Kigotho & another v Al-Amin & another (Civil Appeal E038 of 2024)
[2024] KEELC 13795 (KLR) (16 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13795 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL APPEAL E038 OF 2024

LL NAIKUNI, J

DECEMBER 16, 2024

BETWEEN

ANNE MUTHONI KIGOTHO ..... 1ST APPELLANT

PENNINAH NJERU GICHERU ..... 2ND APPELLANT

AND

HASSAN LUKU AL-AMIN ..... 1ST RESPONDENT

GOSO IBRAHIM BAHIJA ..... 2ND RESPONDENT

RULING

I. Introduction

1. This Honorable Court was tasked to make a determination on the filed Notice of Motion application dated 15th October, 2024. It was brought by Anne Muthoni Kigotho and Penninah Njeru Gicheru the Appellants/Applicants herein as against Hassan Luku Al – Amin and Goso Ibrahim Bahija, the Respondents herein. The Court was moved under the dint of Sections 3, 3A, 63 (e) of *Civil Procedure Act*, Order 42 Rule 6, Order 51 rule 15 and all other enabling provisions of the law.

2. Upon service of the application to the Respondent, the 2nd Respondent opposed the application through a Replying Affidavit sworn on 4th November, 2024.

II. The Appellants/Applicants' case

3. The Applicants sought for the following orders: -

    a. Spent.

    b. Spent.

c. That pending the hearing and determination of this Appeal the Honourable court be pleased to grant conservatory orders by way of stay of execution restraining the Respondents by themselves, their agents, servants, successors in title or anybody else claiming under the decree of the Chief Magistrate's ELC No. E014 of 2022 from transferring, selling, building, developing or otherwise dealing with the property Plot No. 6990/I/MN CR. NO 21443.

d. That the status quo in respect of the title deed for L.R No.6990/I/MN Cr. 21448 be maintained pending the hearing and determination of this Appeal.

e. That the court do make any further orders that they court may deem just.

f. That the cost of this application be provided for.

4. The application by the Applicants herein was premised on the grounds, testimonial facts and averments made out under the 20 Paragraphed Supporting Affidavit of – Peninnah Njeru Gicheru, the 2nd Appellant, sworn and dated the same day with the application. The Applicant averred that:

a. The Appellants/Applicants herein were the owners of the parcel of land, Title Number CR. No. 21448 Plot No. 6990/I/MN. They bought the land in the year 2013 from one Maurice Oduwo Oketch who was the registered owner of the respective parcel of land to which he transferred ownership interest after paying the agreed consideration of a sum of Kenya Shillings Eleven Million (Kshs. 11,000,000/-) and the land was transferred to their names. A copy of the transfer document and title deed was attached to the affidavit.

b. They had been paying the annual land rates to the relevant authorities. Photocopies of the receipts of the payments to that effects are attached in the affidavit.

c. They were conducting the routine check on the property on the 13th day of April, 2024 when they discovered development being a boundary wall and store. A set of photographs were attached as "PNG – 4" in the affidavit.

d. Upon inquiry they discovered that one Hassan Luku Al – Amin had instituted a claim of Adverse possession; the suit had proceeded ex – parte and he had obtained a judgment and decree that had the effect of reconstructing the title and registering him as the proprietor of the parcel of land. Annexed as "PNG – 5" was a copy of the Decree.

e. They were not aware of the claim of Adverse possession instituted by the respondents which was apparently served by a newspaper advertisement on the 24th of December, 2022. They consequently filed an application to set aside the ex-parte Judgment. Annexed as "PNG – 6" was a copy of the application.

f. In the ruling delivered on the 11th October, 2024, the trial Court dismissed the application principally for the reason that they swore a joint affidavit in support of the application. Attached in the affidavit was marked as "PNG – 7" was copy of the said Ruling.

g. Immediately after the said ruling, their Advocates requested for interim stay and maintenance of the status quo and the Court declined to grant the same as could be seen from annexure number and marked as "PNG – 7" above.

h. Unless the Application was granted the Respondents may proceed to further deal with the property and the Appeal herein may be rendered nugatory.

i. The Appeal filed herein and the Application to set aside raises substantial issues of procedural- and substantive law and this Court should act to avoid the unconstitutional deprivation of our

property. Attached in the affidavit marked as "PNG – 8" was a copy of the Memorandum of Appeal.

j. The subordinate Court's Act was basically conferred rights on a criminal enterprise represented by the plaintiff who allegedly seek to dispossess owners of their property.

k. He was aware of the hearing date, the 1st Respondent's advocate filed an affidavit that they had not served them but nonetheless the court proceeded without considering the issue of service of the hearing date on the defendants.

l. Without service then the hearing of the matter and the subsequent decree was flowed and fell foul of the dictates of *the constitution*, substantive and procedural law.

m. From their search it had come to their knowledge that the advocate who filed the suit, one Chahilu Ayiro and the advocate who prosecuted the suit one Morris Owino were on the material date not licensed to practice.

n. It would be in the interest of justice to grant the orders sought to protect their proprietary rights and accord them a hearing under due process.

o. They stood to suffer substantive losses if the orders sought were not granted.

p. The entire suit and the proceedings herein were criminal and fraudulent use of the law to defeat their rights.

q. It would be in the best interest of justice to grant the application herein.

III. The 2nd Respondent's response

5. The 2nd Respondent through an 18th paragraphed replying affidavit sworn by Goso Ibrahim Bahija, the 2nd Respondent herein on 4th November, 2024 opposed the Application and averred as follows:-

a. He was the legal and equitable owner of all that property comprised in the title number. CR No. 21448 Plot No. 6990/1/MN containing by measurement 0.1255 hectares or thereabouts situated in the County of Mombasa which property was the subject of this suit herein.

b. He purchased the suit property as hereinabove described from the Plaintiff/Respondent herein for the value being the consideration of a sum of Kenya Shillings Seven Million (Kshs. 7,000,000/-) vide the agreement for sale dated 5th January, 2024 and subsequently paid the entire purchase price. Annexed in the affidavit and marked as "GIB – 1" was a copy of the duly executed agreement for sale and transfer forms to further corroborate the same.

c. He conducted proper due diligence prior to the aforementioned purchase and after execution of the requisite agreement and transfer forms all confirming that the Plaintiff/Respondent herein had a clean and valid title as s resultant of the Trial Court decree. Annexed in the affidavit and marked "GIB - 2" was the certificate of official search and the decree of the Honourable Court to further corroborate the same).

d. The Applicants herein had placed restrictions on the suit property adversely affecting his ownership interest. Annexed in the affidavit and marked "GIB - 3" was the Notice of Intention to remove a restriction as applied on 8th May, 2024 to further corroborate the same.

e. He did his due diligence on the property prior to purchasing the property which included perusing the lower court file and concluded that the judgment was regular as the Respondent was served through substituted service.

f. The Applicant's allegations were purely aimed at misguiding the Court and abusing the due process of Court since it was evident the Applicant was accorded the opportunity to be heard for more than two years since the case was filled and substituted service done but deliberately chose not to participate until the property was transferred in his name.

g. Consequently the Defendants had not offered before this Honourable Court any plausible explanation as to why they failed to enter an appearance and file a Defence in the prescribed period under the Civil Procedure Rules 2010 despite service.

h. Orders granted in this suit by and large affect his legal and equitable interest over the suit property.

i. The Applicant had demonstrated they had not met the threshold for granting conservatory orders.

j. Conservatory orders pertain to matters of public law, intended to facilitate the orderly functioning of public agencies, unlike injunctions, which was typically applied in private disputes, as in the present case. This distinction renders this application frivolous and irrelevant.

k. The Trial Court issued a negative order which was incapable of being stayed or warranting conservatory orders, as there was nothing the Applicant has lost.

l. The dismissal of the Applicant's application dated 9th May 2024, via the ruling dated 11th October 2024,means that the Applicant remains in the same position as before filing this application. Therefore, issues of substantial loss or the appeal being rendered nugatory do not arise.

m. The supporting affidavit was fatally defective, as it was sworn in the absence of a Commissioner for Oaths, contrary to the *Oaths and Statutory Declarations Act*. While the affidavits were stated to have been sworn in Nairobi, they were dated in Mombasa. Accordingly, the supporting affidavit was ripe for striking out.

n. The Applicant had not provided this Honourable Court with a sufficient reason to empower this Honourable Court to exercise its discretion to review its subject Judgment.

o. The affidavit was in opposition to the application dated 15th October 2024 and prayed that the Honourable Court dismisses the Applicant's application with costs as it was frivolous and lacked merit.

IV. Submissions

6. On 5th November, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 24th September, 2024 be disposed of by way of written submissions. Unfortunately, by the time of penning down the Ruling, the Honourable Court had not as yet accessed the written submissions by either party. Subsequently, on the ruling date was reserved for the 11th December, 2024 accordingly.

V. Analysis & Determination.

7. I have carefully read and considered the pleadings herein by the Appellant/Applicant, the responses by the Respondents, the relevant provisions of *the Constitution* of Kenya, 2010 and statures.

8. 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 constitutes the legal parameters for granting stay of execution.

   b. Whether the Notice of Motion application dated 15th October, 2024 seeking grant of conservatory orders by way of stay of execution restraining the Respondents by themselves, their agents, servants, successors in title or anybody else claiming under the decree of the Chief Magistrate's ELC No. E014 of 2022 from transferring, selling, building, developing or otherwise dealing with the property PLOT NO. 6990/I/MN CR. NO 21443 is merited?

   c. Who will bear the Costs of Notice of Motion application dated 15th October, 2024.

Issue No. a). What constitutes the legal parameters for granting stay of execution.

9. Under this Sub – title, the main gist of the matter is on whether or not to grant conservatory orders by way of stay of execution. 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—
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> (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
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> (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.

10. 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.
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> 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."

11. 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.

12. The provision of Section 1A (2) of the *Civil Procedure Act* 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:-
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> "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."

13. 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.

14. 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

15. 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".

16. 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.

17. 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."

18. 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."

19. 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)"}.

20. 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 15th October, 2024 seeking grant of conservatory orders by way of stay of execution restraining the Respondents by themselves, their agents, servants, successors in title or anybody else claiming under the decree of the

Chief Magistrate's ELC No. E014 of 2022 from transferring, selling, building, developing or otherwise dealing with the property Plot No. 6990/I/MN CR. NO 21443 is merited?

21. Under this sub heading, the Honourable Court now wishes to apply the above legal principles to the instant case. To begin with, I wish to cite the case of:- "Invesco Assurance Co – Versus - MW (Minor suing thro' next friend and mother (HW) [2016] eKLR" the meaning and purpose of a conservatory order was stated as follows:

> " A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter."

22. The principles that guide courts in determining whether to grant conservatory orders are now well settled. The principles were pronounced by the Supreme Court in "Gatirau Peter Munya – Versus - Dickson Mwenda Kithinji & 2 others [2014] eKLR" thus:

> " (86) "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes. Emphasis mine
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> (87) The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:
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> (i) the appeal or intended appeal is arguable and not frivolous; and that
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> (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.
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> (88) These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of *the Constitution* of Kenya, 2010, a third condition may be added, namely:
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> (iii) that it is in the public interest that the order of stay be granted.
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> (89) This third condition is dictated by the expanded scope of the Bill of Rights, and the public-spiritedness that run through *the Constitution*..."

23. The Court in the case of "Centre for Rights Education and Awareness (CREAW) & another – Versus - Speaker of the National Assembly & 2 others [2017] eKLR" held that:

> "A party who moves the Court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation, are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending cause or petition...
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> A conservatory order would normally issue where there is real impending danger to violation of *the Constitution* or fundamental rights and freedoms with a consequence that a petitioner or the public at large would suffer prejudice unless the court intervenes and grants Conservatory orders. In such a situation, the Court would issue a conservatory order for purposes of preserving the subject matter of the dispute."

24. The principles to be taken into account in deciding whether an applicant is deserving of a conservatory order are therefore:-

a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*;

b. Whether if a conservatory order is not granted, the suit alleging violation of, or threat of violation of rights will be rendered nugatory; and

c. The public interest must be considered before grant of a conservatory order.

25. Further it should be noted that conservatory orders are only granted in Constitution Petitions. This herein is an appeal from a Civil suit in the subordinate court. Be that as it may, it must also be remembered that this Court, just like other State organs is bound by various principles enunciated under Article 10 of our Constitution. Some of these values and principles include human dignity, social justice, human rights and good governance and moreover, Article 159(2) provides for the principles of exercise of judicial authority. The provision reads in part as follows:

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

26. Conservatory Order is not an injunction as known in Civil matters or generally in other legal proceedings but is an order that tends to and is intended to preserve the subject-matter or set of circumstance that exist on the ground in such a way that the Constitutional proceedings and cause of action is not rendered nugatory. Through a Conservatory Order the court is able to "give such directions as it may consider appropriate for the purpose of securing of ... the provisions of *the*

Constitution (see – Bansraj above)". A Conservatory Order would enable the court to maintain the status quo or existing situation or set of facts and circumstances so that it would be still possible that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of a Petition and the trial was not a futile academic discourse or exercise.

27. Needless to say, it is the duty of the court to stop in their tracks abuses to its processes and it is also a good old principle of law that litigation must come to an end. This court cannot allow a party to proceed with a matter unprocedurally. To do so would defeat the cherished principle of efficient and expeditious disposal of disputes and compromises on the dispensation of justice on the overall, not to mention extravagance on utilisation of judicial time and resources if I were to heed the Applicant's prayers as sought in its present Application. This would in effect be an affront on the Constitutional principles I earlier mentioned and *the Constitution* in general. By this alone the Application as phrased by the Appellants fails.

28. Further from the pleadings, this Appeal was filed as a result of the ex parte Judgment issued against the Appellants and subsequent ruling delivered on the 11th October, 2024 by the Trial Court. The trial Court dismissed the application principally for the reason that they swore a joint affidavit in support of the application.

29. The Appellants have admitted to filing a Memorandum of Appeal which they attached in their affidavit as a "PNG – 8". However, based on the provision of Section 79B of the *Civil Procedure Act*, Cap. 21, guided this Court on all appeals emanating from the Lower Courts. Section 79B provides "Inter alia":_-

> " Before an appeal from a subordinate Court to High Court is heard, a Judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a Decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily". (Emphasis is mine)
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> Outrightly, guided by the above provision of the law which is couched in mandatory terms, the Court noted with concern that there was no Notice of Appeal filed by the Appellants/ Applicant before they filed the Memorandum of Appeal. The Court of Appeal in the case of "In re Estate of Harish Chandra Hindocha (Deceased)[2021] eKLR", opined itself that:-
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> > " The substantive provision for accessing the relief sought is Rule 5 (2) (b) of the Court of Appeal Rules. We, therefore, find it prudent not to interrogate the applicability of the other provisions of law cited alongside the above Rule.
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> Rule 5(2) (b) of the Rules of the Court provides as follows:
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> > " In any civil proceedings where a notice of appeal had been lodged in accordance with rule, order and stay of execution, an injunction, for a stay of any further proceeding on such terms as the court may think just."
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> The principles that guide the Court in the discharge of its unfettered discretionary mandate under the said rule and which we fully adopt some of which we have already highlighted above are as were aptly restated in the case of Stanley Kangethe Kinyanjui – Versus - Tonny Ketter & 5 Others [2013]eKLR".

30. Rule 82 (1), of the Court of Appeal Rules provides for institution of appeals and states as follows:-

> " Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-
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> a. memorandum of appeal, in quadruplicate
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> b. the record of appeal, in quadruplicate;
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> c. the prescribed fee; and
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> d. security for the costs of the appeal
>
> Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy." (Emphasis added).

31. The import of this provision is that where no application for typed proceedings is made, the appeal must be instituted strictly within 60 days of lodging the notice of appeal and where that is not done, a party forfeits its right to invoke the above proviso, and cannot rely on the certificate of delay. I take note that the Applicants unprocedurally filed a Memorandum of Appeal days after the Ruling of the trial court without considerably filing a Notice of Appeal as procedure requires.

32. This position was very articulately reiterated by this Court in "Mae Properties Limited – Versus - Joseph Kibe & Another [2017] eKLR" as follows;

> " We have said on numerous occasions that the Rules of Court exist for the purpose of orderly administration of justice before this Court. The timelines appointed for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before us. The Rules are expressed in clear and unambiguous terms and they command obedience.
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> Failure to comply with the timelines set invites sure consequences. In the case of failure to lodge an appeal within 60 days after filing of the notice of appeal, Rule 83, which is invoked by the applicant herein, provides thus;
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> "83. If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served."
>
> We think that the true meaning and import of the rule is more often than not scarcely appreciated. The rule as framed prescribes the legal consequence for non-institution of an appeal within the 60 days appointed by the Rules of Court. Moreover, the said consequence is couched in mandatory, peremptory terms: the offending party shall be deemed to have withdrawn the appeal. It seems to us that the deeming sets in the moment the appointed time lapses.

> Essentially this is a practical rule that is intended to rid our registry of merely speculative notices of appeal filed either in knee-jerk reaction to the decision of the court below, or filed in holding mode while the party considers whether or not to lodge a substantive appeal. Indeed, it is not uncommon and we take judicial notice of it, for such notices to be lodged ex abundanti cautela by counsel upon the pronouncement of decisions but to await instructions on whether or not to proceed full throttle with the appeal proper – with the attendant risks, prospects and consequences.
>
> It is safe to say, therefore, that a notice of appeal dies a natural death after the expiry of 60 days unless its life should be sooner extended by lodgment of the appeal within 60 literal days, or such longer time as may still amount to 60 days by operation of the proviso to Rule 82(1) on exclusion..." (Emphasis added).

33. Suffice it to say, I take note that the Respondent pleaded that the orders issued by the trial court were negative orders that cannot be stayed. From the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 it is clear that the court must be satisfied that there is "sufficient cause" to grant a Stay. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is "and". It connotes that all three (3) conditions must be met simultaneously. The above finding notwithstanding, we cannot lose sight of the fact that the Judgment that the Applicant seeks to Stay is the Judgment and decree of the trial Magistrates Court in Chief Magistrate's ELC No. E014 OF 2022. It was a negative order. Having said so, this Court noted that the Judgment the trial court granted was not a positive order. As rightly submitted by the Respondent, a negative order is incapable of being Stayed as the Appellant seeks. I am guided by the Court of Appeal decision in the case of "Kaushik Panchamatia & 3 Others – Versus - Prime Bank Limited & Another [2020] eKLR". As the Court reiterated and which I fully adopt, that;

> "...that a negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by applicants."

34. I need not say more. Even for whatever its worth, and for the benefit of doubt, the Appellants/ Applicants application has failed to comply nor fulfil the fundamental requirements of the provision of Order 42 Rules (1), (2) and (6) of the Civil procedure Rules, 2010. Specifically, they have failed to demonstrate that:-

    a). There was any sufficient cause;

    b). There is any substantial loss to be suffered;

    c). There has been security of costs for the due performance of the Judgement or Decree issued by the Lower Court for them to warrant being granted the orders of stay of execution as sought accordingly.

35. The non- compliance with the clear procedures, and timelines set by the Court's rules by no means are not a technicality that can be cured under the Article 159 (2) (d) of *the Constitution* of Kenya, 2010. Further being that there was a negative order from the trial Court there is really nothing to stay in this instance. Therefore, the only execution which can flow from the said Judgment is with respect to cost since the trial court did not order any of the parties to do anything or to refrain from doing anything or to pay any sum. It therefore, follows that in light of the above discussion, this Court has no mandate to grant a Stay Order in the manner prayed for by the Applicants. For these reasons, I find the Notice of Motion Application to lack any merit and thus it should be dismissed. The subsequent Appeal which

was unprocedural instituted struck out entirely by virtue of the provision of Section 79B of the *Civil Procedure Act*, Cap 21, Order 42 Rules 1, 2, 6, 11, 12 and 13 of the Civil Procedure Rules, 2010 and Rule 82 (1), of the Court of Appeal Rules.

ISSUE No. c). Who will bear the Costs of Notice of Motion application dated 15th October, 2024.

35. 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".

36. 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 to awarding the Respondents the costs.

VI. Conclusion & Disposition

37. 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 court arrives at the following decision and makes the following orders:-

    a. That the Notice of Motion application dated October 15, 2024 be and is hereby found to lack merit and the same is dismissed with costs.

    b. That subsequently the Appeal herein filed on October 15, 2024 be and is hereby found to have been unprocedurally instituted by virtue of breach of the provisions of Section 79B of the *Civil Procedure Act*, Cap. 21, Order 42 Rules, 1, 2, 6, 11, 12 and 13 of the Civil Procedure Rules, 2010 and Rule 82 (1), of the Court of Appeal Rules and is hereby struck entirely with no orders as to costs.

    c. That prayer 2 of the Notice of Motion application dated 15th October, 2024 which was granted in the interim be and is hereby vacated.

    d. That the Respondents shall have the costs of the Notice of Motion Application dated October 15, 2024.

    It is so ordered accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 16TH DAY OF DECEMBER 024.

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HON. MR. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT AT MOMBASA

Ruling delivered in the presence of:

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

b. Mr. Nyabena Advocate for the Appellants/Applicants.

c. Mr. Owino Advocates for 1st Respondent.

d. Mr. Yunis Advocate for the 2nd Respondent.