in the nature to be granted at an interlocutory or application stage as it amount to allowing the main Appeal. Further, it amounts to this Court micro – managing the proceedings of the Tribunal and taking that they are orders to be sought where there exists a pending suit but not an appeal as it is in the instant case. Indeed, there was no suit pending.

ISSUE No. b). Whether the parties are entitled to the reliefs sought

18. Under this Sub – heading, the Honourable Court will deliberate on whether the parties herein are entitled to the reliefs sought. Indeed, it has been noted herein, that the application has sought for several prayers. I will deal with each prayer separately. Specifically, under payer (d) of the application, the Tenant/Applicant has sought for the following orders:-

> "That pending the hearing and determination of this suit, a temporary injunction is issued restraining the Respondents by themselves, their agents, assigns and employees from evicting, harassing, trespassing, locking, attaching or auctioning goods or otherwise interfering with the Tenant/Applicant's occupation of the suit premises Plot No. CR 31419 Subdivision No.7156 Kiembeni Blue Estate Phase 1 Mombasa.

19. Clearly, from the above, what the Applicant is seeking si for temporary injunction orders on assumption that there exists an instituted suit. This is a misnomer and as already indicated there exists no suit at all in this matter instituted by any of the parties herein. But to give the Tenant/Applicant some benefit of doubt, the Honourable Court will assess to see whether the orders sought have any legal basis or not. The said application herein by the Tenant/Applicant is premised under the provision of Order 40 Rules 1, 2 and 4 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -

Order 40, Rule 1

Where in any suit it is proved by affidavit or otherwise—

a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

20. The principles applicable in an application for an injunction were laid out in the celebrated case of "Giella – Versus - Cassman Brown & Co Limited (Supra)", where it was stated:-

> " First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

21. In summary, the three (3) conditions are:-

a. That the Applicant has to show "prima facie case".

b. That there will be irreparable loss or damage.

c. That the application will be decided on a balance of convenience.

22. It is trite law that all these three (3) conditions as set out in "Giella (supra)", need to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- "Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR",

> " These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between".

23. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in "MRAO Limited – Versus - First American Bank of Kenya Ltd (Supra).

24. I wish to be guided by the case of "Mbuthia – Versus - Jimba credit Corporation Limited 988 KLR 1", the Court held that:-

> " In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases."

25. Similarly, in the case of "Edwin Kamau Muniu – Versus- Barclays Bank of Kenya Limited" the court held that;

> " In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria."

26. From the surrounding circumstances and inferences of this case, it is not disputed that the tenant/ Applicant is a tenant and have a LandLord -tenancy relationship. Further, the gist of the appeal is that there has been a decision rendered by the Tribunal and whose effect are that the applicant faces imminent and real danger of being evicted from the suit property. According to the Tenant/Applicant there isa high likelihood that in the absence of the injunctive orders, the Respondents may proceed to evict him from the suit premises declaring the appeal nugatory or a mere academic exercise. For this reason stand alone, the Court strongly concludes that the Tenant/Applicant harbours a "prima facie" case with a probability of success as required by law.

27. With regard to the second limb, whether the Applicant would suffer irreparable harm which could not be adequately compensated by an award of damages. Principally, the Applicant must demonstrate that it was a harm that cannot be quantified in monetary terms or cannot be cured. The Court of Appeal in "Nguruman Limited (Supra)", held that:-

> " On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

28. In the instant case, the Tenant/Applicant had to demonstrate that irreparable injury would be occasioned to him if an order of temporary injunction is not granted. The judicial decision of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR" provides an explanation for what is meant by irreparable injury and it states;

> " Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

29. From the very scanty information provided, the court feels that the inconvenience of not granting the injunction does not outweigh the inconvenience of the Respondents in not getting an eviction. I strongly hold that the Applicant can be compensated for his alleged improvements and/or deposits which are less than a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000.00/=). The Respondents being the registered and/or beneficial owner still possess constitutional proprietary rights and there is a real possibility of loosing 2/3 of the alleged purchase price of a sum of Kenya Shillings Two Million Eight Hundred Thousand (Kshs. 2,800,000.00/-) which is tantamount to a sum of Kenya Shillings One Million Nine Hundred Thousand (Kshs. 1,900,000.00/=). The court reminds itself that the 1st Respondent has annexed a copy of a sale agreement duly executed on 28th July, 2023 between one Jemima Waceke and herself but no proof of payment has been made. Therefore, the Tenant/Applicant has not satisfied the second condition as laid down in "Giella's case".

30. With regard to the third limb on whether if the Court is doubt should grant the orders on a balance of convenience. In the case of "Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (Supra)", the court dealing with the issue of balance of convenience expressed itself thus:-

> " Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

31. Additionally, the decision of "Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR" where the Learned Judge offered further elaboration on what is meant by "balance of convenience" and stated:-

> " The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice."

32. Without deviling onto too much details of the case, I have taken cognizance that the location of the children's school has not been disclosed. The applicant has also failed to show how the education of his children will be affected negatively. For this reason, I am not convinced that the balance of convenience lies with the Tenant/Applicant. There is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the appeal on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events of the matter. In saying so, I wish to refer to the case of:- "Robert Mugo Wa Karanja – Versus - Ecobank (Kenya) Limited & Another [2019) eKLR" where the court in deciding on an injunction application stated;

> " circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose

the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts..."

33. Suffice it to say, the Honourable Court once more in the same spirit of according the Tenant/Applicant some benefit of doubt and assume that he sought temporary injunction pending appeal under the provision of Order 42 Rule 6 (6) of the Civil procedure Rules, 2010. The Rule provides as follows:

> " Notwithstanding anything contained in sub - rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."

34. In that case, the court would be guided by several decisions. They include the case of "Patricia Njeri & 3 Others – Versus - National Museum of Kenya [2004] eKLR, the court stated as follows;

> " (a) an order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.
>
> (b) the discretion should be refused where it would inflict greater hardship that it would avoid.
>
> (c) the applicant must show that to refuse the injunction would render the appeal nugatory.
>
> (d) the court should also be guided by the principles in Giella – Versus - Cassman Brown [1973] EA 358."

35. However, in the case of "Madhupaper International Limited – Versus - Kerr [1985] eKLR, where the court held that it would be wrong to grant a temporary injunction pending appeal where the appeal is frivolous or where the injunction would inflict greater injustice than it would avoid.

36. Critically speaking, I find that the Memorandum of Appeal dated 9th February, 2024 raises some weighty issues. For instance, the Tenant/Applicant seeking his constitutional right to defend himself and cross examine witnesses and whereby the Learned Magistrate never took into account, a two month deposit made by him as security. Further, the Tenant/Applicant claims that he has school going children and although no evidence has been produced. The Court has taken cognizance that the Respondent never challenged any of these claims. Hence, the court will not sweep them under the carpet and in particular it will consider the best interests of the children which is paramount at all costs.

37. But be that as it may, unfortunately, the Tenant/Applicant has failed to demonstrate that he is entitled to be granted the orders sought. For these reasons, I strongly discern that the injunction orders must therefore fail. This court cannot grant the other prayers are they are not temporary prayers but rather are final orders which can only be granted once the appeal is determined.

ISSUE No. c). Who bears the costs of this application?

38. The issue of costs is at the discretion of the Court. Costs mean the award that is granted to a party at the conclusion of the legal action or proceedings in any litigation. Costs follow the event as provided for in section 27 (1) of the *Civil Procedure Act*, Cap 21. By event it means the result of the said legal action or proceedings.

39. From the instant application, the Tenant/Applicant has unsuccessfully prosecuted his application. However, since there is a pending appeal, the costs will be in the cause.

Conclusions and findings

40. The upshot of the above, therefore, I proceed to make the following directions/Orders:

a.

That the Notice of Motion dated 9th February, 2024 be and is hereby found to lack merit and hence it dismissed.

b.

That there be a mention on 31st July, 2024 for purposes of:

i.

Ascertaining and confirmation of the filing of Records of Appeal.

ii.

taking direction on how to dispose off the impugned appeal through the filed Memorandum of Appeal dated 9th February, 2010 under the provision of Section 79B of the *Civil Procedure Act*, Cap. 21 and Order 42 Rules, 11, 13 and 16 of the Civil Procedure Rules, 2010.

iii.

Further directions.

c.

That costs to be awarded to the Respondents and borne by the Applicant to be in the cause.

It is so Ordered accordingly

RULING DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 10TH DAY OF JUNE 2024

.....

HON. MR. JUSTICE L.L. NAIKUNI

ENVIRONMENT & LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

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

b. No appearance for the Appellant.

c. Mr. Odongo Advocate for the Respondent.