



**Ahmed (Sung as manager and guardian in YMAD (Patient) v Mohamed
(Interim administration in respect of the Estate of Said Bin Awadh & Awadh
hammad Bin damnam alias Awadh Bin Ahmed Bin Damnam) (Environment and
Land Case E001 of 2023) [2024] KEELC 4729 (KLR) (5 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4729 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE E001 OF 2023**

LL NAIKUNI, J

JUNE 5, 2024

BETWEEN

**MUNA ABDIRABO AHMED (SUNG AS MANAGER AND GUARDIAN IN
YMAD (PATIENT) PLAINTIFF**

AND

**MOHAMED SALIM MOHAMED (INTERIM ADMINISTRATION IN RESPECT
OF THE ESTATE OF SAID BIN AWADH & AWADH HAMMID BIN DAMNAM
ALIAS AWADH BIN AHMED BIN DAMNAM) DEFENDANT**

RULING

I. Introduction

1. This Honourable is tasked with the determination of two notice of motion before it. The Plaintiff/ Applicant herein, Muna Abdirabo Ahmed (Suing as manager and guardian in YMAD - (Patient) moved this Honourable Court for the hearing and determination of the Notice of Motion application dated 18th July, 2023 brought under the provision of Section 3A of the *Civil Procedure Act*, Cap. 21. It was brought under a Certificate of urgency. The Defendant/ Applicant herein, Mohamed Salim Mohamed (Interim Administration Respect of the Estate of Said Bin Awadh& Awadh Hammid Bin Damnam Alia Awadh Bin Ahmed Bin Damnam) also moved the Honourable Court for the hearing and determination of his Notice of Motion application dated 6th November, 2023 brought under the provision of Sections 1A and 3A of the *Civil Procedure Act*, Cap. 21 and Order 2 Rule 15(1)(a) & Order 51 Rule 1 *Civil Procedure Rules, 2010*.
2. Upon service of the Notice of Motion application dated 18th July, 2023 the Defendant responded through a replying affidavit sworn on 28th September, 2023. The Plaintiff responded to the Notice of



Motion application dated 6th November, 2023 through a statement of grounds opposition dated 5th February, 2024.

II. The Notice of Motion application dated 18th July, 2023

3. The Plaintiff/ Applicant sought for the following orders:-
 - a. Spent.
 - b. That there be a stay of execution of the orders made on the 17th January 2023 and 13th July 2023 within the Kadhi's Court By Hon Habib Salim Vumbi in relation to Plot No. 128/11/MN in so far as issuance of fresh titles and distribution of the same pending the hearing and determination of this application interparty.
 - c. That there be a stay the orders made on the 17th January, 2023 and 13th July 2023 within the Kadhi's Court By Hon Habib Salim Vumbi in relation to Plot No. 128/11/MN in so far as issuance of fresh titles and distribution of the same pending the hearing and determination of this suit.
 - d. That cost be provided for.
4. The application by the Plaintiff herein was premised on the grounds, testimonial facts and averments made out under the 14th Paragraphed Supporting Affidavit of Muna Abdirabo Ahmed, the Plaintiff/ Applicant sworn and dated 18th July, 2023. She averred that:-
 - a. She was the wife of YMAD who was currently diagnosed with having a depressive illness which renders him incapable of protecting his rights due to mental infirmity hence a person of unsound mind. (Annexed in the affidavit was a medical report from Dr. Omar J. Aly (A Senior Psychiatrist dated 13th October 2021 marked as "MAA - 1").
 - b. On the 21st March, 2022, it was confirmed by Dr. C.M. Mwangome that YMAD (patient) had a severe cognitive impairment and he could not follow the proceedings in any Court of law and hence was of unsound mind (Annexed in the affidavit was a copy of the said medical report by Dr. C.M.Mwangome (Consultant Psychiatrist) and marked as "MAA - 2").
 - c. Pursuant to the provision of Sections 26 and 38 of the Mental Health Act Cap. 248 and Order 32 Rule 15 of the Civil Procedure Rules, 2010 she moved the Court in "Miscellaneous Application no. E013 of 2021" and obtained an order on the 27th May, 2022 given by Hon. Justice J.N. Onyiego that "the applicant M/s. Muna Abdirabo Ahmed was hereby appointed as Guardian to the subject, YMAD (Patient) as well as manager of his estate on condition that she shall have no right unless with Courts authority to alienate, sale, dispose or transfer any immovable assets of the patient". (Annexed in the affidavit was a copy of the order dated 27th May, 2022 by Hon. Justice J.N.Onyiego marked as "MAA - 3" and a copy of the Judgement marked as "MAA - 4").
 - d. On the 17th January, 2023, the Principal Kadhi Hon. Habib Salim Vumbi made ex - parte orders herein which orders she was aggrieved against since application proceeded ex - parte denying them the opportunity to be heard and defend themselves. (Annexed in the affidavit was a copy of the said orders marked as "MAA - 5").
 - e. The subject matter in issue was Land parcel Numbers Plot No. 128/II/MN which land the Applicant and her husband had been in occupation for decades without any interruption. Indeed, they had been in open occupation and even paying ground rates for the same since the



said occupation from the year 1982. (Annexed in the affidavit was a copy of the receipts of the subject property collectively marked as “MAA - 6”).

- f. The Respondents had taken advantage of the mental status of the patient. Their intention was to dispossess the patient of the suit land. This application ought to have been determined inter-party but not ex parte which was unconstitutional denying her the right to be heard and being condemned unheard.
- g. Within these orders, the Land Registrar had been directed to issue fresh title documents pending the distribution of the said estate which orders were prejudicial to them since her husband had been dispossessed with this orders and he was condemned unheard and we content that subject plot could not be issued with fresh title documents without the Applicant being the Guardian of the patient being heard to protect the estate of the patient.
- h. The distribution of the estate was prejudicial to the patient. The Court ought to protect the right of the patient's estate against the dispossession by the Respondents who had misled the Court to obtain the ex - parte orders.
- i. The Court ruled against a mental patient which fact was deliberately not disclosed to the Court in the Civil Case of 268 of 2019.
- j. The attempt to have the said orders reviewed was thwarted on the 13th July, 2023 as per the ruling annexed. (Annexed in the affidavit was a copy of the said ruling marked as “MAA - 7”).
- k. Hence if the said orders were not stayed and stopped, the suit shall be rendered nugatory and the suit Applicant's proprietary right shall be extinguished.
- l. Hence the Court ought to stay the Kadhi Order pending the hearing and determination of the suit.

III. The response to the Notice of Motion application dated 18th July, 2023

5. While opposing the Application, the Defendant responded through an 11th Paragraphed Replying Affidavit sworn by Mohamed Salim Mohamed with one (1) annexure marked as “MSM - 1” annexed thereto. He averred as follows:-
 - a. The subject matter in these proceedings is all that Land Parcel No. Plot No 128/11/MN situated at Mwandoni and which also forms the substratum in ‘Mombasa F.H.C.A e109 of 2023 - *Muna Abdirabo Abmd – Versus - Abdallah Mohamed Ahmed & 3 Others* including himself.
 - b. Vide an application filed in the said high Court proceedings by the Plaintiff herein being an Appeal from the Kadhi's decision in :- “Mombasa Kadhi Succession Cause No.268/19 *in the matter of the Estate of Said Bin Awadh & Haymid Bin Damnan alias Awadh bin Ahmed bin Damnan (deceased)*, the Honourable Learned Judge issued the following orders thereof : that the Notice of Motion application dated 15th May, 2023 was allowed on 4th August 2023 in terms of prayers 2, 3 and 4 thereof , to wit that:
 - i. There be a stay of execution of the decree and Judgement delivered on 3rd March 2022 by the principal Kadhi, the Honourable Habib Salim Vumbi against Yahya M. A Damnan pending the hearing of the application inter partes and also pending the hearing and determination of Civil Appeal No. HCCA No. E109 of 2023.



- ii. The Applicant was granted leave to Appeal out of time and the Memorandum of Appeal in HCCA NO. E109 of 2023 be admitted and be deemed to have been filed within time; He annexed in the affidavit a copy of the said ruling and mark it as “MSM - 1”.
- c. In the pleadings in support of her said application and Appeal, the Plaintiff herein contended that her purportedly infirm husband in whose name she acted claimed the subject property as heir of the deceased yet now before this Court the Plaintiff’s claim had suddenly changed and morphed into a claim for adverse possession.
- d. It needed no gain saying that the orders being sought by the Plaintiff in her instant application had been overtaken by events by dint of the Family Court’s ruling delivered on 4th August 2023 by Hon. Mutai J. in Mombasa HCCA NO. E109 of 2023.
- e. Should this Honorable Court then proceed and render a conflicting ruling over the rights of the parties over the same subject matter forming the substratum of the suit, there was great risk that it would expose the two Courts to undue embarrassment and which scenario may cast the administration of Justice in bad Light as two Courts of concurrent jurisdiction ought not to entertain identical disputes at the same time.
- f. The foregoing sentiments were germane moreso considering the fact that, inevitably, both Courts would be called upon to grapple with and determine the issue of ownership of the subject property in the course of the said parallel proceedings, and which would be detrimental to good order and to the interests of all parties concerned.
- g. Since the Kadhi Cause and the subsequent Appeal therefrom were lodged prior to the proceedings before this Court, it Would be safer for the instant proceedings to be stayed pending the hearing and determination of the Appeal before the Family Court, if not for any other reason, but to maintain good order and to prevent the possibility of the two Courts reaching conflicting and/or contradictory findings on the same subject matter.
- h. In any event, his advocates on record advised that the subject the same ought not to be allowed in the circumstances prevailing herein and urge this honorable Court to dismiss the same with an attendant order as to costs.

IV. The Notice of Motion application dated 6th November, 2023

6. From the application dated 6th November, 2023, the Defendant/ Applicant sought for the following orders:-
 - a. That this Honourable Court be pleased to strike out the suit against the Defendant/ Applicant for not disclosing any cause of action against the Defendant.
 - b. That the costs of the application and of the suit be borne by the Plaintiff/ Respondent.
7. The Application by the Defendant/Applicant herein was premised on the grounds, testimonial facts and averments made out under the Supporting Affidavit of Mohamed Salim Mohamed, The Defendant/Applicant sworn and dated 6th November, 2023 averred that:-
 - i. Vide an amended originating summons dated 20th February, 2023, the Plaintiff/Respondent herein has sued the Applicant claiming adverse possession over the suit property.



- ii. Vide directions issued on 7th June, 2023, the Court ordered that the motion be converted into a Plaint, the affidavit filed into a defence with the attachments thereto as the list of documents.
- iii. The Defendant in this matter had been sued as the interim administrator of the estate of Said Bin Awadh & Awadh Hammid Bin Damnan Alias Awadh Bin Ahmed Bin Damnan, and in the pleadings aforesaid, the said deceased persons herein, rather than the Applicant, had been invited to appear and defend these proceedings despite being long dead.
- iv. In his Replying Affidavit filed before this Court on the 28th September, 2023, the Defendant had annexed a ruling dated the 4th August, 2023 delivered in Mombasa High Court Civil Appeal Number 109 of 2023 in which his appointment as the interim Legal administrator of the aforesaid estate was stayed upon an application lodged by the Plaintiff herein.
- v. In the circumstances the Defendant herein lacked the capacity to sue or to be sued over the suit property herein that forms part of the aforesaid estate.
- vi. In any event, even if the Defendant as still the interim administrator of the aforesaid estate, he would still be devoid of the legal standing to be sued in the instant proceedings unless and or until his appointment as the full administrator is confirmed by the Court.
- vii. In the premises, the suit herein against the Defendant was misconceived and could not be sustained.
- viii. The Defendant was being subjected to great prejudice and inconvenience by the pendency of the suit herein.
- ix. It was only fair and in the interest of justice that the suit herein be struck out as it was without any basis in law and or fact and does not disclose any reasonable cause of action against the Defendant/ Applicant herein.

V. The response to the Notice of Motion application dated 6th November, 2023

8. The Plaintiff opposed the Notice of Motion application dated 6th November, 2023 through a three (3) paragraphed statement of grounds of opposition dated 5th February, 2024 on the following grounds:-
 - a. No evidence under the provision of Order 2 Rule 15(1)(a) should be admitted and the Defendant intended to rely on the ruling dated 4th August, 2023 contrary to the provisions.
 - b. On issue of locus standi, the Defendant still had locus to be sued since the orders had not been set aside or extinguished and the provision of Section 82 of the *laws of Succession*, Cap. 160 on powers of a personal representative limited to filing/ defending the suit can take effect.
 - c. The principles of striking out the suit would not be in the interest of the state and neither would it solve the issues in controversy and if there were any defects, than an amendment would breath life into it instead of the draconian way of striking out the pleadings.

VI. Submissions

9. On 7th February, 2024 while all the parties were present in Court, they were directed to have the Notices of Motion applications dated 18th July, 2023 and another dated 6th November, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and on 13th March, 2024 a ruling date was reserved on 5th June, 2024 by Court accordingly.



A. The Written Submissions by the Plaintiff on the Notice of Motion application dated 18th July, 2023

10. The Plaintiff through the Law firm of Messrs. Martin Tindi & Co. Advocates filed their written submissions dated 5th February, 2024. Mr. Tindi Advocate submitted that the Plaintiff filed the Notice of Motion dated 18th July 2023 wherein she was seeking for the above stated orders. The contention of the Plaintiff was that if the orders were not stayed, then the suit shall be rendered nugatory since the Land Registrar shall issue fresh titles and hence the Applicant's claim herein shall be rendered nugatory. On the 18th July, 2023, the Court certified the matter urgent and granted prayer 2 which in effect meant that there shall be no issuance of fresh titles on Plot No.128/II/MN and distribution pending the Inter-party hearing. The Defendant's Replying Affidavit Mohamed Salim Mohamed sworn on the 28th September, 2023 raised the following issues:
- i. Para 3- that application is an abuse of the Court process and the orders sought therein are not for granting.
 - ii. Para.4-that the subject matter in these proceedings is Plot No.128/11/MN situated at Mwandoni and forms the substratum of Mombasa F.H.C.A E109 of 2023 Muna Abdirabo Ahmed Vs Abdallahi Mohamed Ahmed &30thers;
 - iii. Para 5-that Honourable Mutai granted the applicant leave to appeal out of time and a stay of the decree and judgement delivered on 3rd March, 2022 pending the determination of the appeal
 - iv. Para.6-the Plaintiff's claim in the appeal that she is the heir whilst in these one she is claiming adverse possession.
 - v. PARA 7-orders being sought by the Plaintiff has been overtaken by events by dint of the Family Ruling delivered on 4th August, 2023 by hon. mutai in mombasa HCCA NO. E109 of 2023.
 - vi. PARA.8-risk of a conflicting judgement on the same subject matter would expose the two Courts to undue embarrassment.
 - vii. PARA. 9-both Courts shall be called upon to grapple with and determine the issue of ownership.
 - viii. PARA.10-instant proceedings be stayed pending the hearing and determination of the Appeal before the Family Court to maintain good order and to prevent the possibility of two Courts reaching a conflicting and/or contradictory finding on the same subject matter.
 - ix. PARA 11-the application does not meet the threshold for granting of the orders sought.
11. On the issue Stay of Proceedings pending the hearing and Determination of the Family before the Family Court. The Learned Counsel submitted that the Respondent ought to have filed a substantive application specifically seeking for the said orders; they further submitted that the claim herein is for adverse possession brought under the provision of Order 37 Rule 7(1)(2) & (3) of the [Civil Procedure Rules, 2010](#). They further submitted that the general rule was that proceedings before Succession Court should await a pending case on the ownership of a property subject to the estate pending confirmation of a grant; The Respondent was required to have laid down the evidence to support his assertion that there ought to be a stay. What he had annexed was a ruling made by the Family Court on an application. There was no logical or legal basis to stay the hearing of the instant case to await an outcome of an appeal of the Judgement by the Kadhi that had proceeded against a mental patient.



12. According to the Learned Counsel, the Environment Court shall deal with the issue of ownership by way of adverse possession by the Applicant; A hearing shall take place before the Court and evidence taken to proof ownership. On the other hand, the Family Court shall give a determination on whether it erred on facts and in law in delivering a Judgement against a mental patient who had no proper audience before the Kadhi. What each Court was dealing with was very distinct and the decision of the family Court if the appeal was to be allowed/dismissed could not affect the decision of the ELC Court that shall determine the extent of ownership. Under the provision of Article 162 of the Constitution of Kenya 2010, all matters relating to ownership, use and occupation had now been mandated to be determined by a specialized Court being the Environmental and Land Court (ELC).
13. On issues of risk of conflicting Judgment between the ELC Court and the Family Court. The Learned Counsel submitted that the ELC Court had a claim under adverse possession which fell squarely under its jurisdiction. On the other hand the Family Court was exercising its Appellant jurisdiction against a decision of the Kadhi's Court which decision shall be overturned or upheld. The ELC Court's jurisdiction to hear the claim wholly without the orders of the Kadhi's Court directing the Land Registrar to issue fresh title deeds was stayed pending the outcome of the issue of ownership.
14. The provision of Section 50 Law of Succession, Cap. 160 provide:-
 - (1) An appeal shall lie to the high Court in respect of any order or decree made by a resident magistrate Court in respect of any estate and the decision of the High Court thereon shall be final;

 - (2) An appeal shall lie to the high Court in respect of any order or decree made by a khadi's Court in respect of the estate of a deceased Muslim and, with the prior leave thereof in respect of any point of law, to the Court of appeal.
15. The Learned Counsel submitted that they had demonstrated the distinct jurisdiction of the ELC Court and the family Court, and it is a misguided stretch of the imagination that there might be a risk of a conflicting Judgement. In fact, there was no risk at all.
16. On the issue of orders sought herein been overtaken by events. The Learned Counsel submitted that it was indeed a misnomer to submit that the orders sought was overtaken by events being the orders issued by Justice Mutai on the 4th August 2023. The Family Court Judge allowed the intended Appeal to be heard out of time and a stay of execution of the said orders be granted pending the hearing of the appeal; Assuming the appeal was allowed today and the Kadhi's orders/Decree were set aside, those orders were specifically for the purpose of the Appeal and there shall not affect the claim for land adverse possession claim. On the other hand if appeal was dismissed, it shall not in any way affect the orders before the ELC Court which shall become expire upon final determination of the hearing of the ELC Case.
17. On whether the Applicant barred from claiming adverse possession. The Learned Counsel relied on the case of "Nairobi Succession Cause 1708 of 2005: In the Estate of Henry Wamiti Nganga (Deceased)" Lady Justice Maureen Odera at para held that:-

“Therefore, the correct and proper forum before which the applicant ought to ventilate her claim to the suit land is the ELC. The Environment and Land Court is the only Court exclusively mandated by law to determine the question of ‘ownership’ of the suit land.



18. According to the Learned Counsel, therefore, the Applicant's claim of adverse possession shall be determined by the ELC Court and upon determination of ownership, then the remnants if any can be distributed by the Family Court;
19. On whether the Applicant had met the threshold of granting the orders sought, the Learned Counsel submitted that the orders by themselves on the face are prejudicial to the applicant since they are directing the Land registrar, Mombasa to issue fresh title documents to the Petitioner - Mohamed Salim Mihamed & 40 others pending the distribution and they went further to order the of ficer - in - Charge - Mjambere police station to enforce the compliance of these orders. These orders were mandatory in nature and they were granted ex- Parte by the Kadhi's Court. The applicant had demonstrated a prima facie case for the said orders to be stayed since substantial loss shall be occasioned upon a litigant who was claiming ownership of the subject-land; The principles of natural justice and good governance indeed required a litigant not to be condemned unheard and given audience especially on such a sensitive issue of ownership of land.
20. In conclusion, the Learned Counsel asserted that the Notice of Motion application dated 18th July, 2023 should be allowed as prayed and this matter be scheduled for hearing at the earliest date available to the Court due to its sensitivity on a burning land issue that the Respondents were hell bent in taking away from the Applicant.

B. The Written Submissions by the Defendant/ Respondent

21. The Defendant through the Law firm of Messrs. Oloo & Company Advocate filed their submissions dated 16th February, 2024. Mr. Oloo Advocate for the Defendant commenced his submissions by stating that the Plaintiff's aforesaid application was opposed vide the replying affidavit of Mohmaed Salim Mohamed sworn in these proceedings on the 28th September 2023 together with the annexures filed in support thereof and whose uncontroverted contents they reiterate herein and surmise as hereunder that:-
 - i. The land parcel subject matter herein also forms the substratum in "Mombasa F.H.C.A No. e109 of 2023 - *Muna Abdirabo Ahmed – Versus - Abdallah Mohamed Ahmed & 3 others*, including the Defendant/Respondent herein.
 - ii. Vide a ruling in the aforesaid proceedings dated the 4th August 2023, the High Court issued orders staying the execution of the decree and Judgement delivered on the 3rd March 2022 by the principal Kadhi pending the hearing and determination of Civil Appeal No. HCCA NO.E109 of 2023.
 - iii. The Applicant was equally granted leave to appeal out of time with the Memorandum of Appeal in the said HCCA NO. E109 of 2023 duly admitted and deemed to have been filed within time.
 - iv. In the pleadings before the Kadhi's Court and in the Appeal before the High Court, the Plaintiff herein claims interest in the suit property as an heir, yet in the instant proceedings the claim has morphed into that for adverse possession.
 - v. That bearing in mind the orders of stay already issued by the High Court aforesaid, the instant motion has effectively been overtaken by events as the matter of stay was in the circumstances sub - judice.
 - vi. That in determining the instant suit/application and the subject appeal before the High Court, the 2 Courts of concurrent and complimentary jurisdiction would invariably be called upon



to determine the issue of ownership of the suit property, and thus there was the real risk of the 2 Courts reaching conflicting decisions on the issue and which would not only cause judicial embarrassment but would also upset good order and judicial ethos.

- vii. In any event, the subject application never met the thresh hold for granting of stay orders sought and that the same ought to be dismissed forthwith.
22. On the issue of the jurisdiction to grant stay order sought. The Learned Counsel submitted that it was a common ground among the parties that, the Plaintiff's motion dated the 18th July 2023 sought for stay of execution of orders made by the Chief Kadhi on the 17th January 2023 and on 13th July 2023, and it was his humble but considered submissions that, since the instant proceedings was neither an appeal from the aforesaid decision, nor an application pursuant to supervisory jurisdiction of the Court as provided for under Article 165 of the *Constitution* of Kenya, 2010 the instant Court lacks the jurisdiction to grant the stay orders sought by the Plaintiff herein. Once the Applicant herein expressed dissatisfaction with the orders of the Honourable Principal Kadhi issued on the 17th January 2023 and 13th July 2023, and preferred an appeal therefrom, then the provisions of Order 42 Rule 6 (1) of the *Civil Procedure Rules, 2010* kicked in.
23. In the instant case, it was crystal clear that, being aggrieved by the aforesaid decisions of the principal Kadhi, the Applicant herein had since availed herself of the available remedies by not only lodging an appeal therefrom, being H.C.F.A NO. E109 of 2023, and further, had obtained orders staying ALL the decisions aforesaid made by the principal Kadhi on the 17th January 2023 and 13th July 2023 respectively.
24. According to the Learned Counsel it therefore begged the question as to just why the instant application seeking similar orders as to those already issued by the Learned Judge in the appeal was meant to achieve, if not solely intended to abuse the due process of Court. Whereas Wikipedia defines abuse thus; abuse of process or abuse of the legal process occurs when a party unjustifiably and unreasonably uses the legal process to advance a cause of action, in the case of "*Satya Bhamu Gandhi - Versus - Director of Public Prosecutions & 3 Others* (2018) eKLR" at paragraph 21 and 22, the Court observed thus;
- “21. Clearly, this Judicial Review Application, is founded on issues that have been dealt with in the above Petition. To me this suit constitutes abuse of Court process. It is trite law that the Court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black's law dictionary defines abuse as “Everything which is contrary to good order established by usage that is a complete departure from reasonable use "An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use”.
- “22. The concept of abuse of Court/judicial process is imprecisely involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.”
25. Indeed, at paragraph 23 of the *Satya case* (Supra), the Court further observed that the situations that may give rise to an abuse of Court process were indeed in exhaustive and it involves situations where the process of Court had not been resorted to fairly, properly or honestly to the detriment of the other



- party. Flowing from the foregoing definition, it followed that the Plaintiff's motion dated 18th July 2023 in so far as it sought a replica of the orders already granted by the High Court as aforesaid is tantamount to an abuse of due process of Court as it is manifestly an improper use of judicial process and resources to reach an end that had already been determined in parallel proceedings before a Court of competent and Concurrent Jurisdiction.
26. The Learned Counsel submitted that their foregoing position was further informed by the fact that, despite there being several divisions created for effective administration of justice, there's only one High Court in Kenya and whose decisions as much as was practicable ought not to conflict for the sake of good order and for the effective administration of justice; see the decision in "[*Rapid Kate Services Limited – Versus - Freight Forwarders Kenya Limited & 2 Others*](#) (2005) eKLR" at page 3 for this proposition. In the prevailing circumstances, we urge this Honourable Court to find that Judicial time and resources ought not to be expended on the Plaintiff's Notice of Motion application dated the 18th July 2023 and proceed to dismiss the same with an attendant order as to costs.
 27. On the Respondent's Notice of Motion application dated 6th November, 2023, the Learned Counsel submitted that in the directions herein issued on the Originating Summons, the Applicant became the Plaintiff while the Respondent was now the Defendant. It is also common ground that the Defendant herein has been sued as the Interim Administrator in respect of the estate of Said Bin Awadh & Awadh Hammid Bin Damnan alias Awadh Bin Ahmed Bin Damnan. It was further uncontroverted, and as disclosed by the Replying Affidavit of the Defendant sworn in this proceedings on the 28th September 2023 that, the Defendant was stripped of his said power as an Interim Administrator of the deceased's estate by the ruling of the High Court delivered on 3rd March 2023 in H.C.F.A NO. E109 of 2023; see annexure marked as "MSM - 1" on the said affidavit. It was by dint of the foregoing that the Defendant herein contents that he had no capacity at law, either to sue and or to be sued on behalf of the estate herein and thus the instant application for striking out as the suit never disclosed any cause of action against him in the circumstances.
 28. On the case for striking out. The Learned Counsel submitted that the Provisions of Order 1 Rule 3 of the Civil Procedure Rules, 2010 stipulates, inter alia, that, all persons may be joined as Defendants against whom any right to relief in respect of , or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative; and it was their humble submissions that, in the absence of the powers conferred by the Principal Kadhi's ruling to be the Interim Administrator of the deceased's estate, the Defendant herein lacked the capacity to be sued as a Defendant defined under the aforesaid proviso of the [*Civil Procedure Rules, 2010*](#) as his capacity in the proceedings had been conferred by the since stayed ruling of the Principal Kadhi.
 29. In addition to the above, the provisions of Order 2 Rule 15 (1)(a) of the [*Civil Procedure Rules, 2010*](#) stipulate, inter alia, that, at any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that it disclosed no reasonable cause of action or defence in law, and in conformity with the applicable rules. the Respondent's motion subject matter herein was not supported by affidavit evidence. Contrary to the averments by the Plaintiff in their Grounds of Opposition to the motion, the Applicant was not relying on the Replying Affidavit sworn by the Defendant in these proceedings, rather, what the motion is based on are the grounds on its face, as well as on the pleadings lodged in Court prior to lodging the instant motion, and which invariably included the Defendant's Replying Affidavit sworn on the 28th September 2023 and filed in Court on the same day alongside the annexures thereto.
 30. Moreover, it was trite law that, when determining an application brought under the provisions of Order 2 Rule 15(1)(a), this Honourable Court was enjoined to consider the entirety of the pleadings



lodged prior to lodging of the motion in order to determine whether the same disclosed a cause of action or not: see the case of “*Jeraj Shariff & Co. – Versus - Chotai Fancy Stores* (1960) E.A 374” for this proposition. Therefore, it followed and flowed from the foregoing decision that, the Court in the instant case could not shy away from looking at the Defendant’s uncontroverted pleadings as to the existence of stay orders in Mombasa H.C.F.A NO. E109 of 2023 in determining the instant application for striking out. Further to the foregoing, in the celebrated case of “*D.T. Dobie & Co. (K) Ltd – Versus – Muchina* (1982)KLR1”, where it was held, inter alia that, the words “reasonable cause of action” means an action with some chance of success, when the allegations in the Plaintiff were considered, and further that a cause of action would not be considered reasonable if it did not state such facts as to support the Claim, and lastly the words “cause of action” meant an act on the part of the Defendant which gave the Plaintiff his cause of complaint. Borrowing from the foregoing decision and in a nutshell, the Defendant herein lacked the capacity, by dint of the stay orders since issued by the High Court barring his appointment to act as the Interim Administrator of the deceased’s estate, to advance any acts or omissions thereof that could constitute a cause of action in favour of the Plaintiff. Thus, it was their submissions that the instant suit was a proper candidate for striking out as it never disclosed any cause of action known at law as against the Defendant.

31. In the case of “*Kassam – Versus – Bank of Baroda (Kenya) Ltd* (2002) KLR” on the issue of striking out, the Court reiterated the trite position that the power to strike out a pleading was discretionary power to be exercised along sound judicial principles, and further that, the Court had inherent as well as statutory jurisdiction to strike out a pleading which was an abuse of the process of the Court: and it could not be lost on this Court that the Defendant had set forth compelling grounds, to wit, the lack of standing by the Defendant to either sue or be sued with respect to the suit property, to enable this Court to consider and determine the instant application for striking out on sound judicial principles.
32. Still on the power and rationale for striking out pleadings, the Court in the case of “*Muchanga Investments Limited – Versus - Safaris Unlimited (AFRICA) Limited & 2 Others* (2002) eKLR” at pages 10 and 11 cited with approval the decision in the case of “*Fremar Construction Company Limited – Versus - Mwakisiti Navi Shah* 2005 eKLR” at page 6 where the Court said:-

“Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined on oral evidence in open Court. Unless a trial is on discernable issues it would be farcical to waste judicial time on it.”
33. Just what would be more farcical than this Honourable Court entertaining the proceedings where the Defendant evidently was devoid of the legal standing and capacity to defend the same? He submitted that proceeding with the suit herein in the prevailing circumstances would be tantamount to a farce and waste of precious judicial time and resources. The Learned Counsel urged the Honourable Court to allow the application for striking out in the interest of justice.
34. On the issue of the effect of the stay orders issued. The Learned Counsel acquiesced that as submitted herein elsewhere above, it was on record that the decision/orders of the principal Kadhi issued on the 17th January 2023 and 13th July 2023 were stayed by the decision of the High Court in H.C.F.A NO.E109 of 2023; and it would be disingenuous for the Plaintiff herein to deny the existence of those orders since the same were issued upon their own application. A plain reading of the aforesaid orders left no doubt that the Defendant herein had been stripped of all the powers that were vested in him to administer the subject estate comprising of the suit property herein that had hitherto been conferred onto him by the impugned decisions rendered by the principal Kadhi as aforesaid.
35. According to the Learned Counsel it needed no gainsaying that, Court orders were to be obeyed until the same were either varied, vacated and/or set aside, and the sanction for non - compliance was citation



for contempt and the appurtenant penal consequences thereof . In the circumstances, the provisions of Section 82 on the powers of a personal representative limited to filing/defending suit cannot be invoked to compel the Applicant to Defend the instant proceedings as the same would amount to contempt of the express orders issued by the High Court, family Division, on the 4th August 2023 and would attract penal sanctions, including being jailed. The Learned Counsel further humbly submitted that the Defendant's Notice of motion application dated the 6th November 2023 met the threshold set down under the law and pray that the same be allowed.

36. On the issue of stay of proceedings in the alternative. The Learned Counsel submitted that if the prayer for striking out never found favour with the Honourable Court, then in the alternative, this would be a proper case to order stay of proceedings herein pending the hearing and determination of the Plaintiff's appeal H.C.F.A NO. E109 of 2023 aforesaid to avoid a situation where parallel proceedings were being undertaken before 2 different Courts of concurrent jurisdiction over the same subject matter. Indeed, the power to order stay of proceedings was in the discretion of the Court, and which position was reiterated by the Court in the case of "*Port Florence Community Health Care – Versus - Crown Health Care Ltd* (2022) eKLR" where at paragraph 18 of the decision, the Court held thus;

“ 18. In the case of *DAvid Morton Silverstein – Versus - Atsango Chesoni* (Supra), the Court of Appeal citing *Kenya Commercial Bank Limited – Versus - Benjob Amalgamated Limited & Another* [1998] eKLR held that it is not the law that a stay of proceedings cannot be granted but that each case depends on its own facts.”

37. In conclusion, the Learned Counsel submitted that having appreciated the facts surrounding the dispute between the parties herein at large, and the attendant consequences that are likely to befall the Defendant if he were to act contrary to and in contempt of the orders issued by the High Court pursuant to the Plaintiff's application, this is a proper case where the Court can judiciously exercise its discretion and order stay of the proceedings herein pending the outcome of the aforesaid appeal, and all the while noting that no prejudice shall befall the Plaintiff in the circumstance by dint of the status quo prevailing.

C. The Written Submissions by the Plaintiff for the Notice of Motion dated 6th November, 2023

38. The Plaintiff through the Law firm of Messrs. Martin Tindi & Co. Advocates filed their written submissions dated 12th March, 2024. Mr. Tindi Advocate submitted that the Defendant had filed the notice of motion application dated 6th November 2023 to have this Court strike out the suit against the Defendant/Applicant for not disclosing any reasonable cause of action against the Defendant and costs of the application and the suit be borne by the Plaintiff/Respondent.

39. On the other hand, the Plaintiff filed a statement of grounds of opposition stating:

- I. No evidence under the provision of Order 2 Rule 15(1) should be admitted and the Defendant intends to rely on the ruling dated 4th August 2023 contrary to the provisions.
- II. On issue of locus standi, the Defendant still has the locus to be sued since the orders have not been set aside or extinguished and Section 82 On Powers of Personal Representative limited to filing/defending the suit can take effect.
- III. The principles of striking out the suit would not be in the interest of the estate, and neither would it solve the issues in controversy and if there are any defects, than an amendment would breathe life into it instead of the draconian way of striking out the pleadings.



40. The Learned Counsel averred that the main contention of the Defendant was that Mohamed Salim Mohamed had been sued as the interim administrator. The Defendant further contents that due to a ruling dated 4th August, 2023, delivered in the Civil Suit – “Mombasa High Court Civil Appeal number 109 of 2023, the appointment as interim administrator was stayed; That in the circumstances the Defendant herein lacked the capacity to be sue or be sued over the suit property herein that formed part of the aforesaid estate. On their part, they submitted that the Defendant was misinterpreting the ruling Civil Appeal Number 109 of 2023 wherein the Judge granted the following orders being inter alia:

“that there be a stay of execution of the decree and Judgment delivered on 33rd March, 2022 by the Principal Kadhi, the Honourable Habib Vumbi, against YMAD pending the hearing of and determination of Civil Appeal No. HCCA No. E109 of 2023.”

41. According to the Learned Counsel, the Court should take note that the decree and Judgement delivered on 3rd March, 2023 was in reference to succession cause no. 268 of 2019 which is different from Miscellaneous application no. E004 of 2019 Justice Mutai’s orders did not touch the Miscellaneous application No. E004 of 2019 wherein the stay orders granted by the ELC Court were specifically against the miscellaneous application which stayed the issuance of fresh titles and distribution of Plot No.128/IL/MN that the Plaintiff herein claims to had stayed on for more than 12 years uninterrupted and this Court was better placed to confirm the adverse possession claim which should not be subject to distribution; Those were triable issues that this Court shall determine during the hearing of the case and hence the Plaintiff had a reasonable cause of action that should be ventilated and heard.

42. In Miscellaneous Application No. E004 of 2023, the Hon Habib Salim Vumbi had made the following orders on 17th January, 2022:-

- i.
- ii. That this Court do hereby appoint Mohamed Salim Mohamed as the interim administrator in respect of the estate of Said Bin Awadh& Awadh Haymid Bin Daminan Alias Awadh Bin Ahmed Bin Daminan and in respect of the remaining assets Plot No.128/II/MN pending the distribution of the estate of the late Said Bin Awadh & Awadh Haymid Bin Damnan Alias Awadh Bin Awad Bin Ahmed Bin Damnan.
- iii. That the Land Registrar Mombasa is hereby directed by this Honourable Court to make entry of appointment of the applicant herein one Mohamed Salim Mohamed as the interim Administrator in respect of the Land Parcel No.128/II/MN and to issue fresh title documents pending the distribution of the said estate.
- iv.
- v.

43. Thus, the Learned Counsel submitted that the Judgment delivered on the 3rd March, 2022 was in favour of the Petitioners which was in “Succession Cause no. 268 of 2019 - Abdalla Mohamed Ahmed & 4 others – Versus - Yahya Damnam & another and hence the Judge ordered for a stay of the said Judgement against a mental patient. Therefore Justice Mutai was not dealing with ‘Miscellaneous Application no E004 of 2023 - Abdalla Mohamed Ahmed 4 others.

44. Therefore, as on the 24th February, 2023 when the Amended Salim Mohamed had been appointed as the administrator by the which was a different cause of action confined to administration of the



deceased property. Thus, he submitted that Mohamed Salim Mohamed had the capacity to be sued or to sue; that had not been taken away from him. Justice Mutai's ruling which was delivered on 4th August, 2023 and it did not vitiate the appointment of Mohamed Salim Mohamed as the administrator in a different miscellaneous application that was confined only to appointing him as the interim administrator.

45. In the case of :- "[Joseph Owiso Ogombo – Versus – Sebastian Ben Aduori](#) (2022) eKLR" at para 13, Justice A.omollo held:-

“whether the annexed documents were sufficient to allow the Respondent's suit to stand is a question to be determined after hearing both parties. I find that the subordinate Court was right to hold that the Respondent had demonstrated he had locus standi.”

At para.15. Though Order 2 Rule 15 *Civil Procedure Rules* gives the discretion to dismiss suits or strike out pleadings where a cause of action has not been disclosed, said discretion is exercised judicially. In *D.T.Dobie & Company Kenya Limited - Versus - Joseph Mbaria Muchina & Another*(1980) eKLR, Madan JA stated - No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of a case before it.”

46. Hence, the Learned Counsel urged this Court to adopt the findings of the above authority wherein the Court found that the Respondent had the locus standi to be sued; they submitted that the Court appointed Mohamed Salim Mohamed as administrator and at the time this suit was filed he was the administrator. They further submitted that the appointment as administrator has not been set aside and he still remains the administrator. Placing reliance on the same authority, he further submitted that the Plaintiff had a reasonable cause of action; the cause of action had a high chance of success since it was a claim of adverse possession. The Plaintiff had to show that she was leaving on the said possession of land for more than 12 years without any disturbance from the registered title-deed holder and hence, the Court should proceed to hear her case.
47. In conclusion, the Learned Counsel held that the Defendant's Notice of Motion application dated 6th November, 2023 should be dismissed with costs awarded to the Plaintiff and the case be given a priority date for hearing.

VII. Analysis & Determination.

48. I have carefully read and considered the pleadings herein by the Plaintiff and the Defendant, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of the [Constitution](#) of Kenya, 2010 and statutes.
49. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
- a. Whether the suit as filed against the Defendant/ Applicant ought to be struck out for not disclosing any cause of action
 - b. Whether the Notice of Motion application dated 18th July, 2023 seeking to stay execution of the orders made on the 17th January, 2023 and 13th July 2023 within the Kadhi's Court by Hon Habib Salim Vumbi in relation to Plot No. 128/11/MN in so far as issuance of fresh titles and distribution of the same pending the hearing and determination of this suit?



- c. Who will bear the Costs of Notice of Motion applications dated 18th July, 2023 and 6th November, 2023.

Issue No. a). Whether the suit as filed against the Defendant/ Applicant ought to be struck out for not disclosing any cause of action?

50. The main substratum in the subject matter is two fold. Firstly, the application dated 6th November, 2023 by the Defendant/Applicant is for striking out of the suit against the Defendant/Applicant for not disclosing any reasonable cause of action against the Defendant. Secondly, on the other hand the Plaintiff seeks for the stay of the execution of the orders issued by the Khadhi's Court.

51. To begin with, the jurisdiction to strike out pleadings is discretionary and must be exercised judicially. In saying so, I rely on the decision of ”- “Yaya Towers Limited – Versus - Trade Bank Limited (In Liquidation)” (Civil Appeal No. 35 of 2000)” the Court expressed itself thus: -

“ A Plaintiff (Defendant) is entitled to pursue a claim in our Courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved”.

52. Order 2 Rule 15 (1) of Civil Procedure Rules, 2010 provides as follows: -

- 1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that—
 - (a) it discloses no reasonable cause of action or defence in law; or
 - (b) it is scandalous, frivolous or vexatious; or
 - (c) it may prejudice, embarrass or delay the fair trial of the action; or
 - (d) it is otherwise an abuse of the process of the Court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
- (2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.
- (3) So far as applicable this rule shall apply to an originating summons and a Petition.

53. The provision of Order 2 Rule 15 (2) of the Rules, holds that the applications seeking to strike out pleadings for not disclosing a reasonable cause of action or defence should not be supported by any evidence. The Court should only look at the pleadings in order to ascertain whether the impugned pleading raises a reasonable cause of action or defence.

54. The Court must be cognizant of the fact that judicial time is precious and must not be wasted in engaging itself in academic exercises by hearing cases in a full trial where it is plain and obvious that a plaintiff discloses no reasonable cause of action or defence in law, where a plaintiff is scandalous, frivolous, vexatious, where a plaintiff may prejudice, embarrass or delay the full trial of the action or where the plaintiff is otherwise an abuse of the Court process.



55. In the case “*DT Dobie & Co (K) Limited – Versus - Muchina*, [1982] KLR”, the Court of Appeal defined the term:-

“reasonable cause of action” to mean “an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer.....”.

56. The Court of Appeal in the “*Crescent Construction Limited – Versus - Kenya Commercial Bank Limited* [2019] eKLR”, stated as follows:-

“However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the Court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honored legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”

57. After examining the pleadings in entirety, it is evident that the borne of contention between the parties is on the ownership of the land and the same cannot be dismissed without examining the evidence produced by both parties and the documentation herein. From the amended originating summons by the Plaintiff it is evident that the Defendant is not right in seeking their being expunged from this suit. There has been an establishment from the pleadings a connection between them and these events and any final orders that this Court may make in this suit as drawn. It is only reasonable to keep them in it.

58. It cannot be gainsaid that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. The Court of Appeal in “*Blue Shield Insurance Company Limited – Versus - Joseph Mboya Oguttu* [2009] eKLR” restated these principle thus:

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his Judgment in the case of *D.T. Dobie and Company (Kenya) Limited – Versus - Muchina* (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 Rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of *Cail Zeiss Stiftung – Versus - Ranjuer & Keeler Ltd and others (No.3)* (1970) ChpD 506, where the Lord Justice said:-

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be



exercised having regard to the quality and all the circumstances relating to the of fending pleading.”

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.”

59. The Defendant herein lacks the capacity, by dint of the stay orders since issued by the High Court barring his appointment to act as the Interim Administrator of the deceased's estate, to advance any acts or omissions thereof that can constitute a cause of action in favour of the Plaintiff and thus our humble submissions that the instant suit is a proper candidate for striking out as it does not disclose any cause of action known at law as against the Defendant.

60. The Plaintiff on the other hand submitted that the main contention of the Defendant is that Mohamed Salim Mohamed has been sued as the interim administrator; The Defendant further contents that due to a ruling dated 4th August, 2023, delivered in Mombasa High Court Civil Appeal Number 109 of 2023, the appointment as interim administrator was stayed; That in the circumstances the Defendant herein lacks the capacity to be sue or be sued over the suit property herein that forms part of the aforesaid estate. On their part, they submitted that the Defendant are misinterpreting the ruling Civil Appeal Number 109 of 2023 wherein the judge granted the following orders being inter alia:

“ that there be a stay of execution of the decree and judgment delivered on 33rd March, 2022 by the Principal Kadhi, the Honourable Habib Vumbi, against YMAD pending the hearing of and determination of Civil Appeal NO. HCCA No. E109 of 2023.”

61. According to the Learned Counsel for the Plaintiff, the Court should take note that the decree and judgement delivered on 3rd March, 2023 was in reference to Succession Cause No. 268 of 2019 which is different from Miscellaneous Application No. E004 of 2019 Justice Mutai's orders did not touch the Miscellaneous application No. E004 of 2019 wherein the stay orders granted by the ELC Court were specifically against the miscellaneous application which stayed the issuance of fresh titles and distribution of Plot No.128/IL/MN that the Plaintiff herein claims to have stayed on for more than 12 years uninterrupted and this Court is better placed to confirm the adverse possession claim which should not be subject to distribution; Those are triable issues that this Court shall determine during the hearing of the case and hence the Plaintiff has a reasonable cause of action that should be ventilated and heard.

62. This Court carefully considered the written submissions filed by both parties. In the course of it, I have keenly noted that analyzing the suit has the potential of this Court combing through the evidence which the Defendant/Applicant wish to rely upon to determine whether or not they had disclosed a reasonable cause of action. For this stand alone reason stated above, the Honourable Court finds that the Notice of Motion application dated 6th November, 2023 lacks merit and the same is dismissed with costs to the Plaintiff/Respondent.

Issue No. b). Whether the Notice of Motion application dated 18th July, 2023 seeking to stay execution of the orders made on the 17th January, 2023 and 13th July 2023 within the Kadhi's Court by Hon Habib Salim Vumbi in relation to Plot No. 128/11/MN in so far as issuance of fresh titles and distribution of the same pending the hearing and determination of this suit?

63. Under this Sub – heading, the Honourable Court deciphers that the main issue is on the granting of stay of execution from the order from the Kadhi's Court. The principles governing the granting of



stay of execution are provided for under the provision of Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010 as follows: -

“No appeal or a second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order, but the Court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred, shall be at liberty, on an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”

64. While the provision of Order 42 Rule 6 states:-

“No order for stay of execution shall be made under sub-rule (1) unless:-

- a. The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- b. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

65. The Applicant needs to satisfy the Court on the following conditions before they can be granted the stay orders:-

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

66. The principles governing the exercise of the Court’s jurisdiction are now well settled. The Court of Appeal decision in “Chris Munga N. Bichange – Versus - Richard Nyagaka Tongi & 2 Others eKLR” the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus:-

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the Court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

67. Now to apply the legal principles to the instant case. The Court is not sitting as an appellate Court but rather one that is meant to determine the ownership of the suit property which is a function of the ELC Court under the provision of Section 13 of the ELC Act, No. 19 of 2011. The Plaintiff averred that she was the wife of YMAD who is currently diagnosed with having a depressive illness which renders him incapable of protecting his rights due to mental infirmity hence a person of unsound mind. On the 21st



- March, 2022, it was confirmed by Dr. C.M.Mwang'ombe that YMAD (Patient) has a severe cognitive impairment and he cannot follow the proceedings in any Court of law and hence was of unsound mind.
68. Pursuant to section 26 and 38 of the *Mental Health Act* Cap. 248 and Order 32 Rule 15 of the *Civil Procedure rules*, she moved the Court in Miscellaneous Application no. e013 of 2021 and obtained an order on the 27th May, 2022 given by Hon. Justice J. N Onyiego that “the applicant Muna Abdirabo Ahmed is hereby appointed as Guardian to the subject, Yahya M.A.Damnam (Patient) as well as manager of his estate on condition that she shall have no right unless with Courts authority to alienate, sale, dispose or transfer any immovable assets of the patient”. On the 17th January, 2023, the Principal Kadhi Hon. Habib Salim Vumbi issued an ex - parte orders herein which orders whereby she was aggrieved against since application proceeded ex parte denying them the opportunity to be heard and defend themselves.
69. The subject matter in issue is Land Parcel Plot No. 128/II/MN which land the Applicant and her husband have been in occupation for decades without any interruption and have been in open occupation and even paying ground rates for the same since the said occupation from the year 1982. The Respondents have taken advantage of the mental status of the patient to dispossess the patient through this application that ought to have been determined inter-party but not ex parte which is unconstitutional denying me the right to be heard and being condemned unheard.
70. In response, the Defendant stated that the subject matter in these proceedings is all that Land Parcel No. Plot No 128/11/MN situated at Mwandoni and which also forms the substratum in the civil suit of “Mombasa F.H.C.A e109 of 2023 - *Muna Abdirabo Ahmd – Versus - Abdallah Mohamed Ahmed & 3 others* including himself. Vide an application filed in the said high Court proceedings by the Plaintiff herein being an Appeal from the Kadhi’s decision in the Civil case “Mombasa Kadhi Succession Cause no. 268/19 *in the matter of the Estate of Said Bin Awadh & Haymid Bin Damnan Alias Awadh Bin Ahmed Bin Damnan (deceased)*”, the Honourable Learned Judge issued the following orders thereof : that the notice of motion application dated 15th May, 2023 was allowed on 4th August 2023 in terms of prayers 2, 3 and 4 thereof , to wit that:-
- i. There be a stay of execution of the decree and Judgement delivered on 3rd March 2022 by the principal Kadhi, the Honourable Habib Salim Vumbi against Yahya M. A Damnan pending the hearing of the application inter partes and also pending the hearing and determination of Civil Appeal No. HCCA NO. E109 of 2023.
 - ii. The Applicant is granted leave to Appeal out of time and the Memorandum of Appeal in HCCA NO. E109 of 2023 be admitted and be deemed to have been filed within time; He annexed in the affidavit a copy of the said ruling and mark it as “MSM - 1”.
71. In the pleadings in support of her said application and Appeal, the Plaintiff herein contended that her purportedly infirm husband in whose name she acted claimed the subject property as heir of the deceased yet now before this Court the Plaintiff’s claim has suddenly changed and morphed into a claim for adverse possession. It needed no gain saying that the orders being sought by the Plaintiff in her instant application have been overtaken by events by dint of the Family Court’s ruling delivered on 4th August 2023 by Hon. Mutai J. in Mombasa HCCANO. E109 of 2023. Should this Honorable Court then proceed and render a conflicting ruling over the rights of the parties over the same subject matter forming the substratum of the suit, there is great risk that it would expose the two Courts to undue embarrassment and which scenario may cast the administration of Justice in bad Light as two Courts of concurrent jurisdiction ought not to entertain identical disputes at the same time.



72. A stay of execution would be overwhelming hindrance to the exercise of the discretionary powers of the Court. The Court in considering whether to grant or refuse an Application for stay of execution is empowered to see whether there exist any special circumstances which can sway the discretion of the Court in a particular manner.
73. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of their orders. The Honorable Court is of the opinion that the orders issued by the Kadhi's Court on 17th January, 2023 and 13th July 2023 in relation to Plot No. 128/II/MNin so far as issuance of fresh titles and distribution of the same were rather detrimental as they were final by a Court that may not have had Jurisdiction to make such orders. These are issues to be deliberated on in the pendency of this hearing and hence I need say no more. Therefore, in the interim and meanwhile, I discern that the Notice of Motion application dated 18th July, 2023 herein has merit and is allowed.

Issue No. c). Who will bear the Costs of Notice of Motion application dated 18th July, 2023 and Notice of Motion application dated 6th November, 2023.

74. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court "*Jasbir Rai Singh – Versus Tarchalan Singh* (2014) eKLR " and *Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited*, (2014) eKLR.
75. In this case, this Honourable Court opines that the Plaintiffs/Applicants are entitled to the costs of both applications which will be in the cause.

VIII. Conclusion & Disposition

76. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this Court arrives at the following decision and makes the orders below:-
- a. That the Notice of Motion application by the Plaintiff dated 18th July, 2023 be and is hereby found to have merit hence allowed in its entirety.
 - b. That the Notice of Motion application dated 6th November, 2023 be and is hereby found to lack merit and dismissed in its entirety.
 - c. That an order do and is hereby issued that there be a stay the orders made on the 17th January, 2023 and 13th July 2023 within the Kadhi's Court by Hon Habib Salim Vumbi in relation to Plot No. 128/11/MN in so far as issuance of fresh titles and distribution of the same pending the hearing and determination of this suit.
 - d. That for expediency sake, there be a mention on 22nd July, 2024 for purposes of Pre – Trial Conference and a hearing fixed on 19th September, 2024.
 - e. That the costs of the Notice of Motion application dated 18th July, 2023 and 6th November, 2023 shall be in the cause.
- It is so ordered accordingly.



RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, MEANS, SIGNED AND DATED AT MOMBASA THIS 5TH DAY of JUNE 2024.

.....

**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND Court AT MOMBASA**

Ruling delivered in the presence of :

- a. M/s. Firdaus Mbula the Court Assistant.
- b. Mr. Tindi Advocate for the Plaintiff.
- c. Mr. Oloo Advocate for the Defendant.

