Halai Brothers Limited v rimba & 2 others (On their own Behalf and on Behalf of all the People Squatting on Plaot Number KILIFI/KIJIPWA/48) (Civil Suit 334 of 1996) [2024] KEELC 13794 (KLR) (16 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13794 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL SUIT 334 OF 1996

LL NAIKUNI, J

DECEMBER 16, 2024

BETWEEN

HALAI BROTHERS LIMITED ..... PLAINTIFF

AND

ROY RIMBA ..... 1ST DEFENDANT

ROY NYALE ..... 2ND DEFENDANT

KAHINDI NDAGO ..... 3RD DEFENDANT

ON THEIR OWN BEHALF AND ON BEHALF OF ALL THE PEOPLE SQUATTING ON PLAOT NUMBER KILIFI/KIJIPWA/48

RULING

I. Introduction

1. This Honorable Court was tasked to make a determination on the filed Notice of Motion application dated 2nd May, 2024 by Roy Rimba, Roy Nyale and Kahindi Ndago (on their own behalf and on behalf of all the People squatting on Plot Number KILIFI/KIJIPWA/48), the Defendants/Applicants herein. It was brought under the dint of Sections 1A, 1B, 3A of the *Civil Procedure Act*, Cap. 21 Laws of Kenya, Order 42 Rule 6, Order 50 Rule 6, Order 51 Rule (1), (3) of the Civil Procedure Rules, 2010 and all other enabling provisions of the law).

2. Upon service of the application to the Plaintiff/Respondents, and while opposing it filed their Replying Affidavit dated 13th June, 2024. The Honorable Court will be dealing with the Responses in depth later on in this Ruling.

II. The Defendants/Applicants' case

3. The Applicants sought for the following orders: -

   a. Spent.

   b. That this Honourable Court be pleased to order a stay of execution of the decree of this Honourable Court issued on the 30th 7th November 2023 pending the hearing and determination of the intended appeal to the Court of Appeal by the Applicants herein.

   c. That this Honourable Court be pleased to give further orders and/or directions herein in the interest of justice.

   d. That cost of this application be provided for.

4. The application was premised on the grounds, testimonial facts and averments made out under the 13th Paragraphed Supporting Affidavit of – ROY RIMBA, sworn and dated the same day with the application. The Applicant averred that:

   a. On the 7th November 2023, the Honourable Court delivered a judgment against all the People squatting on the suit property herein.

   b. Among the orders issued by the Court included an order for eviction from the suit property within the next Ninety (90) days from the date of the delivery of the Judgment on or before the 28th February, 2024. The Honourable Court further awarded the Plaintiff a sum of Kenya Shillings Ten Million (10,000,000/-) as general damages. He annexed and marked as 'RR -2' a copy of the judgment and the decree thereof issued on 30th November 2023.

   c. Being aggrieved with the judgment, the Defendants had preferred an appeal to the Court of Appeal as per the Notice of Appeal annexed in the affidavit and marked as 'RR – 3'.

   d. The intended appeal against the said decision was meritorious, arguable andwith a great likelihood of success. He annexed and marked as 'RR - 4' a draft Memorandum of Appeal.

   e. He was apprehensive that unless an order of stay of execution pending was granted herein, there was imminent danger of the Plaintiff proceeding which execution of the decree whereof all the people on the suit property shall be evicted hence shall suffer substantial loss that would be irreversible if the intended appeal is successful.

   f. The Plaintiff through its Advocates had already written to his Advocates warning them to comply with the terms of the judgment of risk eviction in execution of the decree herein. He annexed and marked as 'RR - 5' a letter dated 6th March 2024.

   g. In view of the foregoing, unless the Court orders a stay of execution herein, the Plaintiff shall proceed to evict the Defendants from the suit property and whereas the Defendants have lived on the property since time immemorial and have no other place to call home, an action which will in effect render the appeal nugatory and the Defendants shall suffer irreparable loss and damage.

   h. No prejudice whatsoever shall be occasioned to the Plaintiff by the grant of the orders sought herein.

   i. It was in the interest of justice that the orders sought in the application herein be allowed.

   j. The affidavit was sworn in support of the Application herein

III. The Replying affidavit by the Plaintiff/Respondent

5. While opposing the Notice of Motion Application dated 2nd May,2024, the Plaintiff/Respondent filed their the Replying Affidavit dated 13th June, 2024 and sworn by HALAI MAHENDRA HARJI K. He averred as follows:-

   a. He was one of the Directors of the Plaintiff Company rein and conversant with the issues pertaining to this matter.

   b. The averments contained in this Affidavit fell within his personal knowledge and where he made legal submissions was based on advice of the Plaintiff/Respondent's Advocate on record.

   c. He had read the Application dated 2nd May, 2024 and where necessary explained to by the Plaintiff/Respondent's Advocate and to which he responded as hereunder. He did oppose in toto the prayers sought in the Application specifically the prayers seeking for the above stated orders.

   d. This Honorable Court delivered its Judgment herein was delivered on 7th November, 2023 in favour of the Plaintiff/Respondent and a Decree subsequently issued on 30th November, 2023. Annexed and marked as "1" was a copy of the Decree.

   e. Among other orders issued in the Judgment herein, the Honourable Court decreed that there be a peaceful eviction of the Defendants/Applicants by 28th February, 2024 and further, that the Plaintiff/Respondent was awarded a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/=) being general damages to be borne by the Defendants which they had not settled to date.

   f. He was advised by the Plaintiff/Respondent's Advocates on record that the Applicants were undeserving of the Orders sought because the law governing the grant of Stay of Execution in case of Appeal was set out under the provision of Order 42 (6) (2) and (7) of the Civil Procedure Rules 2010. It categorically provides for the following principles to be satisfied as hereunder:-

      Stay in case of appeal [Order 42, rule 6(2).1

      (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.

   g. Security in case of order for execution of decree appealed from [Order 42, Rule 71 provided:-

      (1) Where an order is made for the execution of a decree from which an appeal is pending, the court which passed the decree or the court to which an appeal is pending in terms of rule 6 shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the court from whose decree or order such appeal shall have been brought.

(2) Where an order has been made for the sale of immovable property in execution of a decree and an appeal is pending from such decree, the sale shall, on the application of the Judgment- debtor to the court which made the order, or to any court to which such appeal or second appeal shall have been made, be stayed on such terms as to giving security or otherwise as the court thinks fit until the appeal is disposed of.

h. The aforementioned principles were enunciated in the celebrated case of "Butt – Versus - Rent Restriction Tribunal [1979]" where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-

a) The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.

b) Secondly, 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 the appeal court reverse the judge's discretion.

c) Thirdly, 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.

d) Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse.

i. The principle of substantial loss was enunciated in the case of:- "Shell Limited – Versus - Kibiru and Another [1986] KLR 410" where Platt JA set out two different circumstances when substantial loss could arise as follows:-

> " The appeal is to be taken against a Judgment in which it was held that the present respondents were entitled to claim damages....lt is a money decree. An intended appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts...."

j. He was further advised by the Plaintiff/Respondent's Advocates on record that the Applicants herein had not satisfied the above principle to warrant this Honorable Court to grant the Orders sought. From the Supporting Affidavit by the 1st Applicant herein ROY RIMBA, he alleged that the Defendants/Applicants had lived on the property since time immemorial and had no other place to call home, yet no evidence had been tendered in support of the above, as

it was within his knowledge that the trial court has already made a determination on the issue of ownership vide the Judgment of 7th November, 2023 by declaring that:-

> "…….all that suit of land known as Land Reference numbers Kijipwa/Kilifi/48 is legally and absolutely registered in the names of Halai Brothers Limited from 26th March 1996 with all the indefeasible title, interest and rights vested in them pursuant to the provisions of Article 40 (1) (a) & (b) of *the Constitution* of Kenya,2010; Sections 24, 25 and 26 of the *Land Registration Act* No. 3 of 2012."

k. Further, the Defendants/Applicants had not demonstrated that the Plaintiff/ Respondent had threatened to execute or had in fact violated a legal right and intended to perpetuate the violation, and thus the application was pre-mature and unmerited.

l. Given the above set of facts and the case law, the Plaintiff/Respondent would be the one to suffer substantial loss since this matter had been in court for a period of 28 years now and the Court had already made a determination in favour of the Plaintiff/Respondent.

m. In response to the averments made out under Paragraphs 2 and 3 of the orders sought in the application which sought stay of execution of the judgment delivered on 7th November, 2023, the Defendants/Applicants were intentionally using delay tactics in a bid to frustrate the Plaintiff from reaping the fruits of its Judgment.

n. From the Supporting Affidavit sworn by ROY RIMBA, the Defendants/Applicants had neither demonstrated nor advanced any reasons whatsoever that the Application for stay of execution had been brought forth without unreasonable delay.

o. On the contrary to the allegation that the instant application has been filed without undue delay, the Defendants/Applicants had filed the same seven (7) months since delivery of the Judgment on 7th November, 2023. It was an additional four (4) months since the Defendants/ Applicants were to comply with the orders of peaceful eviction and payment of the general damages of a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/=) awarded to the Plaintiff/Respondent.

p. The Honourable Court in the persuasive decision of: "Gianfranco Manenthi & Another – Versus - Africa merchant Assurance Co. Limited [2019]eKLR" observed as follows in regard to the principle of security for costs:-

> "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 a 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 falls.
>
> 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 judgment 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."

q. Upon perusal of the Supporting Affidavit sworn by ROY RIMBA, the Defendants/Applicants have not demonstrated a single intention to pay the Plaintiff/Respondent its General damages of a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/=).

r. Despite the Plaintiff/Respondent's Advocates writing a letter dated 6th March, 2024 calling for payment of the general damages of Kenya Shillings Ten Million (Kshs.10,000,000/=), the Defendants/Applicants declined to respond to the same and consequently, yet again, went back to sleep for a period of almost two (2) months before moving this Honorable court vide the instant application. Annexed and marked as "2" was a copy of the letter dated 6th March, 2024.

s. It had been seven (7) months since delivery of the said Judgment yet the Defendants/Applicants had not attempted to pay the Plaintiff/Respondent's award of General damages to the tune of a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/=). In essence, the Defendants/Applicants were in contempt of this Honourable Court's Judgment and therefore never deserved the sympathy of this Honorable Court.

t. From the foregoing and in response to paragraph (f) of the grounds in the application, the Defendants/Applicants could not then purport imminent risk and danger which would occasion substantial loss, where the Plaintiff/Respondent proceeded to exercise its right to execute.

u. The Defendants/Applicants needed to embrace the fact that litigation must come to an end in one way or another.

v. The instant application was an afterthought whose sole aim was to frustrate the Plaintiff/Respondent from enjoying the fruits of its Judgment.

w. If the orders in the application dated 2nd May, 2024 were granted, the Plaintiff/Respondent stood to suffer great prejudice, by being denied the fruits of its Judgment.

x. If at all this Honourable Court allowed the application, he prayed that the same be conditional and that the Defendants/Applicants be ordered to pay the entire amount of a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/=) to the Plaintiff/Respondent.

IV. Submissions

6. On 29th September, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 2nd May, 2024 be disposed of by way of written submissions. Subsequently, upon all parties fully complying, on 20th November, 2024 the ruling was deferred 5th December, 2024 but eventually delivered on 16th December, 2024 accordingly.

A. The Written Submissions by the Defendants/Applicants.

7. The Defendants/Applicants in support of their application dated 2nd May, 2024, through the Law firm of Messrs. Madzayo Mrima & Jadi filed their written Submissions dated 8th October, 2024. M/s. Jadi commenced her submission by stating that the Defendants/Applicants wished to rely entirely on the Supporting Affidavit of Mr. Roy Rimba in support of the Application herein.

8. She relied on the provision of Order 42 Rule 6 of the *Civil Procedure Act* (Cap 21) of the Laws of Kenya which governs applications for stay of execution pending appeal. It outlined that an Applicant seeking stay of execution must demonstrate:-

   a) That there shall be substantial loss if the stay order is not granted.

   b) The Application has been made without unreasonable delay.

   c) Security for costs is provided.

9. On these ingredients, the Learned Counsel averred she would be submitting on each item as hereunder:

a) Substantial loss.

10. Under this heading, she cited the case of "Tropical Commodities Suppliers Ltd& Others – Versus - International Credit Bank Ltd (in liquidation) [2004] 2 EA 331" where Ogolla J, stated that:-

> "...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or smal1, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal..."

11. The Learned Counsel submitted that as could be seen from the draft Memorandum of Appeal annexed to the Application herein, the issues in the appeal revolved around the ownership of the suit property. It was not in dispute that the Defendants/Applicants herein had lived on the suit property since time immemorial and they had no other place to call home. That pursuant to the decree of this Honorable Court issued on 30th November 2023, the Defendants/Applicants were granted Ninety (90) days within which to vacate the suit property. Vide a letter dated 6th March 2024, the Plaintiff/ Respondent herein gave the Applicants Ten (10) days to comply with the decree and in default, execution proceedings shall ensue.

12. The Counsel averred that the Plaintiff/Respondent who was declared the legal owner of the suit property could enter into the suit property as it pleased and also sale the property to third parties as it so wished. This would not only occasion substantial loss to the Applicants but also render the appeal nugatory since the suit property which was the subject matter of the appeal shall not be available. In view of this, she submitted that the threatened eviction shall automatically affect the Applicants who had a strong appeal. They had no other place to call home hence they shall suffer substantial loss. To buttress on this point she referred Court to the case of:- In the case of "RWW – Versus - EKW [2019] eKLR", the Court opined:-

> "...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

b) Unreasonable delay.

13. Under this item, the Learned Counsel asserted that the Application herein had been was brought within five (5) months after the Judgement which was delivered on the 7th November 2023. The Application had been filed on the 6th May 2024. She submitted that there was no delay in filing the present Application since there had not been a threat to execution by the Respondent until March 2024. In any event, she argued that time period of Five Months had time and again not been considered as manifestly unreasonable. To support her point she cited the case of "Maitai – Versus - Silas (Suing as the personal representative of the Estate of Douglas Muchui - Deceased) (Miscellaneous Civil Application E047 of 2024) [2024] KEHC 5846 (KLR) (23 May 2024) (Ruling) where Edward M. Muriithi J upon finding an application for stay of execution pending appeal meritorious held that:-

> " .....12.The Court has already found above that the delay in the matter was for a period of 5 months which cannot be termed as manifestly unreasonable..."

c) Security for costs.

14. Under this sub title, the Learned Counsel stated that she was mindful of the Court's decision in the case of:- "Samvir Trustee Limited – Versus -Guardian Bank Limited [2007] eKLR" in that:-

> " .....the yardstick is for the Court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment..."

15. To this end, the Learned Counsel opined that she was also mindful of the fact that the Court had wide discretion in determining what form and amount of security was appropriate. The Honorable Court conducted a site visit to the suit property. It was evident from the said site visit that the Defendants/ Applicants were not persons of means. She referred Court to the case of "Re Estate of Kyungu Mutuku (Deceased) 2020 eKLR where the High Court emphasized that the failure to provide security or the offer of insufficient security may lead to the denial of a stay of execution. However, the Court noted that security should not be punitive but should reflect a balance between securing the Respondent's interest and avoiding undue hardship to the Appellant.

16. Additionally, the Learned Counsel contended that the Applicants herein had a strong appeal with high chances of success hence not frivolous. The annexed Memorandum of Appeal raised serious issues of Law and fact. It had raised a total of Fourteen (14) grounds. A notice of appeal had already been filed. Indeed, the appeal had been admitted and allocated Appeal No. E101 of 2024. A record of appeal had also been filed. Given the issues raised in the appeal there was a reasonable chance that the Court of Appeal would find in favor of the Applicants herein.

B. In conclusion, the Learned Counsel prayed that the Application herein be allowed and the orders of stay of execution be granted pending the hearing and determination of the appeal.

C. The Written Submissions by the Plaintiff/Respondent.

17. In the course of opposing the Notice of Motion application dated 02nd May, 2024 by the Defendants/ Applicants, the Plaintiff/Respondent through their Advocates on record, the Law firm of Messrs. Muturi Gakuo & Kibara Advocates filed their written Submission dated 15th October, 2024. Mr. Gakuo Advocate commenced by providing the court with a brief background to the said application herein. Primarily, it sought for a stay of execution of this court's decree and Judgement issued on 30th

November, 2023 pending the hearing and determination of the application and the appeal. He stated that Plaintiff/Respondent opposed in toto the prayers sought in the application.

18. In opposition to the application, the Plaintiff/Respondent had filed a Replying Affidavit sworn on 13th June, 2024 by one of the Plaintiff/Respondent's directors, Halai Mahendra Harji K. The Learned Counsel stated that he would rely on the Replying Affidavit in beseeching this Honourable court to dismiss the application. From the depositions in, and annextures to, the Replying Affidavit, the Plaintiff's argument in opposition to the application may be restated as hereunder. Judgment herein was delivered on 07th November, 2023 in favour of the Plaintiff/Respondent and a Decree subsequently issued on 30th November, 2023. Among other orders issued in the said Judgment, the Honourable Court decreed that there be a peaceful eviction of the Defendants/Applicants by 28th February, 2024. Further, that the Plaintiff/Respondent had been awarded a sum of Kenya Shillings Ten Million (Kshs.10,000,000/=) being general damages to be borne by the Defendants which they had not settled to date. The Applicants were undeserving of the Orders sought because they had not satisfied the conditions for grant of stay of execution pending appeal as set out under the provision of Order 42 Rule (6)(2) and (7) of the Civil Procedure Rules 2010. The Applicants had not demonstrated substantial loss they stood to incur if the application was disallowed. The Applicants alleged in the Supporting Affidavit sworn by the 1st Applicant herein Roy Rimba, that the Defendants/Applicants had lived on the property since time immemorial and had no other place to call home, yet they had not tendered evidence in support of the allegation

19. In any event, the trial court had already made a determination on the issue of ownership vide the afore - stated Judgment of . by declaring that:

> "..all that suit of land known as Land Reference numbers Kijipwa/Kilifl/48 is legally and absolutely registered in the names of Halal Brothers Limited from 26/03/1996 with all the indefeasible title, interest and rights vested in them pursuant to the provisions of Article 40 (1) (a) & (b) of *the Constitution* of Kenya,2010; Sections 24,25 and 26 of the *Land Registration Act* No. 3 of 2012."

20. Further, the Learned Counsel averred that the Defendants/Applicants had not demonstrated that the Plaintiff/Respondent had threatened to execute or had in fact violated a legal right and intended to perpetuate the violation, and thus the application was pre - mature and unmerited.

21. His contention was that given the above set of facts and the case law, the Plaintiff/Respondent would be the one to suffer substantial loss since this matter had been in court for a period of 28 years now and the Court had already made a determination in favour of the Plaintiff/Respondent. The Defendants/Applicants were intentionally using delay tactics in a bid to frustrate the Plaintiff from reaping the fruits of its Judgment. From the Supporting Affidavit sworn by Roy Rimba, the Defendants/Applicants had neither demonstrated nor advanced any reasons whatsoever that the Application for stay of execution had been brought forth without unreasonable delay. The Defendants/Applicants had filed the application a whopping seven (7) months since delivery of the Judgment on 07th November, 2023 and an additional four (4) months since the Defendants/Applicants were to comply with the orders of peaceful eviction and payment of the general damages of a sum of Kenya Shillings Ten Million (Kshs.10,000,000/=) awarded to the Plaintiff/Respondent. A cursory perusal of the Supporting Affidavit sworn by Roy Rimba showed that the Defendants/Applicants had not demonstrated a single intention to pay the Plaintiff/Respondent its General damages of a sum of Kenya Shillings Ten Million (Kshs.10,000,000/=).

22. The Learned Counsel informed the Court that despite the Plaintiff/Respondent's Advocates writing a letter dated 06th March, 2024 calling for payment of the said general damages, the Defendants/Applicants declined to respond to the same and consequently, yet again, went back to sleep for a period of almost two (2) months before moving this Honourable court vide the instant application. Seven (7) months had elapsed since delivery of the Judgment herein yet the Defendants/Applicants had not attempted to pay the Plaintiff/Respondents' award of general damages. In essence, the Defendants/Applicants were in contempt of this Honourable Court's Judgment and therefore never deserved the sympathy of this Honourable Court. From the foregoing, the Defendants/Applicants could not then purport imminent risk and danger which would occasion substantial loss, should the Plaintiff/Respondent proceed to exercise its right to execute. Litigation must come to an end in one way or another.

23. The application was an afterthought whose sole aim was to frustrate the Plaintiff/Respondent from enjoying the fruits of its Judgment. If the orders in the application were granted, the Plaintiff/Respondent stood to suffer great prejudice, by being denied the fruits of its Judgment. If at all this Honourable Court allowed the application, the Plaintiff/Respondent prayed that the same be conditional upon the Defendants/Applicants paying the entire amount of a sum of Kenya Shillings Ten Million (Kshs.10,000,000/=) awarded to the Plaintiff/Respondent.

24. The Learned Counsel reiterated that the Defendants/Applicants had not met the threshold for grant of stay of execution pending appeal. He opined that the provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010 which sets out the principles for stay of execution pending appeal requires the applicant to:

    (a) show substantial loss that may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

    (b) provide security for the due performance of such decree or order as may ultimately be binding on him.

25. His contention was that the Defendants/Respondents had not demonstrated substantial loss they stood to suffer if stay of execution was not granted. A cursory look at the Defendants/Respondents' affidavit in support of the application never disclosed any substantial loss the Defendants/Respondents stood to suffer should the application be disallowed. To support his point, the Learned Counsel cited the High Court the case of "Nzyuko – Versus - Matheka (Civil Appeal E061 of 2023)[2023] KEHC 23844 (KLR)" held, inter alia:

> " 24. The third principle that the court must establish is whether failure to grant stay of execution the Applicant is likely to suffer substantial loss. In the case of James Wangalwa & Another – Versus - Agnes Naliaka Cheseto [2012] eKLR, where it was held that:
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> > "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."

26. He asserted that the Defendants/Respondents had neither in the affidavit in support of the application nor otherwise, had cast any doubts on the Plaintiff/Respondent's ability to refund to the Defendants/Applicants any sums of money paid in satisfaction of the decree. In a very recent ruling (March, 2024), the High Court in "Guardian Coach – Versus - Mutai (Suing as the Legal Representatives of the Estate of Nickson Kiprotich Mutai) (Civil Appeal E057 of 2023) [2024] KEHC 2779 held inter alia:-

> " 18. Similarly, the Court of Appeal in Caneland Limited Malkit Singhpandhal & another – Versus - Delphis Bank Ltd (2000) eKLR held:
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> > "We now turn to apply these principles to the facts of the present case. Let us say at once that it was nowhere alleged by the applicants in the supporting affidavits or otherwise that the respondent will be unable to refund to the defendants any sums of money paid in satisfaction of the decree. The onus was on the applicants to satisfy the court on this issue...."
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> 20. Based on the evidence before me, it is my finding that the Applicant has not proved the substantial loss that it would suffer. Therefore, he failed to prove the first condition for the grant of stay of execution. 28. This principle was enunciated in the decision of Gikonyo J. in Absalom Dova – Versus - Tarbo Transporters (2013) eKLR, where he stated:
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> > "The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court: as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights: the Appellant to his 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..."

27. The Learned Counsel held that in tandem with the foregoing case law authority, he beseeched this court to find that the Defendants/Respondents herein have not proved the substantial loss which is an indispensable condition for grant of stay of execution pending appeal.

28. As regards the issue of undue delay, the Counsel as stated earlier herein, the Defendants/Applicants had filed the application a whopping seven (7) months since delivery of the Judgment on 7th November, 2023 and an additional four (4) months since the Defendants/Applicants were to comply with the orders of peaceful eviction and payment of the general damages of a sum of Kenya Shillings Ten Million (Kshs.10,000,000/=) awarded to the Plaintiff/Respondent. The Defendants/Applicants via their Supporting Affidavit sworn by Roy Rimba had not explained - sufficiently or at all - why the application was filed seven (7) months post - Judgment. It was the Plaintiff/Respondent's considered submission that the application had been brought forth with unreasonable delay and ought to be dismissed on that score alone.

29. The Learned Counsel averred that the Defendants/Applicants had not provided Security for due Performance. In addition to not demonstrating any substantial loss and unreasonable delay, the Defendants/Applicants had similarly not satisfied the precondition relating to security for due performance of the decree. In fact, the Defendants - both on the face of the application and in the supporting affidavit – never mentioned at all - let alone show any willingness to deposit - any form of security such as a bank guarantee or proposal to deposit at least part of the damages in court or in an interest-earning bank account in the joint names of the advocates herein pending the hearing and determination of the appeal. The High Court in the case of:- "Gianfranco Manenthi & Another (Supra) held inter alia:

> "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 a 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 o(1) of the Civil Procedure Rules, It Is trite that the winner of litigation should not be dented the opportunity to execute the decree in order to enjoy the fruits of his Judgement in case the appeal falls.
>
> 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 judgment involves a money decree."

30. The High Court in the case of "Nzyuko – Versus - Matheka (Supra) held, inter alia: "32. The Court of Appeal in Nduhiu Gitahi – Versus - Warugongo [1988|KLR 621; 1 KAR 100;[1988-92] 2 KAR 100...expressed itself as follows:"

> In the course of opposing the Notice of Motion application dated 02nd May, 2024 by the Defendants/Applicants, the Plaintiff/Respondent through their Advocates on record, the Law firm of Messrs. Muturi Gakuo & Kibara Advocates filed their written Submission dated 15th October, 2024. Mr. Gakuo Advocate commenced by providing the court with a brief background to the said application herein. Primarily, it sought for a stay of execution of this court's decree and Judgement issued on 30th November, 2023 pending the hearing and determination of the application and the appeal. He stated that Plaintiff/Respondent opposed in toto the prayers sought in the application.

31. In opposition to the application, the Plaintiff/Respondent had filed a Replying Affidavit sworn on 13th June, 2024 by one of the Plaintiff/Respondent's directors, Halai Mahendra Harji K. The Learned Counsel stated that he would rely on the Replying Affidavit in beseeching this Honourable court to dismiss the application. From the depositions in, and annextures to, the Replying Affidavit, the Plaintiff's argument in opposition to the application may be restated as hereunder. Judgment herein was delivered on 07th November, 2023 in favour of the Plaintiff/Respondent and a Decree subsequently issued on 30th November, 2023. Among other orders issued in the said Judgment, the Honourable Court decreed that there be a peaceful eviction of the Defendants/Applicants by 28th February, 2024. Further, that the Plaintiff/Respondent had been awarded a sum of Kenya Shillings Ten Million (Kshs.10,000,000/=) being general damages to be borne by the Defendants which they had not settled to date. The Applicants were undeserving of the Orders sought because they had not satisfied the conditions for grant of stay of execution pending appeal as set out under the provision of

Order 42 Rule (6)(2) and (7) of the Civil Procedure Rules 2010. The Applicants had not demonstrated substantial loss they stood to incur if the application was disallowed. The Applicants alleged in the Supporting Affidavit sworn by the 1st Applicant herein Roy Rimba, that the Defendants/Applicants had lived on the property since time immemorial and had no other place to call home, yet they had not tendered evidence in support of the allegation

32. In any event, the trial court had already made a determination on the issue of ownership vide the afore - stated Judgment of . by declaring that:

> " ..all that suit of land known as Land Reference numbers Kijipwa/Kilifl/48 is legally and absolutely registered in the names of Halal Brothers Limited from 26/03/1996 with all the indefeasible title, interest and rights vested in them pursuant to the provisions of Article 40 (1) (a) & (b) of *the Constitution* of Kenya,2010; Sections 24,25 and 26 of the *Land Registration Act* No. 3 of 2012."
>
> Further, the Learned Counsel averred that the Defendants/Applicants had not demonstrated that the Plaintiff/Respondent had threatened to execute or had in fact violated a legal right and intended to perpetuate the violation, and thus the application was pre - mature and unmerited. His contention was that given the above set of facts and the case law, the Plaintiff/Respondent would be the one to suffer substantial loss since this matter had been in court for a period of 28 years now and the Court had already made a determination in favour of the Plaintiff/Respondent. The Defendants/ Applicants were intentionally using delay tactics in a bid to frustrate the Plaintiff from reaping the fruits of its Judgment. From the Supporting Affidavit sworn by Roy Rimba, the Defendants/Applicants had neither demonstrated nor advanced any reasons whatsoever that the Application for stay of execution had been brought forth without unreasonable delay. The Defendants/Applicants had filed the application a whopping seven (7) months since delivery of the Judgment on 07th November, 2023 and an additional four (4)months since the Defendants/Applicants were to comply with the orders of peaceful eviction and payment of the general damages of a sum of Kenya Shillings Ten Million (Kshs.10,000,000/ =) awarded to the Plaintiff/Respondent. A cursory perusal of the Supporting Affidavit sworn by Roy Rimba showed that the Defendants/Applicants had not demonstrated a single intention to pay the Plaintiff/Respondent its General damages of a sum of Kenya Shillings Ten Million (Kshs.10,000,000/=).

33. The Learned Counsel informed the Court that despite the Plaintiff/Respondent's Advocates writing a letter dated 06th March, 2024 calling for payment of the said general damages, the Defendants/ Applicants declined to respond to the same and consequently, yet again, went back to sleep for a period of almost two (2) months before moving this Honourable court vide the instant application. Seven (7) months had elapsed since delivery of the Judgment herein yet the Defendants/Applicants had not attempted to pay the Plaintiff/Respondents' award of general damages. In essence, the Defendants/ Applicants were in contempt of this Honourable Court's Judgment and therefore never deserved the sympathy of this Honourable Court. From the foregoing, the Defendants/Applicants could not then purport imminent risk and danger which would occasion substantial loss, should the Plaintiff/ Respondent proceed to exercise its right to execute. Litigation must come to an end in one way or another. The application was an afterthought whose sole aim was to frustrate the Plaintiff/Respondent from enjoying the fruits of its Judgment. If the orders in the application were granted, the Plaintiff/ Respondent stood to suffer great prejudice, by being denied the fruits of its Judgment. If at all this Honourable Court allowed the application, the Plaintiff/Respondent prayed that the same be

conditional upon the Defendants/Applicants paying the entire amount of a sum of Kenya Shillings Ten Million (Kshs.10,000,000/=) awarded to the Plaintiff/Respondent.

34. The Learned Counsel reiterated that the Defendants/Applicants had not met the threshold for grant of stay of execution pending appeal. He opined that the provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010 which sets out the principles for stay of execution pending appeal requires the applicant to:

(a) show substantial loss that may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) provide security for the due performance of such decree or order as may ultimately be binding on him.

35. His contention was that the Defendants/Respondents had not demonstrated substantial loss they stood to suffer if stay of execution was not granted. A cursory look at the Defendants/Respondents' affidavit in support of the application never disclosed any substantial loss the Defendants/Respondents stood to suffer should the application be disallowed. To support his point, the Learned Counsel cited the High Court the case of "Nzyuko – Versus - Matheka (Supra) held, inter alia:

> " 24. The third principle that the court must establish is whether failure to grant stay of execution the Applicant is likely to suffer substantial loss. In the case of James Wangalwa & Another – Versus - Agnes Naliaka Cheseto [2012] eKLR, where it was 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."

35. He asserted that the Defendants/Respondents had neither in the affidavit in support of the application nor otherwise, had cast any doubts on the Plaintiff/Respondent's ability to refund to the Defendants/Applicants any sums of money paid in satisfaction of the decree. In a very recent ruling (March, 2024), the High Court in "Guardian Coach – Versus - Mutai (Suing as the Legal Representatives of the Estate of Nickson Kiprotich Mutai) (Civil Appeal E057 of 2023) [2024] KEHC 2779 held inter alia:-

> " 18. Similarly, the Court of Appeal in Caneland Limited Malkit Singhpandhal & another – Versus - Delphis Bank Ltd (2000) eKLR held:
>
> > "We now turn to apply these principles to the facts of the present case. Let us say at once that it was nowhere alleged by the applicants in the supporting affidavits or otherwise that the respondent will be unable to refund to the defendants any sums of money paid in

satisfaction of the decree. The onus was on the applicants to satisfy the court on this issue...."

20. Based on the evidence before me, it is my finding that the Applicant has not proved the substantial loss that it would suffer. Therefore, he failed to prove the first condition for the grant of stay of execution. 28. This principle was enunciated in the decision of Gikonyo J. in Absalom Dova – Versus - Tarbo Transporters (2013) eKLR, where he stated:

> "The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court: as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights: the Appellant to his 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..."

36. The Learned Counsel held that in tandem with the foregoing case law authority, he beseeched this court to find that the Defendants/Respondents herein have not proved the substantial loss which is an indispensable condition for grant of stay of execution pending appeal. As regards the issue of undue delay, the Counsel as stated earlier herein, the Defendants/Applicants had filed the application a whopping seven (7) months since delivery of the Judgment on 7th November, 2023 and an additional four (4) months since the Defendants/Applicants were to comply with the orders of peaceful eviction and payment of the general damages of a sum of Kenya Shillings Ten Million (Kshs.10,000,000/=) awarded to the Plaintiff/Respondent. The Defendants/Applicants via their Supporting Affidavit sworn by Roy Rimba had not explained - sufficiently or at all - why the application was filed seven (7) months post - Judgment. It was the Plaintiff/Respondent's considered submission that the application had been brought forth with unreasonable delay and ought to be dismissed on that score alone.

37. The Learned Counsel averred that the Defendants/Applicants had not provided Security for due Performance. In addition to not demonstrating any substantial loss and unreasonable delay, the Defendants/Applicants had similarly not satisfied the precondition relating to security for due performance of the decree. In fact, the Defendants - both on the face of the application and in the supporting affidavit – never mentioned at all - let alone show any willingness to deposít - any form of security such as a bank guarantee or proposal to deposit at least part of the damages in court or in an interest-earning bank account in the joint names of the advocates herein pending the hearing and determination of the appeal. The High Court in the case of:- "Gianfranco Manenthi & Another (Supra) held inter alia:

> "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 a 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 o(1) of the Civil Procedure Rules, It Is trite that the winner of litigation should not be dented the opportunity to execute the decree in order to enjoy the fruits of his Judgement in case the appeal falls.

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 judgment involves a money decree."

38. The High Court in the case of "Nzyuko – Versus - Matheka (Supra) held, inter alia:

> " 32. The Court of Appeal in Nduhiu Gitahi – Versus - Warugongo [1988|KLR 621; 1 KAR 100;[1988-92] 2 KAR 100...expressed itselfas follows:"
>
> > The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the Plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the Plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and I that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the Defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it".

39. It was deducible from the foregoing case law that the Defendants ought to pay security for due performance. In the Replying Affidavit, the Plaintiff/Respondent urged that in the alternative to dismissing the application outright. this Honourable Court may allow the application on condition that the Defendants/Applicants paid the decretal sum of a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-). In conclusion, the Plaintiff/Respondent submitted that that the Defendants/Applicants had not demonstrated - sufficiently or at all - that their application satisfied the criteria for stay of execution pending appeal. Specifically, the Defendants/Applicants had neither demonstrated substantial loss nor deposited security for due performance of the decree herein. Besides, the delay in

filing the application was inexplicable, unreasonable and inordinate. In a nutshell, he submitted that the Defendants/Applicants' application was meritless and ought to be dismissed.

> The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the Defendant while giving no legitimate advantage to the Plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the Plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and I that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the Defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it".

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41. In conclusion, the Plaintiff/Respondent submitted that that the Defendants/Applicants had not demonstrated - sufficiently or at all - that their application satisfied the criteria for stay of execution pending appeal. Specifically, the Defendants/Applicants had neither demonstrated substantial loss nor deposited security for due performance of the decree herein. Besides, the delay in filing the application was inexplicable, unreasonable and inordinate. In a nutshell, he submitted that the Defendants/Applicants' application was meritless and ought to be dismissed.

V. Analysis & Determination.

42. I have carefully read and considered the pleadings herein by the 1st Defendant/Applicant, the myriad of authorities cited herein by the parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statures.

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

    a. What are legal parameters governing the grant of Stay of execution?

    b. Whether the Notice of Motion application dated 2nd May, 2024 seeking to stay execution of the of the decree of this Honourable Court issued on the 7th November 2023 by this Honourable Court pending the hearing and determination of the Appeal is merited?

c. Who will bear the Costs of Notice of Motion application dated 29th February, 2024.

ISSUE No. a). What are legal parameters governing the grant of Stay of execution?

44. Under this Sub – title, the main gist of the matter is on whether or not to grant Stay of Execution from a delivered Judgement or Decree of the 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.

45. 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 (Supra) 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."

46. 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*, 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*, Cap. 21 or in the interpretation of any of its provisions.

47. 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."

48. 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.

49. 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

50. 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".

51. 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.

52. 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."

53. 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."

54. 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)"}.

55. 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 Notice of Motion application dated 2nd May, 2024 seeking to stay execution of the of the decree of this Honourable Court issued on the 7th November 2023 by this Honourable Court pending the hearing and determination of the Appeal is merited

56. Under this sub heading, the Honourable Court now wishes to apply the above legal principles to the instant case. From the proceedings, the Defendants/Applicants herein filed an application dated 2nd May, 2024 seeking orders to stay the Judgement in this matter delivered by this Honourable Court on 7th November 2023. According to the Applicants, the Honourable Court delivered a Judgment against all the people currently in occupation and inhabiting on the suit property herein. Among the orders issued by the Court included an order for eviction from the suit property within the next Ninety (90) days from the date of the delivery of the judgment on or before the 28th February, 2024. The Honourable Court further awarded the Plaintiff/ Respondent a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/) as general damages. He annexed and marked as 'RR -2' a copy of the said Judgment and the decree thereof issued on 30th November 2023. However, according to the Plaintiff/ Respondent this sum has never been paid todate and thus which triggered them to issue a demand letter

dated 6th March, 2024. Resultantly, instead of the said letter eliciting any response, the Defendants/ Applicants decided to file the instant application. The 1st Defendant/Applicant is aggrieved by the whole Judgment and has filed a Notice of Appeal dated 21st November, 2023.

57. 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 Applicants.

58. Regarding the pre-requisite conditions evolving from the law is on substantial loss occurring to the Appellants. 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, I am strongly persuaded that indeed, the Applicants have 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.

59. On 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 on 7th November, 2023 and the application herein was filed on 2nd May, 2024, the Notice of appeal on 21st November, 2023. This application was filed after about 6 months after the Judgment. Clearly, in this Honourable Court's assessment, the application was made a long while after the Judgment was delivered. Indeed, I have observed that the application was not filed expeditiously as would have been expected by law. It was with undue delay.

60. On the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules 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.

61. 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.

62. 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."

63. 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 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 the provision of Order 42 Rule 6 of the Rules.

64. The Court observed in the case of:- "Gianfranco Manenthi & Another (Supra) 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 degree 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)

65. 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.

66. 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 half of the outstanding amount in contention being a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-) that is a sum of Kenya Shillings Five Million (Kshs. 5, 000, 000.00/=).

ISSUE No. c). Who will bear the Costs of Notice of Motion application dated 29th February, 2024.

67. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court "Jasbir Rai Singh – Versus - Tarchalan Singh (2014) eKLR" and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, (2014) eKLR".

68. 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

69. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to the Preponderance of Probabilities and balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the application, this the Honourable court arrives at the following decision and makes the following orders:-

    a. That the Notice of Motion application dated 2nd May, 2024 be and is hereby found to have merit and hence allowed subject to the fulfilment of the Pre – Conditions stated herein.

    b. That this Honourable Court do hereby issue an order to stay the execution of its decree arising from the Judgment of this Honorable delivered on 7th November, 2023 pending the hearing and determination of the Intended appeal in the Court of Appeal.

    c. That an order be and is hereby made directing the Defendants/Applicants to deposit a sum of Kenya Shillings Five Million (Kshs. 5,000,000/-) as security deposit for the performance of the decree from the Judgement of this Honourable Court in a Joint Escrow bank account of a reputable Commercial bank to be held in the names of the Law firms of Messrs. Madzayo Mrima & Jadi Advocates and the Messrs. Muturi Gakuo & Kibara Advocates within the next fourty five (45) days from the delivery of this Ruling pending the hearing and determination of the appeal.

    d. That failure to adhere with the condition under Clause (c) herein above of this Ruling the Notice of Motion application dated 2nd May, 2024 shall automatically stand dismissed thereof and execution of the Decree shall ensue procedurally as provided for by law

    e. That there shall be no orders as to costs.

    It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 16TH DAY OF DECEMBER 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. Gitau Advocate holding brief for Mr. Gakuo Advocate for the Plaintiffs/Applicants.

c. M/s. Jadi Advocates for Defendants/Respondents.