



**Mawando Limited & another v Thousand Palms Beach Hotel Limited & another; SBM Bank (K) Ltd (Interested Party) (Civil Suit 45 of 2012) [2024] KEELC 7288 (KLR) (28 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7288 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CIVIL SUIT 45 OF 2012  
LL NAIKUNI, J  
OCTOBER 28, 2024**

**BETWEEN**

**MAWANDO LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**ZAHID IQUBAL DEAN ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**THOUSAND PALMS BEACH HOTEL LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR MOMBASA ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**SBM BANK (K) LTD ..... INTERESTED PARTY**

**RULING**

**I. Introduction**

1. Before this Honourable Court for its determination are two (2) motions. The first one is the Notices of Motion applications dated 1<sup>st</sup> July, 2024 by Diamond Housing Limited, the 3<sup>rd</sup> Defendant/Applicant and brought under the provisions of Article 40 of *the Constitution* of Kenya, 2010, Sections 1A, 1B, 3A of the *Civil Procedure Act*, Cap. 21; Order 42 Rule 6 of the Civil Procedures Rules, 2010.
2. While the second one is the Notice of Motion application dated 30<sup>th</sup> August, 2024 was by James Njenga Mungai and James Raymond Njenga, the Intended Interested Parties/Applicants and brought under the provisions of Article 40 of *the Constitution* of Kenya, 2010, Sections 1A, 1B, 3A of the *Civil Procedure Act*, Cap. 21; Order 42 Rule 6 of the Civil Procedures Rules. 2010.
3. Upon service of the Notices of Motion applications upon the Respondents, the 1<sup>st</sup> Defendant/Plaintiff in the Counter - claim responded to the Notice of Motion dated 1<sup>st</sup> July, 2024 through a ground of



opposition dated 31<sup>st</sup> July, 2024 and the Plaintiffs/Respondents responded to the Notice of Motion dated 30<sup>th</sup> August, 2024 replying affidavit dated 9<sup>th</sup> October, 2024 respectively. The Honorable Court will be dealing with each one of these pleadings separately but make a decision in an omnibus Ruling hereof.

## **II. The Notice of Motion application dated 1<sup>st</sup> July, 2024 by the 3<sup>rd</sup> Defendant/Applicant**

4. The 3<sup>rd</sup> Defendant/Applicant's sought for the following orders:
  - a. Spent.
  - b. Spent.
  - c. That there be a stay of execution of the Ruling and Order of the Honourable Court delivered virtually on 20<sup>th</sup> May, 2024 by Hon. Justice L.L. Naikuni and any other consequential Order pending the hearing and final determination of the Appeal filed by the 3<sup>rd</sup> Defendant/Applicant.
  - d. That this Honourable Court vacates the hearing date of the subject main suit of 30<sup>th</sup> July, 2024.
  - e. That the cost of this Application be provided for.
5. The application was supported by the grounds, testimonial facts and the averments made out under the 19<sup>th</sup> paragraph supporting affidavit of Osman Erdinc Elsek, the Director of the 3<sup>rd</sup> Defendant/Applicant with five (5) annexures marked as "OEE 1 – 5" annexed thereto. He averred that:-
  - a. The Hon. Justice L.L. Naikuni delivered a Ruling virtually on 20<sup>th</sup> May, 2024 in favour of the 1<sup>st</sup> Defendant/Respondent and that the 3<sup>rd</sup> Defendant/Applicant ordered to be restrained from using, occupying, entering, remaining upon, constructing upon or altering the character of the Suit Property, said Ruling was annexed in the affidavit and marked as "OEE - 1".
  - b. The said Ruling was in respect to the Notice of Motion application dated 15<sup>th</sup> January, 2024 of the 1<sup>st</sup> Defendant/Respondent.
  - c. He had a Notice of Appeal dated 30<sup>th</sup> May, 2024 intending to oppose the Ruling of the Honourable Judge and he had also applied for the copy of the entire proceedings of this case to enable him file the Record of Appeal all marked as "OEE - 2".
  - d. The intended Appeal will serve no purpose if the 3<sup>rd</sup> Defendant/Applicant was evicted from the Suit Property.
  - e. The intended Appeal was arguable and has overwhelming chances of success and annexed in the affidavit a copy of the Draft Memorandum of Appeal and marked as "OEE - 3".
  - f. The 1<sup>st</sup> Defendant/Respondent will not suffer any prejudice in any way the Orders of stay being issued in favour of the 3<sup>rd</sup> Defendant/Respondent.
  - g. The 3<sup>rd</sup> Defendant/Applicant stood to suffer substantial loss if the stay is not granted as the 3<sup>rd</sup> Defendant/Applicant had ploughed over Kenya Shillings Three Hundred Million Only (Kshs. 300,000,000/- as per the Valuation Report dated 2<sup>nd</sup> October, 2023 done by Wyco Valuers Company which copy was marked as "OEE - 4".
  - h. His continuous occupation of the Suit Property shall preserve the existing investment done and he shall be able to protect the same from vandalism and he shall secure the same till the end of the determination of the subject suit.



- i. He shall have no one to hand over the entire investment in the event the Plaintiffs or the 1<sup>st</sup> Defendant/Respondent decide to secure the said investment they had no known capacity or financial muscle to secure the same and in the event his Appeal succeeds which chances were very high neither the Plaintiffs or the 1<sup>st</sup> Defendant/Respondent reconstitute the developments done by him on the Suit Property to the current status.
- j. In the event of the 3<sup>rd</sup> Defendant/Applicant exits the Suit Property with the enormous investment intact, the Honourable Court in its Ruling of 20<sup>th</sup> May, 2024 did not determine yet who will take control of the investment.
- k. The 3<sup>rd</sup> Defendant/Applicant made formal complaints to the Directorate of Criminal Investigations (DCI) on 29<sup>th</sup> April, 2024 at their Nairobi Headquarters as well as the Sub County Criminal Investigations Officer (SCCIO) on 2<sup>nd</sup> March, 2024 to investigate the conduct of the Plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the manner of which they handled the purported changes in ownership of the Suit Property where criminal acts have conducted by the Parties to this suit and investigations were still ongoing and he had annexed in the affidavit the mentioned complain letters and were marked as “OEE-5”.
- l. The Ruling of Hon. Justice L.L. Naikuni delivered virtually on 20<sup>th</sup> May, 2024 has discrepancies as to the Court's decision allowing the Notice of Motion Application dated 15<sup>th</sup> January, 2024 in its entirety and on the other hand not considering the current occupation on the Suit Property by the 3<sup>rd</sup> Defendant/Applicant.
- m. He had obtained copies of the all handwritten proceeding of the subject suit on 21<sup>st</sup> June, 2024 for the Court's Registry to enable his Advocate type the same and return to the Registry for proof reading and certifying the same which was as per the Court's directions and order on 19<sup>th</sup> June, 2024.
- n. He urged this Honourable Court to exercise its discretion in my favour by granting the Orders of stay.
- o. He shall abide to any other order given by this Honourable Court.
- p. The Affidavit was made in support of the Application herein.

### **III. The responses by the 1<sup>st</sup> Defendant/ Plaintiff in counter claim's to the Application dated 1<sup>st</sup> July, 2024**

- 6. The 1<sup>st</sup> Defendant opposed the Notice of Motion application dated 1<sup>st</sup> July, 2024 through a 10 paragraphed grounds of opposition dated 31<sup>st</sup> July, 2024, where the 1<sup>st</sup> Defendant prayed for the dismissal of the application on the following grounds:-
  - a. An appeal does not operate as an automatic stay of proceedings and stay can only be granted when an application met the basic tenets for grant of such remedy. The Applicant had not met the most basic conditions for the grant of the orders sought hence its application was without merit and ought to be declined.
  - b. The application for stay dated 1<sup>st</sup> July, 2024 was served grossly late on 23<sup>rd</sup> July, 2023 over 63 days post the delivery of the ruling in question and just 7 days to the hearing set for 30<sup>th</sup> July, 2024. Such delay was unexplained, the Applicant was guilty of laches and was undeserving of any discretionary remedy of this Honourable Court.



- c. The Applicant by its application filed and served late, succeed at scuttling the hearing set for 30<sup>th</sup> July, 2024 and has therefore drawn an undue advantage from its delay to the detriment of parties particularly the 1<sup>st</sup> Defendant/Plaintiff by Counterclaim then ready to proceed. The Applicant had evidently approached the Court with unclean hands and its application for discretionary orders ought to be declined.
- d. Staying the orders of 20<sup>th</sup> May, 2024 and consequential orders means stalling the trial to await the determination of an appeal whose record had not been compiled or served. Further delay of this trial by a stay of those orders of injunction, will occasion grave injustice upon the 1<sup>st</sup> Defendant/Plaintiff by Counterclaim whose property has not only been fraudulently appropriated and altered in form, but has also been kept from drawing benefit therefrom by the unlawful collusion between the Defendants to the Counter - claim.
- e. Stay of these proceedings would have grave ramifications as it would further impede the 1<sup>st</sup> Defendant/Plaintiff by Counter - claim's right to access justice, its right to be heard on its Counter - claim without delay and its overall right to fair trial.
- f. The subject matter of this suit to preserve pending trial was the land and not the illegal development thereon. Any claims by the 3<sup>rd</sup> Defendant by Counter - claim could be quantified and recovered by way of a claim in contract between it and the party it contracted, also sued as a Defendant to Counter - claim, the exclusion of the 1<sup>st</sup> Defendant/Plaintiff by Counter - claim whichever way its claim and the Counter - claim went. It was unnecessary to stay this suit.
- g. The Applicant had filed no Defence to the 1<sup>st</sup> Defendant's Counter - claim. Its claimed could not be advanced within these proceedings more so in the absence of a Defence to Counter - claim.
- h. Restraining orders were in the nature of negative orders. This Honourable Court was thus functus officio and cannot stay its own restraining orders. The Applicant should move the Appellate Court for appropriate remedies if any.
- i. Orders for injunctions can only be discharged, set aside or varied by the trial Court on application upon valid grounds. The current application for stay of injunctive orders was misplaced, bad in law and ought to be declined.
- j. The Court ordered and directed way back on 3.6.2024 that the Applicant moves the Court on account of the orders of 20<sup>th</sup> May, 2024, within 3 days of that date. The Applicant did not comply with that order. As it has not sought for enlargement of time outside those set timelines, its application was late, unsustainable and ought to be dismissed with costs to the 1<sup>st</sup> Defendant/Plaintiff by Counter - claim to pave way for the hearing of this suit and determination of the 1<sup>st</sup> Defendant's Counterclaim without further delay.

#### **IV. The Notice of Motion application dated 30<sup>th</sup> August, 2024 by the Intended Interested Parties/Applicants.**

7. The Interested Parties sought for the following orders:
  - a. Spent.
  - b. That this Honorable Court do grant leave to the Firm of Khaminwa & Khaminwa Advocates to come on record for the some for the Applicants/Intended Interested Party herein.



- c. That pending the hearing and determination of this suit, this Honorable Court do allow the Applicants herein be enjoined in this case as Interested parties since they are the owners/Co-directors/shareholders of the suit property L. R No.MN/III/736 in Kikambala Mombasa which owns Thousands Palms Beach Hotel Ltd.
  - d. That subsequently pending the hearing and determination of this Application there be an express order from this Honorable Court to stay the proceedings in this Court and its consequential orders until the original case in Nairobi HCCC 213 of 2009 is heard and determined
  - e. That costs of this application be provided.
8. The application was supported by the grounds, testimonial facts and the averments found under the 17<sup>th</sup> paragraph supporting affidavit of James Njenga Mungai, one of the Directors/Shareholder/owners herein to L.R. No. MN/III/736 which holds Thousand Palms Hotel Beach Hotel with five (5) annexures marked as “JNM 1 – 5” who averred that: -
- a. He had instructed the Law firm of Messrs. Khaminwa & Khaminwa Advocates to come on record for us in this matter.
  - b. In or about the year of 1980 Mr. James Raymond Njenga applied for a letter to the then President Daniel Arap Moi for allotment of L.R. No. MN/III/736, which was later allotted to him. (Attached in the affidavit, the letter dated 19<sup>th</sup> November,1980 and copy of the letter of allotment respectively marked as “JNM - 2”).
  - c. Thereafter Mr. James Raymond Njenga engaged him and since they were mostly in Nairobi and by then the Thousand Palms Beach Hotel Limited was known as Seawake beach hotel was on its inception, they had to have someone cater for the daily-go of the Company.
  - d. Subsequently Mr. James Raymond and himself invited Mr. Salav Dean since he was conversant with the Coast region to join us in the venture of our project for Seawake Beach Hotel Limited. Annexed in the affidavit and marked as “JNM - 3” was a copy of the Memorandum and Articles of Association dated 13<sup>th</sup> March, 1981).
  - e. Dean would own half with his family, because he was mostly majored around (region).
  - f. Later Seawake Beach Hotel Limited was-changed to Thousand-Palm Beach Hotel Limited, dated 8<sup>th</sup> day of September 1986. (Attached and marked herein as “JNM - 4” a copy of the Certificate of Change of Name”).
  - g. Later it came to their knowledge that they were excluded by Salav Dean from being directors of their company, that’s after they conducted a search on the company, which extensively dawned them that Mr. Salav Dean and his family were in the process of selling the suit property to unknown people.
  - h. In correlation to the above they filed a suit in Court HCCC No. 1108 of 1991, which was currently known as HCCC No. 213 of 2009, which the orders on the property were issued pending the hearing and determination of the case. Attached and marked as “JNM - 5” were orders issued in relation to the suit property).
  - i. It just came to their attention recently that there was still another suit which was instituted later despite the orders from court and them being kept in the dark by the family of Salav Dean.



- j. The case was instituted in Court by the family of Mr. Salav Dean despite them being aware were in contempt of the Court orders.
- k. He stood to suffer great prejudice and harm if the orders sought herein are not granted and the case herein is not stayed until the main Nairobi HCCC. No 213 of 2009 was determined.
- l. It was in the interest of justice and good order that this matter before this Court is stayed as it was brought with malice and an abuse of Court process despite their knowledge of an ongoing case in Nairobi.
- m. There would be no prejudice occasioned to the Parties herein erstwhile Advocates if the Orders sought herein were granted.
- n. This application had been filed at the earliest opportunity and in any case, before the execution thereupon. It was therefore, in the interest of justice that this Application was heard and determined.
- o. The affidavit was in support of the Application herein for Leave to be granted and for stay of this case to be made pending and determination of the case in Nairobi HCCC No. 213 of 2009.

#### **V. The response by the Plaintiffs/Respondents to the application dated 30<sup>th</sup> August, 2024**

- 9. The Plaintiffs opposed the application through a 22 paragraphed replying affidavit sworn by Zahid Iqbal Dean, 2<sup>nd</sup> Plaintiff/Respondent herein and a director of the 1<sup>st</sup> Plaintiff/Respondent who averred that: -
  - a. The Application before Court, was a sham, a waste of the precious judicial time and ought to be dismissed at first instance for being an abuse of the Court's process.
  - b. The instant Application had no legs to stand on as the said proposed intended interested party/Applicant was not a proper party before court and ought not to be enjoined in these proceedings as an interested party.
  - c. On 23<sup>rd</sup> July 2021, the Court sitting in Nairobi dismissed Nairobi HCC No.213 of 2009 for want of prosecution hence the same had been finally determined and the allegations that the same was pending was not true.
  - d. The suit Nairobi HCC No. 213 of 2009 was filed in the year 2009 and it was now over a decade (15 years) for the Applicants to alleged that the same was still pending which was unreasonable.
  - e. Had the Applicants been interested in pursuing their interests in the said suit they ought to have moved the Court appropriately to ensure the matter was heard and determined within reasonable time.
  - f. The Applicants were afforded reasonable chance to be heard but they slept on their own rights until the suit was dismissed. It therefore went without saying that the dismissal occurred as a result of the fault and wrongdoing of the Applicants who did not take the necessary steps to prosecute the suit.
  - g. On 7<sup>th</sup> June, 2024, the Applicants herein again approached the Honourable Court in Nairobi seeking reinstatement of the suit being Nairobi HCC No. 213 of 2009.



- h. The said Application was still pending ruling and the Applicants are here again seeking stay pending a suit that was dismissed way back in 2021; the actions of the Applicants amounted to forum shopping and the Court should not entertain such.
- i. In any event the intended Applicants alleges to be the directors of Thousand Palms Limited which party was already in the suit as the 1<sup>st</sup> Defendant and it is now not clear in what capacity the Applicants were seeking to be enjoined in the suit.
- j. The allegations by the proposed interested party that they were the directors of the 1<sup>st</sup> Defendant was misplaced and full of lies as the said party has not attached any single document in proof of the alleged directorship. The same were mere allegations which holds no water and should be disregarded.
- k. Equity aided the vigilant and not the indolent. The Application currently before Court had been brought late in the day with no other purpose but to defeat justice and cause confusion.
- l. All the allegations raised by the Applicants were misplaced and not supported by any tangible evidence to warrant their joinder in the suit.
- m. The said Application was mischievous having been filed twelve years later when this current suit was filed in the year 2012 and it can never be true that the Applicants learnt of this case this year.
- n. The current Application before Court was just meant to delay justice and block me from prosecuting the main suit to its logical conclusion as the Applicants herein have all along been aware of the pending suits in Court but never took steps to participate in the same.
- o. Allowing stay of proceedings in this suit will be greatly prejudicial to to him and he tend to suffer irreparable loss if stay orders are granted as the Applicant intends to hold the case to a standstill indefinitely to ensure it does not proceed.
- p. The Applicants had not even told Court what stage the alleged case was at for the Court to consider but were only interested in holding the proceedings in this matter in a standstill to an indefinite time which might be 15 years to come as it happened in HCC No. 213 of 2009 which they never prosecuted.
- q. The law firm representing the Applicants that is Messrs. Khaminwa and Khaminwa Advocates, had in previous occasions been acting on his behalf on other related issues or matters in issues.
- r. It was only fair just and in the interests of justice that the Application before Court be dismissed with costs for being baseless and a waste of the precious judicial time.
- s. The affidavit was sworn in support of his plea that he application dated 30<sup>th</sup> August, 2024 lacked merit and should be dismissed with costs to them.

## **VI. Submissions**

10. On 15<sup>th</sup> October, 2024 while all the parties were present in Court, they were directed to have the Notices of Motion applications dated 1<sup>st</sup> July, 2024 and 30<sup>th</sup> August, 2024 be disposed of by way of written submissions. Pursuant to that on 24<sup>th</sup> October, 2024 a ruling date was reserved on 28<sup>th</sup> October, 2024 by Court accordingly on its own merit.



**A. The Written submissions by the 3<sup>rd</sup> Defendant for the Notice of Motion application dated 1<sup>st</sup> July, 2024**

11. The 3<sup>rd</sup> Defendant through the Law firm of Messrs. Daniel & Kenneth Advocates LLP filed their written submissions dated 28<sup>th</sup> August, 2024. The Learned Counsel commenced their submissions by stating that before the Honourable Court was the 3<sup>rd</sup> Defendant/Applicant Application dated 1<sup>st</sup> July 2024 filed under Certificate of Urgency and supported by the 3<sup>rd</sup> Defendant/Applicant Affidavit sworn on even date seeking for the afore – stated.
12. According to the Learned Counsel, the application was supported by the Affidavit sworn on 1<sup>st</sup> July, 2024 by one OSMAN ERDINC ELSEK. The only issue for determination according to the Learned Counsel was whether the Applicant had demonstrated that the orders of stay of execution pending appeal were merited.
13. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles were provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010.
14. 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 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.”
15. Therefore, the Learned Counsel submitted that an order pending appeal shall be granted upon the applicant satisfying the conditions set out in Order 42 Rule 6(2), aforementioned namely;
  - a. that substantial loss may result to the applicant unless the order is made,
  - b. that the application has been made without unreasonable delay, and
  - c. that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given
16. As to what substantial loss is, it was observed in the case of:- “James Wangalwa & Another – Versus - Agnes Naliaka Cheseto [2012] eKLR”, 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 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.”
17. According to the Learned Counsel, in the instant case, the Applicant stood to suffer substantial loss of over a sum of Kenya Shillings Four Hundred Million (Kshs. 400,000,000/=) as well as costs and interest if stay of execution was not granted on the basis that the Honourable Court in its Ruling of 20<sup>th</sup> May 2024 did not yet determine who will take control of the Applicant’s investment situated on the suit property. The 1<sup>st</sup> Defendant/Plaintiff by Counter - claim has not demonstrated that it was able



to repay or reconstitute the developments done by the 3<sup>rd</sup> Defendant/Applicant if the appeal succeeds, as indicated under paragraph 6 of the 1<sup>st</sup> Defendant/Plaintiff by Counterclaim Grounds of Opposition.

18. The Learned Counsel referred the Court to the case of “RWW – Versus - EKW [2019] eKLR” where the Court considered the purpose of stay of execution order pending appeal, in the following words:-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her Judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

19. The Learned Counsel averred that in this case, the 1<sup>st</sup> Defendant/Plaintiff by Counter - Claim had not given any material as to his ability to repay or reconstitute the developments done by the 3<sup>rd</sup> Defendant/Applicant in case the appeal succeeds and in light of the depositions by the 3<sup>rd</sup> Defendant/Applicant that it stood to suffer substantial loss if stay was not granted.

20. On whether or not the application was brought without undue delay, the Learned Counsel humbly submitted that there was no unreasonable delay in filing of the Application. The Ruling of the Honourable Court was delivered on 16<sup>th</sup> May 2024 while the Application for Stay filed on 1<sup>st</sup> July 2024, one month after delivery of the Ruling. They invited this Honourable Court to be guided by the decision in the case:- “Paschal (Guardian ad-litem of Paschal Mule Nzyuko) – Versus - Muthoka & 2 others (Environment and Land Appeal E002 of 2023) [2023] KEELC 21730 (KLR) (15 November 2023) (Ruling)” where the Court determined as follows;

“Lastly, in considering whether or not to grant an application for stay of proceedings the court must consider whether the application has been filed expeditiously. The Ruling the Appellant intends to appeal was delivered on January 31, 2023. The Memorandum of Appeal was filed on February 15, 2023 while the present application was filed on March 3, 2023. One month cannot not be said to have been inordinate. This court is satisfied that the present application was filed without any delay.”

21. On the issue of security, it was the Learned Counsel’s humble submission that the Court had power and discretion to allow an application for stay of execution pending appeal without requiring deposit of the security for the performance of the Orders as it was stated in the case of:- “RWW – Versus - EKW [Supra]” where Hon. Onger J. opined as follows

“13. The other condition for granting stay orders is on the security to be due performance of the orders as may ultimately be binding on the appellant I am however of the considered view that in the circumstances of this cause and it being a matrimonial cause, the court can grant stay of execution of its orders without demanding that the Applicant furnish the Court with security for the due performance of the orders.”

22. Further, the Learned Counsel acquiesced that the allegations by the 1<sup>st</sup> Defendant/Plaintiff by Counter - Claim under Paragraph 5 of the Grounds of Opposition that the stay of the justice lack merit



and should be treated with utmost disregard by this Honourable Court. In fact, it was the Learned Counsel's submission that there shall not be an impediment to the course of justice given that the application seek to unravel the truth on the subject matter. This Court shall be hearing the applicant on whether the orders should be stayed pending the hearing of the appeal and the respondents have not demonstrated how the grant of the Orders sought in the 3<sup>rd</sup> Defendant's application shall amount to an impediment to the course of justice.

23. The Learned Counsel invited the Honourable Court to be guided by the decision of "Rose Detho – Versus – Ratilal Automobiles Ltd & 6 Others [2007] eKLR" where the Court of Appeal determined as follows;

The main application before us is seeking stay of the orders made by the superior court at Eldoret on the 24<sup>th</sup> day of November 2006. The pertinent part of the ruling giving rise to the application states as follows:

"I do therefore find that she acted in contempt of court and do order that she regularises her position within the next thirty-six hours otherwise she stands to suffer imprisonment for six months."

That is the order that the applicant is seeking to stay. As to the other order of 15<sup>th</sup> September, 2006, this Court had on 17<sup>th</sup> October 2006 made an order and it is not before us. If the applicant is ordered to purge the contempt before she is heard, the consequences are that she will have to face imprisonment or to take action on the order of 15<sup>th</sup> September 2006 which she is alleging is illegal before she is heard. In my mind, purging contempt is not composed of merely appearing in court and apologizing to the court. It means atoning for or wiping out the offence or putting right what the court had ordered to be done and which was not done. But even more important, can one say that if the alleged contempt in this matter continues, it will impede the course of justice? In other words, can the applicant's failure to take the actions that were ordered on 17<sup>th</sup> October 2006 or on 15<sup>th</sup> September 2006 impede the course of justice in the application for stay before us or make it difficult for us to ascertain the truth in respect of that application? I do not think so. We will be hearing the applicant on whether the orders should be stayed pending the hearing of the appeal and the respondents have not suggested in what way the failure to obey the orders of the superior court given on those two occasions will be an impediment to our hearing and concluding the application.

That being my view of the matter, I would decline to uphold the preliminary objection which I would dismiss with costs in the application."

24. Subsequently, the Learned Counsel submitted that the 1<sup>st</sup> Defendant/Plaintiff in the Counter - Claim has alleged under paragraph 6 of the Grounds of Opposition that the developments done on the suit property by the 3<sup>rd</sup> Defendant/Applicant herein were illegal. They submitted that the structures on the suit property were developed with the explicit consent by way of a lease agreement of the 2<sup>nd</sup> Plaintiff/Respondent and therefore the actions by the 3<sup>rd</sup> Defendant/Applicant were based on the assumption that he had the legal right to grant such permission as the Director of the 1<sup>st</sup> Plaintiff/Respondent.
25. The lease agreement duly executed between the 2<sup>nd</sup> Plaintiff/Respondent and the 3<sup>rd</sup> Defendant/Applicant created a reasonable expectation that the 3<sup>rd</sup> Defendant/Applicant could make developments on the property. As a result of the reliance of the Lease and the reasonable belief that the 3<sup>rd</sup> Defendant/Applicant could make developments on the suit property, they invited the Honourable Court to proceed and invoke the doctrine of proprietary estoppel against the 1<sup>st</sup> Defendant/Plaintiff



to the Counterclaim as it would be unjust for it to assert its rights without compensating the 3<sup>rd</sup> Defendant/Applicant or this Honourable Court addressing the issue of ownership of the suit property.

26. Further in response paragraph 8 of the Grounds of Opposition, the Learned Counsel submitted that it was apparent that the 3<sup>rd</sup> Defendant/Applicant's appeal seeks to challenge the ruling delivered by the trial court, the orders of injunction restraining the 3<sup>rd</sup> Defendant/Applicant from using, occupying, entering, remaining upon, constructing upon or altering the character of the suit premises. They submitted that the 3<sup>rd</sup> Defendant/Applicant has demonstrated that the appeal raises prima facie arguable points of law and fact and that if an order for stay of execution and proceedings was denied the 1<sup>st</sup> Defendant/Plaintiff by Counter claim proceeds with execution, there was a likelihood that the appeal will be rendered nugatory.
27. Given the nature of the suit and the circumstances before this Honourable Court, they submitted that on the interest of justice vis-à-vis the subject of prejudice, the 3<sup>rd</sup> Defendant/Applicant will be greatly prejudiced if the orders sought in its Application are denied, thereby denying it its constitutional right to a fair hearing. The 1<sup>st</sup> Defendant/Plaintiff by Counter - Claim did not stand to be prejudiced if the order for time for the parties to first pursue the appeal before undertaking any further proceedings in the present suit.
28. The Learned Counsel invited the Honourable Court to be guided by the decision in "Schon Ahmed Noorani – Versus Rajendra Ratilal Sanghani [2021] eKLR" where it was stated as follows;

“20. The second principle concerns itself with whether the applicant has an arguable appeal with reasonable chances of success. The appellant is of the view that their appeal raises arguable grounds and has high chances of success, and that if the order sought herein is denied, thereby rendering the appeal nugatory.

21. From my study of the grounds featured in the memorandum of appeal, it is apparent that the appeal seeks to challenge the ruling delivered by the trial court, the orders of injunction restraining the Appellant from further publishing any defamatory and threatening material.

22. In my view, I am satisfied that the appellant has demonstrated that the appeal raises prima facie arguable points of law and fact and that if an order of stay of proceedings is denied and suit proceeds for hearing, there is a likelihood that the appeal will be rendered nugatory.

23. The third principle touches on the interest of justice vis-à-vis the subject of prejudice, the appellant states and submits that they will be greatly prejudiced if the order sought is denied, thereby denying them their constitutional right to a fair hearing, while stating that the respondent does not stand to be prejudiced if the order for stay of proceedings is granted.

24. Concerning the fourth principle on the expeditious disposal of cases vis-a-vis proper use of judicial time, upon considering the foregoing circumstances, I find that it would only be a practical and proper use of judicial time for the parties to first pursue the appeal before undertaking any further proceedings in the present suit.



25. In the end therefore, the Motion dated 28<sup>th</sup> May, 2021 is hereby allowed on merit. Consequently, there shall be a stay of all further proceedings in Milimani CMCC NO. E6567 of 2020 pending appeal

29. Lastly the Learned Counsel averred that in response to Paragraph 10 of the Grounds of Opposition, that this Honourable Court had never issued on the issue of stay pending appeal. Nonetheless, it was the 3<sup>rd</sup> Defendant/Applicant's contention that non - compliance as alleged by the 1<sup>st</sup> Defendant/Plaintiff to the Counter - Claim could not impede justice in favour of 3<sup>rd</sup> Defendant/Applicant in the instant Application. They invited the Honourable Court to be guided by the decision in "Rose Detho [Supra]" where the Court of Appeal determined as follows:-

"The main application before us is seeking stay of the orders made by the superior court at Eldoret on the 24<sup>th</sup> day of November 2006. The pertinent part of the ruling giving rise to the application states as follows:

"I do therefore find that she acted in contempt of court and do order that she regularizes her position within the next thirty-six hours otherwise she stands to suffer imprisonment for six months."

That is the order that the applicant is seeking to stay. As to the other order of 15<sup>th</sup> September, 2006, this Court had on 17<sup>th</sup> October 2006 made an order and it is not before us. If the applicant is ordered to purge the contempt before she is heard, the consequences are that she will have to face imprisonment or to take action on the order of 15<sup>th</sup> September 2006 which she is alleging is illegal before she is heard. In my mind, purging contempt is not composed of merely appearing in court and apologizing to the court. It means atoning for or wiping out the offence or putting right what the court had ordered to be done and which was not done. But even more important, can one say that if the alleged contempt in this matter continues, it will impede the course of justice? In other words, can the applicant's failure to take the actions that were ordered on 17<sup>th</sup> October 2006 or on 15<sup>th</sup> September 2006 impede the course of justice in the application for stay before us or make it difficult for us to ascertain the truth in respect of that application? I do not think so. We will be hearing the applicant on whether the orders should be stayed pending the hearing of the appeal and the respondents have not suggested in what way the failure to obey the orders of the superior court given on those two occasions will be an impediment to our hearing and concluding the application.

That being my view of the matter, I would decline to uphold the preliminary objection which I would dismiss with costs in the application."

30. Therefore, the Learned Counsel submitted that the applicant's failure to comply with any orders did not obstruct the justice process in considering the stay application.

31. In conclusion, it was the Learned Counsel's assertion that the Applicant was deserving of the Orders sought in the Application and that substantial loss will be occasioned upon the Applicant if the Ruling was to be executed at this stage, without full determination of the matter.

## VII. Analysis and Determination

32. The Honourable Court has carefully read and considered the pleadings herein – the applications, the responses, the written submissions and authorities relied on by the Learned Counsels, the relevant provision of *the Constitution* of Kenya, 2010 and the statutes.



33. In order to arrive at an informed, fair, Equitable and reasonable decision, the Honorable Court has four (4) framed the following issues for determination.
- a. Whether the Notice of Motion application dated 1<sup>st</sup> July, 2024, by 3<sup>rd</sup> Defendant/Applicant for stay of execution of the Ruling and Order of the Honourable Court delivered virtually on 20<sup>th</sup> May, 2024 by Hon. Justice L.L. Naikuni and any other consequential Order pending the hearing and final determination of the Appeal filed by the 3<sup>rd</sup> Defendant/Applicant is merited?
  - b. Whether the Intended Interested Party have made out a case to be joined as parties in this suit
  - c. Whether the prayer on stay of proceeding in the Notice of Motion application dated 30<sup>th</sup> August, 2024 is meritorious and thus the Application is merited?
  - d. Who will bear the Costs of Notices of Motion applications dated 1<sup>st</sup> July, 2024 and 30<sup>th</sup> August, 2024.

**ISSUE No. a). Whether the Notice of Motion application dated 1<sup>st</sup> July, 2024, by 3<sup>rd</sup> Defendant/Applicant for stay of execution of the Ruling and Order of the Honourable Court delivered virtually on 20<sup>th</sup> May, 2024 by Hon. Justice L.L. Naikuni and any other consequential Order pending the hearing and final determination of the Appeal filed by the 3<sup>rd</sup> Defendant/Applicant is merited**

34. Under this Sub – title, the main gist of the matter is on whether or not to grant Stay of Execution from a delivered Ruling and orders of this Court. The law concerning stay of execution pending Appeal is found in the provision of Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, 2010 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.

35. It is trite law that stay of execution pending appeal is a discretionary power bestowed upon this court by the law. In the initial stages of building Jurisprudence around this legal aspect, 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.”
36. 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 the provision of Sections 1A and 1B of the *Civil Procedure Act*, 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*, cap. 21 or in the interpretation of any of its provisions.
37. 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.”
38. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules 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.
39. 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
40. 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”.
41. 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.
42. 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.”
43. 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.”
44. 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)”}.
45. 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...”
46. From the pleadings the Applicant herein filed an application dated 1<sup>st</sup> July, 2024 seeking orders to stay Ruling and Order of the Honourable Court delivered virtually on 20<sup>th</sup> May, 2024 by Hon. Justice L.L. Naikuni. According to the Applicant the said Ruling is in respect to the Notice of Motion application



- dated 15<sup>th</sup> January, 2024 of the 1<sup>st</sup> Defendant/Respondent. He had a Notice of Appeal dated 30<sup>th</sup> May, 2024 intending to oppose the Ruling of the Honourable Judge and he had also applied for the copy of the entire proceedings of this case. The intended Appeal will serve no purpose if the 3<sup>rd</sup> Defendant/Applicant was evicted from the Suit Property. The intended Appeal was arguable and has overwhelming chances of success.
47. In their submission according to its Learned Counsel, in the instant case the 3<sup>rd</sup> Defendant stood to suffer substantial loss of over Kshs. 400,000,000 as well as costs and interest if stay of execution was not granted on the basis that the Honourable Court in its Ruling of 20<sup>th</sup> May 2024 did not yet determine who will take control of the Applicant's investment situated on the suit property. The 1<sup>st</sup> Defendant/Plaintiff by Counterclaim has not demonstrated that it was able to repay or reconstitute the developments done by the 3<sup>rd</sup> Defendant/Applicant if the appeal succeeds, as indicated under paragraph 6 of the 1<sup>st</sup> Defendant/Plaintiff by Counterclaim Grounds of Opposition.
  48. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under 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 Applicants 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.
  49. Regarding the pre-requisite conditions evolving from the law is on substantial loss occurring to the 3<sup>rd</sup> Defendant. The court has already deliberated on this aspect and taken into consideration of it from the case of: - “Kenya Shell Limited (Supra)”. From the surrounding facts and inferences of the instant case, the 3<sup>rd</sup> Defendant/ Applicant has proved that it will suffer substantially if the orders for stay of the execution are not granted as prayed. For that reason, the application should succeed.
  50. On the second issue to determine is where the application for stay of execution was made without inordinate delay. From the record, the ruling being appealed against was delivered on 20<sup>th</sup> May, 2024 and the application herein was filed on 1<sup>st</sup> July, 2024. This application was filed after about 42 days after the ruling. Clearly, in this Honourable Court's assessment, the application was made timeously without any delay. Indeed, the application was filed expeditiously and without undue delay.
  51. 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. The Learned Counsel for the Applicant in their submissions averred that the Court had power and discretion to allow an application for stay of execution pending appeal without requiring deposit of the security for the performance of the Orders as it was stated in “RWW – Versus - EKW [Supra]”. The Applicant made no provision for security in its application.
  52. This provision of the law notwithstanding from the face value, this court is not bound by the type of security offered by an applicant. It 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.
  53. In saying so I seek refuge from 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 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.”

54. Therefore, in the interest of justice and fairness, it behooved the Applicant herein to furnish security as stipulated by the law. Stay of execution is exactly what it states. It is an order of the court barring a person from enjoying the fruits of his Ruling pending the determination of some issue in contention. It matters not whether the issue in contention is the amount awarded in the decretal sum, 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 the provision of Order 42 Rule 6 of the Rules.

55. The Court observed in the case of: - “Gianfranco Manenthi & Another – Versus - Africa Merchant Assurance Company Limited [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)

56. As already demonstrated in the case of “James Wangalwa & Another – Versus - 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.

57. According to the Plaintiffs/Respondents none of the conditions above have been fulfilled by the Applicant herein. The application does not establish any factor which shows 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 Applicant has demonstrated any loss as he had ploughed over Kshs. 300,000,000/- (Kenya Shillings Three Hundred Million Only) as per the Valuation Report dated 2<sup>nd</sup> October, 2023, that it will suffer should this Honourable Court decline the invitation to stay the execution of its Order.



58. In the result, I am persuaded to grant the order for stay of execution but strictly on condition that the Applicants shall furnish security being a reasonable sum equivalent to the outstanding amounts in contention being a sum of Kenya Shillings Five Million (Kshs. 10,000,000/-).
59. For this reason, therefore I find the Notice of Motion application dated 1<sup>st</sup> July, 2024 merited and hence hereby stands allowed.

**ISSUE No. b). Whether the Intended Interested Party have made out a case to be joined as parties in this suit**

60. Under this sub – title, the Honourable Court shall examine whether the Applicant should be joined as a party in the suit. Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010 states as follows: -

“The court may at any stage of the proceedings, either upon, or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon or settle all questions involved in the suit, be added.”

61. The Interested parties herein sought to be joined as interest Party to the suit for the reasons that as the Directors/Shareholder/owners herein to L.R. No. MN/III/736 which holds Thousand Palms Hotel Beach Hotel. The first step will be to define who an Interested Party is in order to consider whether the Applicant herein falls in the same category/ definition. Rule 2 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013;

“interested party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation;

62. The Black’s Law Dictionary defines an Interested Party as “a party who has a recognizable stake (and therefore standing) in the matter.”

63. Further, The Supreme Court of Kenya in “Communications Commission of Kenya and 4 Others – Versus - Royal Media Services Limited & 7 Others Petition No. 15 OF [2014] eKLR” relied on its earlier decision in the “Mumo Matemo case” where the Court in defining who an Interested Party is, and held as follows;

“An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. Similarly, in the case of Meme v. Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- (i) Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;
- (ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) Joinder to prevent a likely course of proliferated litigation.



We ask ourselves the following questions:

- a) what is the intended party's state and relevance in the proceedings and
- b) will the intended interested party suffer any prejudice if denied joinder.?"

64. Subsequently, having defined who an Interested Party is, it is important to then determine whether the Applicant satisfies the criteria for joinder as an Interested Party in the proceedings. The law on joinder of interested parties to suits has been settled by the Supreme Court of Kenya in the case of "Francis K. Muruatetu and another – Versus - Republic & 5 others (2016) eKLR", the court set out identifiable key elements for consideration in an application for joinder as an Interested Party. The elements are as follow: -

- a. The Personal interest or stake that the party has in the matter must be set out in the application. The Interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- b. The prejudice to be suffered by the intended Interested Party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- c. Lastly, a party must, in its application, set out the case and/or submission it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court."

65. In other words, there needs to be a demonstration that the interest of the person goes further than "merely being affected" by the judgment or order. It must be shown that the presence of that person is necessary, so that the issues in the suit may be settled, and that if the person is not enjoined, the court may not be fully equipped to settle the questions in the suit or may be handicapped in one way or another. A joinder may also be allowed if the intended interested party has a claim of his own, which in the circumstances of the matter, needs to be tried, or is convenient to be tried alongside the claims of the incumbent plaintiff and defendant. The threshold for joinder of an interested party should not be too low, or else, this is prone to open doors for busybodies to be joined to proceedings, merely to spectate or confuse the issues in the matter. Apart from the above, whether or not to enjoin a person as an interested party, must be looked at within the context and surrounding circumstances of each particular case.

66. According the Interest Parties averred that in or about the year of 1980 Mr. James Raymond Njenga applied for a letter to the then President Daniel Arap Moi for allotment of L.R. No. MN/III/736, which was later allotted to him. Thereafter Mr. James Raymond Njenga engaged him and since they were mostly in Nairobi and by then the Thousand Palms Beach Hotel Ltd was known as Seawake beach hotel was on its inception, they had to have someone cater for the daily-go of the Company.

67. Subsequently Mr. James Raymond and himself invited Mr. Salav Dean since he was conversant with the Coast region to join us in the venture of our project for Seawake Beach Hotel Limited. Dean would own half with his family, because he was mostly majored around (region). Later it came to their knowledge that they were excluded by Salav Dean from being directors of their company, that's after they conducted a search on the company, which extensively dawned them that Mr. Salav Dean and his family were in the process of selling the suit property to unknown people. In correlation to the above



they filed a suit in Court HCCC No. 1108 of 1991, which is currently known as HCCC No. 213 of 2009, which the orders on the property were issued pending the hearing and determination of the case.

68. It just came to their attention recently that there was still another suit which was instituted later despite the orders from court and them being kept in the dark by the family of Salav Dean. The case was instituted in Court by the family of Mr. Salav Dean despite them being aware are in contempt of the Court orders He stood to suffer great prejudice and harm if the orders sought herein are not granted and the case herein is not stayed until the main Nairobi HCCC. No 213 of 2009 was determined. It was in the interest of justice and good order that this matter before this Court is stayed as it was brought with malice and an abuse of Court process despite their knowledge of an ongoing case in Nairobi.
69. Further, I do find that their presence before the Court is necessary and they will enable the Court to effectively and completely answer questions on the ownership of the suit property of the suit property among others issues involved in the suit.

**ISSUE No. c). Whether the prayer on stay of proceeding in the Notice of Motion application dated 30<sup>th</sup> August, 2024 is meritorious and the Application is merited**

70. Under this sub title the court shall examine whether or not the Intended interested Parties have made out a case for stay of proceeding in this matter and whether overall the application is merited. From the very onset, it will be noted that this matter is part – heard and has a hearing date on .....November, 2024. The issue here is whether the stay of execution orders granted would be synonymous with stay of proceedings. It is instructive to note that Judicial time is precious and scarce and must not be wasted at all.
71. As was held in the case of “Muchanga Investments Limited – Versus - Safaris Unlimited (Africa) Limited & 2 Others [2009] eKLR”, the Court of Appeal rendered itself as follows: -
- “Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”
72. The prayer for stay of proceedings is an equitable relief. An applicant must have come to court with clean hands. It is therefore important for the court to consider whether or not the application for stay of proceedings has been filed expeditiously. In the case of “Kenya Wildlife Service – Versus - James Mutembei (2019) eKLR”, Gikonyo J held that: -
- “Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”.
73. Further, in the persuasive authority in “Global Tours & Travels Limited; Nairobi HC Winding up Cause No. 43 of 2000” Ringera J, (as he then was) stated that
- “ As I understand the law, 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 interest of Justice .... the sole question is whether it is in the interest 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 or not granting the order. And in considering those matters, it should bear in mind such factors as the need for



expeditious disposal of cases, 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 expeditiously”.

74. In the “Kenya Wildlife Case (Supra),” Gikonyo J quoted Halsbury’s Law of England, 4<sup>th</sup> Edition. Vol. 37 page 330 and 332, that

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case”.

75. I am persuaded by the above authorities which lay down the clear principles that stay of proceedings is a grave matter to be entertained only in the most deserving cases as it impacts the right to expeditious trial. It is a discretionary power exercisable by the court upon consideration of the facts and circumstances of each case. As stated by the Court of Appeal in the case of “David Morton Silverstein – Versus - Atsango Chesoni (2002) eKLR”: -

“The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court’s own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay”.

76. From the surrounding facts and inferences, I strongly hold that the intended interested parties have not made out a case for the stay of proceedings pending the hearing and determination of Nairobi HCCC. No 213 of 2009 as I join heads with the Plaintiffs/ Respondents that the suit Nairobi HCC No. 213 of 2009 was filed in the year 2009 and it was now over a decade (15 years) for the Applicants to alleged that the same was still pending which was unreasonable. Equity aided the vigilant and not the indolent. The Application currently before Court had been brought late in the day with no other purpose but to defeat justice and cause confusion.

77. Therefore, I reiterate that despite of having granted a stay of execution, it is not an automatically stays of proceedings in this case. This matter already has a hearing date on 27<sup>th</sup>, November, 2024. I emphasise that the stay of execution of the Ruling of this Court of 20<sup>th</sup> May, 2024 pending hearing and final determination of the Appeal. As for the stay pending the Nairobi case the same has been declined as no proof was even produced to show that the case still exists and that the Applicants were interested in prosecuting it. Further the said property happens to be in this jurisdiction and not in Nairobi. I will not indulge the parties to discuss matters jurisdiction as I have already extensively discussed it in my previous ruling dated 22<sup>nd</sup> June, 2024. For these reasons, the notice of Motion application dated 30<sup>th</sup>



August, 2024 is only merited to the extent of the stay of the Ruling of 20<sup>th</sup> May, 2024 but not for stay of proceedings of this part – heard matter.

**ISSUE No. d). Who will bear the Costs of Notices of Motion applications dated 1<sup>st</sup> July, 2024 and 30<sup>th</sup> August, 2024**

78. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR” and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR”, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. 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 the present case, the Honourable Court is of the opinion that there shall be no orders as to costs.

**VIII. Conclusion and disposition**

79. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following: -

- a. THAT the Notice of Motion application dated 1<sup>st</sup> July, 2024 by Diamond Housing Limited, the 3<sup>rd</sup> Defendant herein be and is hereby found to have merit and the same is allowed with no orders as to costs.
- b. THAT there be a stay of execution of the Ruling and Order of the Honourable Court delivered virtually on 20<sup>th</sup> May, 2024 by Hon. Justice L.L. Naikuni and any other consequential Order pending the hearing and final determination of the Appeal filed by the 3<sup>rd</sup> Defendant/Applicant.
- c. THAT the Notice of Motion application dated 30<sup>th</sup> August, 2024 by James Njenga Mungai and James Raymond Njenga, the Intended Interested Parties be and is hereby found to be partially meritorious and the same is allowed as follow: -
  - i. Pending the hearing and determination of this suit, leave is hereby granted to join the Intended Interested Parties James Njenga Mungai and James Raymond Njenga as the 4<sup>th</sup> and 5<sup>th</sup> Interested Parties in this suit.
  - ii. Parties are at liberty to amend their pleadings to include the interested parties.
  - iii. In the meantime there being no order for stay of proceedings, the part heard matter shall proceed on for hearing on 27<sup>th</sup> November, 2024 and 11<sup>th</sup> December, 2024 respectively as scheduled.
- d. THAT there shall be no orders as to costs.

IT IS SO ORDERED ACCORDINGLY.



**RULING DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 28<sup>TH</sup> DAY OF OCTOBER 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. Achieng Advocate for the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs.
- c. M/s. Muyaa Advocate for the 1<sup>st</sup> & 2<sup>nd</sup> Defendants & Plaintiffs in the Counter – Claim.
- d. Mr. Kimanthi Advocate for the 3<sup>rd</sup> Defendant.
- e. No appearance for the 4<sup>th</sup> Defendant
- f. Mr. Nyabuti Advocate holding brief for Mr. Khaminwa Advocate for the Interested Parties.

