



Kizingo Crescent Limited v Mohamed & another (Environment and Land Appeal E006 of 2024) [2024] KEELC 6061 (KLR) (18 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6061 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E006 OF 2024
LL NAIKUNI, J
SEPTEMBER 18, 2024**

BETWEEN

KIZINGO CRESENT LIMITED APPELLANT

AND

ANVERALI ALI MOHAMED 1ST RESPONDENT

DR YUSUF SIDIK KARIM 2ND RESPONDENT

RULING

I. Introduction

1. This Honorable Court is tasked on making a determination to the Notice of Motion application dated 12th July, 2023 by Kizingo Crescent Limited, the Appellant herein. It was brought under the provision of Order 42 rule 6 Civil Procedure Rules 2010, Sections 1A, 1B, 3 & 3A of the Civil Procedure Act, Cap. 21 and Section 13 of the Environment & Land Court Act, No. 19 of 2011.
2. Upon service of the application to the Respondents, the 1st Respondent opposed the application through a replying affidavit sworn on 31st July, 2023.

II. The Appellant's case

3. The Appellant sought for the following orders:-
 - a. Spent.
 - b. Spent.
 - c. That this Honorable Court be pleased to issue a stay execution of the Judgment delivered on 12th June 2023 in CMCC 311 of 2022: Dr. Yusuf Sidik Karim & Another – Versus - Kizingo Crest Limited pending hearing and determination of the Appeal



- d. That this honorable court be pleased to grant an injunction barring the Respondents either in themselves or their agents, from executing the judgment, until the appeal is fully heard and determined.
 - e. That costs of this application be provided for.
4. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 22 Paragraphed Supporting Affidavit of –Nasir Ali Osman, the Director of the Appellant company herein sworn and dated 12th July, 2023. The Deponent averred that:
- a. Depending on the Respondent concerned herein, they separately and individually entered into sale agreements with the Appellant pursuant to a Letter of Offer signed between the parties and or a written agreement or a letter of offer supported by part payment and performance by the parties.
 - b. The sale of the apartments was to be by off plan sales and it was envisaged that the construction of the apartments was to be carried out and eventually completed by payment of regular periodic payments of instalments.
 - c. In breach of the said terms of the agreement to make regular instalment payments, the Respondents all defaulted in making payments as required by the letter of offers and the agreement for sales thus resulting in a sabotage of the continued construction of the project by starving the project of funding.
 - d. In course of the transactions between the parties, subsequent external intervening circumstances also contributed to the failure to continue with the project and more particularly the closure of Imperial Bank Limited and its being placed under receivership by the Kenya Deposit Insurance Corporation (Hereinafter referred to as “The KDCI”) where all the funds for the project were being held
 - e. As an act of good faith, despite the Appellant being entitled to retain the deposited sums as a result of breach of the contractual, the Appellant offered to remit all payments received from Imperial Bank to the Respondents as good and final satisfaction of sums owed with the understanding that no claim be made against the Appellant.
 - f. By dint of above, the consideration was the Appellant’s forbearance to take punitive action against the Respondents for their default on condition that money would be paid as and when released by Imperial Bank Limited.
 - g. The parties therefore entered into a subsequent contract to formalize the ex gratia gesture by the Appellant that modified the terms of the original agreement. Accordingly, and in fulfillment of the new agreement, the Appellant begun paying on a pro rata basis remittances of all funds that were received from the Imperial Bank official Receiver.
 - h. The Respondents then moved to court seeking a full refund of the remaining deposits and interest thereupon.
 - i. The Appellant contended that the cause of action was based on individual and independent contracts and joinder of Respondents made it difficult to defend each action effectively.
 - j. The Appellant also contended that due to the failure by the Respondents to make regular instalment payments, the Respondents all defaulted in making payments as required by the agreement, the project could not proceed and the Appellant was entitled to receive and retain



the deposits since the said sums were forfeited by the Respondents in respect of the individual apartments because of the breach.

- k. The collapse of the Imperial Bank as well frustrated the contract between the Respondents and the Appellant such that defendant's contractual obligation became incapable of being performed due to frustration.
- l. The 1st Respondent was the sole witness in the matter and gave evidence on behalf of the other Respondents despite their having different and distinct contractual terms and conditions. In essence he gave hearsay evidence on contracts he was not privy to.
- m. On 12th June, 2023, the trial court delivered its Judgment via email in favour of the Respondents. Annexed in the affidavit and produced as exhibit a true copy of the said Judgment and proceedings marked as "NAO 1a and 1b" annexed thereto.
- n. The orders issued in the said judgment were arrived at through a litany of blunders both procedural and legal therefore necessitating this appeal, as will be seen from the proceedings. The judgment in itself is also vague as it does not explain the various findings and how they were arrived at. As a result, a memorandum of appeal has been prepared stating the various grounds of appeal. A letter requesting for typed proceedings has also been written to enable the filing of the appeal. Annexed in the affidavit and produced as exhibit a true copy of the said Memorandum of Appeal marked as "NAO – 2" annexed thereto.
- o. By dint of above, the Respondents Advocates had since written to his advocates on 20th June 2023 stating their intent to execute the said contested judgment if the sums granted therein are not paid up through their letter dated 14th February 2023. Annexed in the affidavit and produced as exhibit a true copy of the said letter marked as "NAO – 3" annexed thereto.
- p. The only thing that stopped their execution was the 30 days stay granted by the trial court on 12th June 2023 upon delivery of the judgment. However the same expires on 12th July 2023, tomorrow, thus necessitating the issuance of an interim stay pending the hearing of this stay application.
- q. In view of the foregoing, unless this Honorable court intervened and certified this matter as urgent and grants the orders sought, the Appellant risks to suffer prejudice with the danger that the Respondents herein shall proceed to execute the judgment rendering this application and the appeal superfluous or otherwise nugatory wherefore the urgency of the Application.
- r. Should such orders be issued, the Respondents would not suffer any prejudice, loss or inconvenience.
- s. The affidavit was sworn in support of the application filed herein and pray that this Honourable Court grants the orders sought therein.

III. The 1st Respondent's response

- 5. The 1st Respondent opposed the application through a 14 paragraphed Replying Affidavit sworn by Dr. Yusuf Sidik Karim, the 1st Respondent herein on 31st July, 2023 where the deponed that:-
 - a. From the onset the Respondents' Claim were totally admitted by the Appellant in writing but it failed to pay. He produced on pages 1 to 4 of his Exhibit marked as "YSK" copies of self-explanatory admissions of their claim by the Appellant.



- b. The Appellant owed truthfully a total sum of Kenya Shillings Eighteen Million Seventy One Thousand One Hundred and Six (Kshs.18,071,106/-) plus costs and interest and they do not intend to pay and hence their Application herein is not made in good faith but is a total abuse of the court process. He confirmed that the Appellant had never offered any evidence to contradict the Respondents' Claim nor did they call any Witness to controvert the Respondents' Claim.
- c. The Appellant's Appeal had very limited chances of success and hence it could not be the basis of granting the Stay Orders being sought herein in light of two [2] key facts that was the Appellant's admission of their Claim and the Appellant's failure to offer any evidence to contradict the Respondents' Claim at the Trial Court.
- d. The Respondents' claim was very clear. He attached copies of the Witness Statement dated 4th March, 2022 and the Authority to Act duly signed and dated 18th February, 2022 produced on pages 5 -7 of his Exhibit. He produced his Exhibit marked as "YSK - 1" in pages 1 to 7.
- e. The Appellants' allegations contained in the entire supporting affidavit were not true or at all and he put the Deponent to strict proof.
- f. The Respondents shall be seriously prejudiced if the Orders sought by the Appellant were allowed in that they were the successful litigants in trial Court matter and hence they needed not be denied the fruits of their Judgment without any good reasons and in light of the conduct of the Appellant in not paying amount admitted.
- g. The Appellants' Appeal had extremely very limited chances of success and hence the filing of the Appeal in the matter cannot be the single basis for granting of the Stay Orders being sought and he prayed that this Honourable Court rejected the Appellant's Application.
- h. The Appellant had not demonstrated or adduced any touchable evidence to warrant this Honourable Court to exercise its discretion in its favour and hence the Appellant's Application ought to be dismissed with costs.
- i. In the event the Court was inclined to grant the Orders being sought then a conditional Stay ought to be granted by ordering the Respondents to deposit a sum of Kenya Shillings Thirty Seven Million Six Fourty Three Thousand Five Fourty Five Hundred (Kshs.37,643,545/-) as per the letter dated 20th June, 2023 produced as Exhibit No. "NAO - 3" by the Appellant in an interest joint account of both the Advocates on record within a limited period of time failing of which the Stay Orders shall lapse.
- j. A dismissal will be the most appropriate Order however a Conditional Stay will be appropriate too in this matter because the Appellant does not intend to pay the amount ordered by the Lower Court and hence we shall suffer great prejudice by failure to enjoy the fruits of our Judgment if a Conditional Stay is not granted. The Appellant had not met the minimum Principles to warranty issuance of the Orders sought.
- k. He prayed for the dismissal of the Applicant's application with costs.

IV. Submissions

6. On 5th March, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 12th July, 2023 be disposed of by way of written submissions and all the



parties complied. Pursuant to that on 6th June, 2024 a ruling date was reserved on notice by Court accordingly.

A. The Written Submissions by the Respondents

7. The Respondents through the Law firm of Messrs. Mogaka Omwenga & Mabeya Advocates filed their written submissions dated 5th March, 2024. Mr. Omwenga Advocate commenced their submissions by stating that these were the Respondents' Written Submissions in respect to the Appellant's Application dated 12th July, 2023. The Application basically sought for the aforesaid orders.
8. The Learned Counsel submitted that the Application was supported by the Affidavit of Nasir Ali Osman sworn on 12th July, 2023 together with the Exhibits attached thereto. The Respondent had opposed the Application vide a Replying Affidavit sworn by the 1st Respondent DR. Yusuf Sidik Karim sworn on the 31st July, 2023 and Exhibit thereto. There were basically five [5] main issues that the Honourable Court need to be satisfied that the Applicants had met before the Honourable Court grant the Orders being sought those were:-
 - a. That the Applicant will suffer substantial loss.
 - b. The Application has been made without unreasonable delay
 - c. Whether security for the performance of the Decree has been given or if the Appeal is dismissed?
 - d. Whether the Appeal is arguable?
 - e. Costs
9. The Learned Counsel submitted on the first issue of whether the Appellants will suffer any substantive loss, that nowhere in the grounds on the body of the Application dated 12th July, 2023 and Supporting Affidavit have the Applicants disclosed at all that it will suffer any substantive loss if Stay was not granted. Hence in light of that, they submitted that the Applicant's Application should be out rightly be dismissed with costs to the Respondent. They referred to Authorities herein to support their Submissions.
10. On the second issue on whether the Applicant's Application has been filed without unreasonable delay, the Learned Counsel submitted that indeed it was filed timely, however that cannot be the main and or only ground to allow the Application. It was actually the least ground for allowing the Application for Stay pending Appeal. On the third issue on whether the Applicants had offered security to satisfy the Decree which was in the sum of about a sum of Kenya Shillings Six Forty Three Thousand Five Thirty Five Hundred (Kshs.643,545/-). The Learned Counsel argued that nowhere in their Application and or Affidavit had they ever attempted to offer any form of security to satisfy the Decree. On this ground alone their Application ought to be dismissed with costs. According to the Learned Counsel, the Respondent stood to suffer substantial loss in event the Applicants did not provide and or deposit the entire decretal sum as a condition for Stay. The Applicant has no known business or offices. There were no known attachable assets to be attached of the Applicant. The failure to provide security was deliberate scheme not to ever pay the Respondents. This Honourable Court should reject that ill intended scheme by the Applicants.
11. On the fourth issue, the Learned Counsel submitted that the Applicants did not at all have an arguable appeal. The Learned Counsel went ahead to state that the clear fact as enumerated in the Judgement that they-are-seeking to set aside *vide* the appeal and those undenied facts are inter alia:-



- i. The admission of Claims as per the Exhibit in the Replying Affidavit.
 - ii. They never called any Witnesses in trial Court.
 - iii. They never produced any evidence in the trial Court.
 - iv. They never controverted the Respondents' Claim in the trial Court.
 - v. They made part payment
12. According to the Learned Counsel in light of the above the Applicants' Appeal herein has nil chance of success and hence the Application ought to be rejected. On the last issue on costs, the Learned Counsel submitted that the same ought to be granted to the Respondents who had demonstrated that the Applicants' Application had nil chance of success and it ought to be dismissed with costs. In support to the above submissions, the Learned Counsel referred the Court to the following decisions:-
13. The case of "Murang'a HCA No. 107 of 2015 *Masisi Mwita – Versus – Damaris Wanjiku Njeri*", where the Honourable Court held that:-

It is clear from the wording of Order 42 Rule 6 (1), for an applicant to succeed in an application of this nature, he must satisfy the following conditions, namely; (a) Substantial loss may result to the applicant unless the order is made; (b) The application has been made without undue delay; (c) such security as to costs has been given by the applicant.

The corner stone of the jurisdiction of the court under Order 42 of the *Civil Procedure Rules* is that substantial loss would result to the applicant unless a stay of execution is granted. [5] What constitutes substantial loss was broadly discussed by Gikonyo J in the case of *James Wangalwa & Another – Versus - Agnes Naliaka Cheseto* [6] where it was held inter alia that:-

" No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein – Versus - Chesoni*, [7]the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”

In the present application, the applicant has not demonstrated that he would suffer substantial loss. It has not been shown that the Respondent is a person of straw and that he may not repay the said sum in the event of the appeal succeeding. In *Equity Bank Limited – Versus - Taiga Adams Company Limited*, [8] the court stated a follows:-

In the application before me, the applicant has not shown or established the substantial loss that would be suffered if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent-that is execution is carried out-in the event the appeal



succeeds, the respondent would not be in a position to pay-reimburse-as/he is a person of no means. Here, no such allegation is established by the appellant.”

In *Elena D. Korir – Versus - Kenyatta University* [9] Justice Nzioki wa Makau had this to say:-

“ the application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & another – Versus - Thomson & Turpin Limited* [10] where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay.

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo – Versus - Straman EA Limited/11/(2013)* as follows:-

The importance of complying with the said requirement in my view was well emphasized in *Machira T/A Machira & Co Advocates – Versus - East African Standard* (No 2) [17] where it was held that:-

“ to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle,

In the case of *Global Tours and Travels Limited* [20] it was held that:-

“Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”(Underlining provided)



It should also be noted that the Judgement in question is a money decree. In considering whether a money decree or a liquidated claim would render the success of an appeal nugatory, the court of appeal in the case of *Kenya Hotel Properties Limited – Versus – Willesden Properties Limited* [21] had this to say:-

" The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not in a 'man of straw' but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant./However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle of law was not being established at all." (Emphasis added)

The upshot is that applying the above principles, I hereby disallow the application before me and dismiss it with costs to the Respondents.

14. In the case of "Nairobi HCC Misc. Application No. 453 of 2017 – *Congress Rental South Africa – Versus – Kenyatta International Convention Centre and Co – operative Bank of Kenya Limited & KCB Bank Kenya Limited*", the Court held that:-

"The Notice of Motion before the Court is dated 16th August 2018, brought to the Court pursuant to Article 159 (2) of the *Constitution* of Kenya 2010, Sections 1A,1B, and 3A of the *Civil Procedure Act*, 2010 and all other enabling. The Applicant prays for the following orders:-

That the Honourable Court do grant and/or extend stay pending the hearing and determination of the intended Appeal; and

In the instant matter, no security has been offered, nor proposal on how to settle the Respondent's claim nor single coin has been paid since the delivery of the Ruling or deposited in the parties joint account or deposited with the Court. There is no commitment exhibited by the applicant and as such I find that the applicant has not provided nor demonstrated sufficient cause and has been applying delaying tactics to destroy the Respondent prompt disposal of this matter. The discretionary relief of stay of execution pending appeal is designated for the benefit of both parties so that none of the parties would be worse off by virtue of an order of the Court, that none is disadvantaged but to ensure substantive justice is administered fairly and justly to all parties. This arises out of the Court's realization that both parties have rights which the Court is bound by law to safeguard; the respondent's right to appeal which includes the prospect that the appeal will not be rendered nugatory or on successful appeal if the decretal amount has been paid; the Respondent would be able to repay and on the other hand the decree which includes the Respondent's enjoyment of the fruits of the judgement which includes all full benefits under the decree.

29. Having evaluated the submissions, and considering the nature of the subject matter, I find the Respondent stand to be worse off, having taken a loan in order to service the Contract subject of these proceedings, that will indeed subject the Respondent to economic hardship, if the orders of stay are granted



as sought. I am persuaded that the Respondent should be left to enjoy the fruits of its judgement.

In *Silverstein – Versus – Chesoni* [2002]1 KLR 867 the Court held that:-

“ The issue of substantial loss-is the cornerstone of both jurisdictions. Substantial-loss-is what-has-to be prevented by preserving the status quo because such a loss would render the appeal nugatory.”

In dealing with issue of substantial loss, I am alive to the fact that the applicant ought to establish that the execution will create a state of affairs that will irreparably affect or negate the very essential core of applicant as a successful party in the appeal. This cause arose in 2015. The Respondent has since then been deprived of its money for a period of over 3 years. The applicant has the burden to prove that by refusal to grant stay of execution it stands to suffer substantial loss. In the instant application no such evidence has been produced; as the applicant has not discharged their duty to prove the nature of loss that they are likely to suffer should an order of stay be denied. It has not been demonstrated that if stay of execution is denied, that it would not recover its money if payment was made since the Respondent would be unable to repay the money. In short I find that the Applicant has failed to avail evidence to support its alleged claim of irreparable loss, should the application for stay of execution be denied.

I have very carefully considered that the onus of proving substantial loss lies with the applicant, and while appreciating the applicant's undisputed right to appeal, I have to balance the applicant's right to appeal with the corresponding right of the Respondent to enjoy its fruits of its judgement; as well as the need to demonstrate that the Respondent couldn't repay the decretal sum if the appeal is successful. The burden of proof does not shift as he who alleges must prove. I find for the Court to find for the Applicant, it has to place before the Court specific relevant evidence demonstrating tangible loss and further that the Respondent is not able to refund the decretal sum should the appeal succeed. The decree herein is a money decree and upon success of the appeal the issue would be the refund and denying granting stay of execution in my view would not render the appeal nugatory.

37. Substantial loss in its various forms was stated to be a cornerstone of jurisdiction for granting a stay. In the case of *Kenya Shell Limited—Versus - Benjamin Karuga Kibiru & Another* [1986] eKLR; Hon. Platt, Ag. JA stated as follows:-

“ It is usually a good rule to see if order XLI rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondents should be kept out of their money.”



38. In view of the above, the question of the amount notwithstanding. I am satisfied the Applicant has failed to prove, as it is required by law; and by evidence, that it shall suffer substantial loss, if the lawful Court's order is enforced and stay of execution denied; therefore I have found its intended appeal would not be rendered nugatory by declining stay of execution and substantial loss being the cornerstone of the Court jurisdiction to grant stay having not been established. I find no basis for this Court, to proceed to hold that the Respondent should be denied the right to enjoy the fruits of its judgement the Respondent should not therefore be kept away from accessing its money.

Under the provisions of Order 42 Rule 6 (1) (2) of the Civil Procedure Rules, a party seeking a stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. In the instant matter, the applicant was required to provide the actual security for consideration by the Court as to its sufficiency. In the case of Equity Bank Limited - Versus - Taiga Adams Company Limited [2006] eKLR it was held that:-

" of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought...let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay..." which principle was also emphasized in *Carter & Sons Limited – Versus - Deposit Protection Fund Board & 3 Others*.

41. The Applicant has been silent on the issue of security in this matter. The offer for a security should come from the applicant, it should not be inferred or implied or left for the Court to make an order for security for due performance as that would amount to stepping into the arena of dispute. I find in this matter the applicant has failed to meet the four mandatory tenets under which this application is brought. The applicant has failed to satisfy any of the four mandatory tenets under which stay of execution can be granted. The Court, is of the view that the Applicant has failed to sufficiently satisfy the required pre-conditions to allow the Court to exercise its discretion in this matter; hence it is of the view that the application is not merited.

42. The upshot is that the Applicant's application dated 16th August 2018 is without merits and is dismissed with costs to the Respondent.

15. In the case of "Malindi HCCC No. 178 of 2012 – Rebecca Peter Franceskides – Versus – Lucas Oloo Opondo & Four (4) Others", the Honourable Court opined that:-

"In formal practice of disposing the application under Order 42 Rule 6 of the Civil Procedure Rules an applicant has to discharge all the three conditions on delay, substantial loss and security for due performance of the decree.

The higher threshold for stay of execution pending an appeal, is the test whether the applicant would suffer substantial loss.

The question therefore is what is the nature of substantial loss when an applicant is required by law to satisfy a Judgment debt obtained on the merits. Am not even sure, whether the



applicant is aggrieved with the entire decretal sum as ordered by the court or a portion of it. The applicant has not delved into any of those issues though seemingly they will be canvassed on appeal.

In *Arun C. Sharma – Versus - Ashana Raikundalla T/A Raimudama & Co. Advocate* the court held:

“ The purpose of the security needed under Order 42 Rule 13 to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the Judgment debtor. Civil process is quite different because in civil process the Judgment is like a debt hence the applicants become and are Judgment debtors in relation to the respondent.”

That is why any security given under Order 42 Rule 6 of the *Civil Procedure Rules* acts as security for due performance such a decree or order as may ultimately be binding on the applicant. I presume the security must be one which can serve the purpose.”

There is ample evidence to prove that the applicant has not discharged the burden of proof on condition number 2 and 3 with regard to substantial loss and offering security for due performance of the decree. There is even nothing to demonstrate that the applicant will suffer irreparable harm not capable of compensating him by way of damages or cost.

Further, that if stay of execution pending the intended appeal is denied he will be prejudiced or occasioned a merit of injustice.

That the appeal proceedings would render him completely ruined.

Significantly this court being aware of the ramifications both applications have on the entire adjudicatory process for all the foregoing reasons the motion is denied.

- 1) That the notice of motion dated 5.4.2019 for stay of execution fails the threshold on all the two central grounds under Order 42 Rule 6 with regard to substantial loss and provision of security for due performance of the decree.

16. In the case of:- “Nairobi HCA No. E072 of 2021 *Dirisa Nagara Kejela – Versus – Jewr Holding Limited*”, the court held that:-

“The application dated 13th August, 2021 seeks the following orders:-

That the Honourable Court be pleased to review and/or vary the orders of 6th July, 2021, requiring the deposit of the entire Decretal sum of Kenya shillings Three Hundred and Twenty Five Thousand (Kshs. 325,000/-) in a joint Interest earning account in the name of the parties Advocates on record within Forty five (45) days and in place be pleased to allow the deposit of a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000/-) or an alternative security in the nature of a Personal Guarantee to satisfy the Decree pending the hearing and determination of the Appeal.”

The trial court ordered the applicant to pay the Respondent Kshs. 325,000/-. The Applicant is a foreigner and has no known assets in Kenya. It is not the intention of the court to make it difficult for the applicant to pursue his appeal. The Respondent contend that the debt accrued because the Appellant took the rent from the Respondent's tenants but failed to remit it. The applicant is seeking the court's discretion to review its earlier orders. The nature of the dispute calls for the imposition of the security. The applicant is a judgment debtor. He cannot call upon the court to impose what he can afford as security. What if the appeal



is dismissed? Would that mean he will not settle the decretal sum due to his weak financial position.

I do appreciate the applicant's financial difficulties but the court has to weigh the interest of both the appellant and the decree holder. The respondent contend that it is in a position to refund the money should the appeal succeed. The money is not being paid to the respondent but will be deposited in a joint account. I do find that the applicant's right to pursue his appeal will not be defeated if he deposited the sum of Kshs. 325,000/- in the joint account. He has deposited Kshs.100,000/-and should deposit the balance.

The upshot is that the application dated 13th August 2021 lacks merit and the same is hereby dismissed. Costs shall follow the outcome of the appeal.

- 17 In the case of:- “Marsabit Succession Cause No. 8 of 2018 – *Grace Wambui Ngugi & Two [2] Others – Versus - Fatuma Galgalo Guyo And Zacharia Guyo Gumi*”, the Court held that:-

“The Petitioner/Applicant has filed a notice of motion dated 17th January 2020 seeking for orders for stay of execution of this court's judgment delivered by Chitembwe J. on the 24th September 2019. The grounds in support of the application are that the applicant has filed an appeal against the judgment at the Court of Appeal at Nyeri, being Civil Appeal No.311 of 2019,

It is the duty of the applicant in an application for stay of execution to establish that he/she will suffer substantial loss if the orders sought are not granted. In *Machira t/a Machira & Co. Advocates – Versus - East African Standard* (No 2) (2002) KLR 63 the Court of appeal considered as to what amounts to substantial loss and held that-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

The applicant has not established that she will suffer any loss, leave alone substantial loss, if the orders sought are not granted.

16. The other consideration is security. In the case of *Arun C. Sharma – Versus - Ashana Raikundalia T/A Rairundalia & Co. Advocates* (2014) eKLR the court held that:

The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding



on the Applicants. I presume the security must be one which can serve that purpose.”

The applicant in this matter has not offered any security in the event that the appeal fails. The condition of security has therefore not been met.

17. The upshot is that there is no merit in the application. The same is thereby dismissed with costs to the respondents.

18. The Learned Counsel concluded that that was all.

V. Analysis & Determination.

19. I have carefully read and considered the pleadings herein by the Plaintiff/Applicant, the myriad of cases cited herein by parties, the relevant provisions of the *Constitution* of Kenya, 2010 and statutes.

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

- a. Whether the Notice of Motion application dated 12th July, 2023 seeking to stay execution of the judgment delivered on 12th June 2023 in CMCC 311 of 2022: Dr. Yusuf Sidik Karim & Another -Versus - Kizingo Crest Limited pending hearing and determination of the Appeal and the issuance of a temporary injunction barring the Respondents either in themselves or their agents, from executing the judgment, until the appeal is fully heard and determined is merited?
- b. Whether the parties herein are entitled to the reliefs sought?
- c. Who will bear the Costs of Notice of Motion application dated 12th July, 2023.

Issue No. a). Whether the Notice of Motion application dated 12th July, 2023 seeking to stay execution of the judgment delivered on 12th June 2023 in CMCC 311 of 2022: Dr. Yusuf Sidik Karim & Another -Versus - Kizingo Crest Limited pending hearing and determination of the Appeal and the issuance of a temporary injunction barring the Respondents either in themselves or their agents, from executing the judgment, until the appeal is fully heard and determined is merited

21. Under this sub heading and as already indicated above from the filed pleadings, the Honourable Court decipheres 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. The law governing the concept on stay of execution pending Appeal is found in Order 42 Rule 6 of the *Civil Procedure Rules* which stipulates as follows:-

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

(2) No order for stay of execution shall be made under sub rule (1) unless—



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

22. Stay of execution pending appeal is a discretionary power bestowed upon this court by the law. At the very initial stages of building jurisprudence over this issue, the Court of Appeal in the case of “Butt – Versus- Rent Restriction Tribunal {1982} KLR 417” gave guidance on how a court should exercise the said discretion and held that:
 - “ 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the Judge’s discretion.
 3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The Court in exercising its powers under Order XLI Rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

23. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, Cap. 21 the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Civil Procedure Act or in the interpretation of any of its provisions.

24. The provision of Section 1A (2) of the Civil Procedure Act, Cap. 21 provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under the provision of Section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”

25. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 to which:



- i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
 - ii. The application is brought without undue delay and
 - iii. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.
26. I find issues for determination arising therein namely:
- i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of judgment pending Appeal.
 - ii. What orders this Court should make
27. The purpose of stay of execution is to preserve the substratum of the case. In the case of “*Consolidated Marine – Versus - Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi)”, the Court held that:-
- “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
28. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.
29. As for the applicant having to suffer substantial loss, in the case of “*Kenya Shell Limited – Versus - Benjamin Karuga Kigibu & Ruth Wairimu Karuga* (1982-1988) KAR 1018” the Court of Appeal pronounced itself to the effect that:
- “It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”
30. The Court of Appeal in the case of “*Mukuma – Versus - Abuoga* (1988) KLR 645” where their Lordships stated that;
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
31. The Applicant has a burden to show the substantial loss they are likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Applicant to the Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. {See the case of “*Absalom Dora – Versus - Turbo Transporters* (2013) (eKLR)”}.



32. As F. Gikonyo J stated in the case of:- “Geoffery Muriungi & another – Versus - John Rukunga M’imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (Deceased)” [2016] eKLR” and which wisdom I am persuaded with: -

“.....the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal...”

Issue No. b). Whether the parties herein are entitled to the reliefs sought?

33. The issue under this sub – heading is straight forward. To deal with it, the Honourable Court will critically examine the surrounding facts and inference of the matter. As already stated herein, the Applicant herein filed an application dated 12th July, 2023 seeking stay of execution of the Judgment delivered on 12th June 2023 in the civil case “CMCC 311 of 2022: Dr. Yusuf Sidik Karim & Another – Versus - Kizingo Crest Limited” by Honourable Chief Magistrate J.B. Kalo pending the hearing and determination of the present appeal. A copy of the Memorandum of Appeal dated 11th July, 2023 marked as “NAO - 2” is annexed herein. The 30 days period granted by the trial court on 12th June, 2023 during the delivery of the aforesaid ruling was set to lapse on 12th July, 2023. Unless this Honorable court intervened and certified this matter as urgent and grants the orders sought, the Appellant risks to suffer prejudice with the danger that the Respondents herein shall proceed to execute the Judgment rendering this application and the appeal superfluous or otherwise nugatory wherefore the urgency of the Application.
34. According to the Appellant they separately and individually entered into sale agreements with the Appellant pursuant to a Letter of Offer signed between the parties and or a written agreement or a letter of offer supported by part payment and performance by the parties. The sale of the apartments was to be by off plan sales and it was envisaged that the construction of the apartments was to be carried out and eventually completed by payment of regular periodic payments of instalments. In breach of the said terms of the agreement to make regular instalment payments, the Respondents all defaulted in making payments as required by the letter of offers and the agreement for sales thus resulting in a sabotage of the continued construction of the project by starving the project of funding.
35. In course of the transactions between the parties, subsequent external intervening circumstances also contributed to the failure to continue with the project and more particularly the closure of Imperial Bank Limited and its being placed under receivership by the Kenya Deposit Insurance Corporation - KDCI where all the funds for the project were being held. As an act of good faith, despite the Appellant being entitled to retain the deposited sums as a result of breach of the contractual, the Appellant offered to remit all payments received from Imperial Bank to the Respondents as good and final satisfaction of sums owed with the understanding that no claim be made against the Appellant.
36. By dint of above, the consideration was the Appellant's forbearance to take punitive action against the Respondents for their default on condition that money would be paid as and when released by Imperial Bank Limited. The parties therefore entered into a subsequent contract to formalize the ex gratia gesture by the Appellant that modified the terms of the original agreement. Accordingly, and in fulfillment of the new agreement, the Appellant begun paying on a pro rata basis remittances of all funds that were received from the Imperial Bank official Receiver. The Respondents then moved



to court seeking a full refund of the remaining deposits and interest thereupon. The 1st Respondent was the sole witness in the matter and gave evidence on behalf of the other Respondents despite their having different and distinct contractual terms and conditions. In essence he gave hearsay evidence on contracts he was not privy to.

37. On 12th June, 2023, the trial court delivered its judgment via email in favour of the Respondents. Annexed in the affidavit and produced as exhibit a true copy of the said Judgment and proceedings marked as “NAO - 1a and 1b”. The orders issued in the said judgment were arrived at through a litany of blunders both procedural and legal therefore necessitating this appeal, as will be seen from the proceedings. The judgment in itself is also vague as it does not explain the various findings and how they were arrived at. As a result, a memorandum of appeal has been prepared stating the various grounds of appeal. A letter requesting for typed proceedings has also been written to enable the filing of the appeal. Annexed in the affidavit and produced as exhibit a true copy of the said Memorandum of Appeal marked as “NAO – 2”. The Appellant being aggrieved, intended to institute an Appeal.
38. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under the provision of Order 42 Rule 6. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicant unless stay of execution is granted; and thirdly such security as the court orders for the due performance of such decree or order as may ultimately be binding on them has been given by the Applicant. I find the reasons advanced by the Applicant to be sufficient for the grant of stay of execution pending appeal.
39. Regarding the pre-requisite in the provision of Order 42 Rule 6, that is substantial loss occurring to the Applicant, the court has already referred the consideration to be made in the case of “[Kenya Shell Limited – Versus - Benjamin Karuga Kigibu & Ruth Wairimu](#) (Supra)”. I find that the Applicant has proved that he will suffer substantially if the orders for stay of the execution are not granted as prayed.
40. The second issue to determine is where the application for stay of execution was made without inordinate delay. From the record, the judgment being appealed against was delivered via email on 12th June, 2023 in the absence of the parties and the application herein was filed on 12th July, 2023, the draft memorandum of appeal on 11th July, 2023. This application was filed after about one month after the judgment. It is this Honourable Court’s opinion, the application was made timeously without any delay. The application was therefore made and filed expeditiously and without undue delay.
41. On the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the [Civil Procedure Rules](#), 2010 stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. Has made no provisions for security in his application.
42. However, this court can make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.
43. In the case of “[Aron C. Sharma – Versus - Ashana Raikundalia T/A Rairundalia & Co. Advocates](#)” the court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the [Civil Procedure](#)



Rules Act as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

44. Stay of execution is exactly what it states; it is an order of the court barring a decree holder from enjoying the fruits of his judgment pending the determination of some issue in contention. It matters not whether the issue in contention is the amount awarded in the judgment debt, or liability or legality of the extracted warrants as in this case. Where a party seeks to stay execution, the Court must be guided by the parameters set out in Order 42 Rule 6. This Court observes that the appeal is based on the issue of non-compliance of the Court orders of vacating the suit premises, which is agree with the Appellant/ Applicant does not call for the security of cost.

45. The Court observed in “Gianfranco Manenthi & Another – Versus - Africa Merchant Assurance Company Ltd [2019] eKLR”, thus:-

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree. (Underlining mine for emphasis)

46. The 1st Respondent contended that in the event the Court was inclined to grant the Orders being sought then a conditional Stay ought to be granted by ordering the Respondents to deposit a sum of Kshs.37,643,545/- as per the letter dated 20th June, 2023 produced as Exhibit No. NAO3 by the Appellant in an interest joint account of both the Advocates on record within a limited period of time failing of which the Stay Orders shall lapse. Being that the subject matter of the suit was the contractual terms and the Appellant having not provided on what security they intended to put forth in satisfaction of Order 42 Rule 6; I agree with the 1st Respondent that the same can be the security of the appeal.

47. As already demonstrated in “James Wangalwa & Another v. Agnes Naliaka Cheseto (*supra*)” the three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. It is my finding that the Applicant herein, though they brought this Application without undue delay and adequately demonstrated the substantial loss that they would suffer as stipulated by sub-rule 2b.



48. The end result is that I grant the order for stay of execution of the Judgment delivered by Hon. J.B. Kalo on 12th June, 2023.
49. With regards to the prayer for temporary injunction, and as to whether the applicant has an arguable appeal, it is this Court's considered opinion that the issues raised by the Applicant raises an arguable appeal worthy of consideration by this Court and as such the intended appeal is not frivolous. Of course the Honourable Court is mindful of the fact that they will make further comments after the detailed examination of the conditions of granting appeal above. As has been previously stated by this Court, this is an arguable appeal with a probability of success and merits to be considered by the Honourable Court. Consequently, from the circumstances of this case, the Court is satisfied that the Applicant has an arguable appeal. From the circumstances of this case the Court is satisfied that if an order of injunction is not granted to preserve the suit property and the property is dealt with in an adverse manner, the substratum of the appeal will have been lost and the intended appeal shall have been rendered nugatory. Accordingly, a temporary injunction pursuant to the provision of Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010 be and is hereby issued barring the Respondents either in themselves or their agents, from executing the Judgment, until the appeal is fully heard and determined.

Issue No. b). Who will bear the Costs of Notice of Motion application dated 12th July, 2023.

50. 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 Black Law Dictionary defines cost to means:-
- “ the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”
51. 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”.
52. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In this case, this Honourable Court has reserved its discretion in not awarding costs.

VI. Conclusion & Disposition

53. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the application, this court arrives at the following decision and makes the following orders:-
- a. That the Notice of Motion application dated 12th July, 2023 be and is hereby found to have merit thus allowed in its entirety.
 - b. That the draft Memorandum of Appeal herein attached dated 11th July, 2023 be and is herein admitted after payment of the requisite filing fees and the appeal be filed Within (15) fifteen days from the date of this ruling.
 - c. That this Honourable Court do hereby issue an order to stay the execution of the judgment delivered on 12th June, 2023 in CMCC 311 of 2022 by Hon. J.B. Kalo (Chief Magistrate) pending the hearing and determination of this appeal herein.



- d. That this Honourable Court be and hereby issues an order of a temporary injunction barring the Respondents either in themselves or their agents, from executing the judgment, until the appeal is fully heard and determined.
- e. That the Applicant to file and serve a Record of Appeal within 45 days from the date of this Ruling.
- f. That for expediency sake, this appeal to be heard on 17th December, 2024. There be a mention on 14th November, 2024 for purposes of taking directions on the disposal of the impugned appeal pursuant to 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.
- g. That there shall be no orders as to costs.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 18TH DAY OF SEPTEMBER 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. M/s. Ndegwa Advocate for the Appellant/ Applicant
- c. Mr. Omwenga Advocate for the Respondent

