



**Ahmed & 4 others v Nur (Land Case Appeal E035 of 2024)  
[2024] KEELC 13785 (KLR) (11 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13785 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
LAND CASE APPEAL E035 OF 2024  
LL NAIKUNI, J  
DECEMBER 11, 2024**

**BETWEEN**

**ISSACH AHMED ..... 1<sup>ST</sup> APPELLANT  
ABDITAJIR ABDI ..... 2<sup>ND</sup> APPELLANT  
HASSAN ADAN HASSAN ..... 3<sup>RD</sup> APPELLANT  
SOFIA NOOR ..... 4<sup>TH</sup> APPELLANT  
SOMIA KASSIM ..... 5<sup>TH</sup> APPELLANT**

**AND**

**ISMAIL SHEIKH NUR ..... RESPONDENT**

**RULING**

**I. Introduction**

1. This Honorable Court was tasked to make a determination on the filed Notice of Motion application dated 24<sup>th</sup> September, 2024 by Issach Ahmed, Abditajir Abdi, Hassan Adan Hassan, Sofia Noor and Somia Kassim the Appellants/Applicants herein. It was brought under the dint of Article 50 of *the Constitution* of Kenya, Order 42 Rule 6 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law).
2. Upon service of the application to the Respondent, the Respondent opposed the Application through a Replying Affidavit sworn on 23<sup>rd</sup> October, 2024. The Honourable Court shall be dealing with it indepth at a later stage of this ruling hereof.

**II. The Appellants/Applicants' case**

3. The Applicants sought for the following orders: -



- a. Spent.
  - b. Spent.
  - c. That this Hon. Court be pleased to grant Stay of Execution Orders against the Ruling/ Orders issued by the Hon. Gakuhi Chege on 22<sup>nd</sup> August, 2024 pending the hearing and determination of the Appeal herein (i.e. Mombasa ELCLA No. E035 of 2024: Issach Ahmed & 4 Others v. Ismail Sheikh Nur).
  - d. That the costs of this application be borne by the Respondent herein.
4. The application by the Applicants herein was premised on the grounds, testimonial facts and averments made out under the 20<sup>th</sup> paragraphed Supporting Affidavit of – HASSAN ADAN HASSAN, the 3<sup>rd</sup> Appellant, sworn and dated the same day with the application. The Applicant averred that:
- a. The genesis of the dispute herein began in BPRT No. E074 of 2024: Hassan Adan Hassan (i.e. 3<sup>rd</sup> Appellant herein) – Versus – Ismail Sheikh Nur where upon receiving a Notice of Termination of Tenancy dated 23<sup>rd</sup> February, 2024 from the Landlord/ Respondent herein, he filed a Reference before the said BPRT on 11<sup>th</sup> March, 2024 objection to the decision to evict him from the suit Business Premises. (Attached in the affidavit and marked HAH – A1 a copy of the reference/ Application in the said BPRT No. E074 OF 2024.
  - b. The Hon. Gakuhi Chege issued interim orders prohibiting the Landlord/ Respondent herein from evicting him pending hearing of the Application interparty on 25<sup>th</sup> April, 2024. (Attached in the affidavit and marked HAH – A1(b) a copy of the first interim order issued by the Hon. G. Chege (Vice Chair) on 11<sup>th</sup> March, 2024).
  - c. Interestingly, the Landlord/ Respondent herein never filed any response to his said Reference dated 11<sup>th</sup> March, 2024 and did not wait for the set Interparty Hearing date of 25<sup>th</sup> April, 2024. He instead filed another Application dated 18<sup>th</sup> March, 2024 now alleging that he was not a tenant at his said Suit Business Premises (i.e. that he was a false tenant) and that interim order issued by the Tribunal pursuant to his said Reference herein above “reviewed, vacated and set aside and that he should be asked to stay away from the premises.”(Attached in affidavit and marked HAH – A2(a) a copy of the Landlord’s Application dated 18<sup>th</sup> March, 2024 in the said BRPT No. E074 of 2024).
  - d. In a strange twist of events which is very unprocedural and unlawful, the aforementioned Landlord’s Application dated 18<sup>th</sup> March, 2024 was now place before the Hon. Patricia May who stayed the aforementioned orders issued by her Senior Hon. Chege on the said 11<sup>th</sup> March, 2024 (i.e. even before the pre-scheduled interparty. Hearing date and essentially nullifying the orders of her senior at an ex parte stage. This was suspect and telling of her impartially and readiness to do the Landlords bidding at whatever cost. Attached in the affidavit and marked as “HAH – A2(b)” was a copy of the first subsequent unlawful ex parte order issued by the Hon. Partricia May on 19<sup>th</sup> March, 2024).
  - e. In addition to the foregoing, the Landlord Respondent herein yet again filed a ‘Notice of Preliminary Objection’ dated 24<sup>th</sup> April, 2024 arguing that the Business Premises Rent Tribunal lacked Jurisdiction to hear and determine the matter as there was no existing tenancy between them. (Attached in the affidavit and marked as “HAH - A3” was a copy of the ‘notice of preliminary objection’ dated 24<sup>th</sup> April, 2024 in BPRT No. E074 of 2024).



- f. The said Landlord/Respondent's Notice of Preliminary Objection and the said Landlords subsequent application were dismissed on 12<sup>th</sup> July, 2024 and 13<sup>th</sup> August, 2024 respectively by the-named Hon. Joyce Osodo and Hon. Gakuhi Chege. Attached in the affidavit and marked as "HAH - A4(a)" and "HAH - A4(b)" was copies the said two Orders dismissing the Landlords P.O and the Application.
- g. Further to the above, the said panel simultaneously allowed their reference thereby upholding the fact that he was a tenant to the suit business premises and that the intended Notice of Termination of his Tenancy to the Landlord/Respondent herein failed.
- h. Unknown to them, during the subsistence of the aforementioned Reference which he had filed as a Tenant objecting to the intended termination of tenancy and/ or eviction, the Landlord Appellant herein had instituted another and/ or similar process by drafting a new set of Termination Notice which was served upon them. This was meant to fool them and ensure that they did not file a Reference on their new set of Termination Notices within the requisite 30 days as required under the law. This was mischief, an affront to the Rule of Natural Justice and a violation of their Constitutional Right to a Fair Hearing under the provision of Article 50 of Constitution. Attached in the affidavit and marked as "HAH – A5" the Land - Lord's Reference containing the new Set of Termination Notices dated 12<sup>th</sup> April, 2024 but allegedly served upon them on 11<sup>th</sup> April, 2024 as indicated in the Affidavits of Service sworn by Festus Kyalo Mutinda attached herein.
- i. They only learnt of the Landlord's intention to evict them when they were served with his Reference in the case of "BPRT No. E172 of 2024: Ismail Sheikh Nur – Versus – Issach Ahmed & 4 Others". By this time, ninety days had lapsed and the Landlord created a wrong/ false impression that they had been served but failed to file their Reference objecting to the said Notice of Termination. This was a ploy to defeat the cause of justice to our prejudice. It was undertaken with a predetermined mind and/or outcome i.e. to evict him and his said workers assigns at his Premises through dubious-means. [Attached in the affidavit and marked as "HAH - A6 (a)" was a copy of their Replying Affidavit and marked as "HAH - A6 (b)" was a copy of their Submissions which despite being filed and acknowledged by the Chair of the Tribunal was never considered.
- j. This matter was handled by the said Hon. Patricia - May whose impartiality was brought into question. Whereas she recused herself and referred the Landlord's Reference to the Hon. G. Chege, they had reliable information indicating that the Impugned Ruling herein was actually written by the Hon. Patricia May and passed out as Hon. G. Chege's Ruling. Their sources intimated that Hon. Patricia May indicated that the Landlord's Reference herein was the Governor's case and thus she/they had to deliver as the governor desired regardless of what the facts of the case entailed. This information came to the fore after we complained to the Chairman of the Tribunal.
- k. They had since filed this appeal i.e. "Mombasa ELCLA No. E035 of 2024; Issach Ahmed & 4 Others - Versus - Ismail Sheikh Nur" against the impugned Ruling dated 22<sup>nd</sup> August. 2024. Accordingly, they were desirous of seeking Stay of Execution Orders against the impugned Ruling pending Hearing and Determination of the Application herein and the said Appeal least it be rendered nugatory and they were exposed to untold loss and suffering in the hands of the Landlord and his agents who are using unprocedural means to evict us from the suit Business Premises. Attached in the affidavit and marked as "HAH - A9" was their Memorandum of Appeal herein dated 16<sup>th</sup> September, 2024 raising triable issues but risk being



rendered nugatory by the imminent eviction which may happen any time from the said Friday 27<sup>th</sup> September, 2024.

- i. This Hon. Court had wide powers and discretion to grant the orders sought so as to allowed an opportunity to present their case in full and on a leveled ground environment. In the circumstances, it was in the interests of justice that the Application be allowed as prayed.

### III. The Respondent's response

5. The Respondent through a 16<sup>th</sup> Paragraphed Replying Affidavit sworn by ISMAIL SHEIKH NUR, the Respondent herein on 23<sup>rd</sup> October, 2024 opposed the Application and averred as follows:-
  - a. He was stunned by the allegations from the Applicant Notice of Motion that they were aggrieved by the Judgment of the Business Premises Tribunal which on merit approved the Notice of Termination of Tenancy dated 12<sup>th</sup> April, 2024 which became effective on 1<sup>st</sup> July, 2024 as such he prayed the application be dismissed due to the following reasons.
  - b. The present application offended the principle of fair hearing marred with falsehood as the court record would bear him witness that at the date of delivery of the Judgment, the Applicants advocates did not even bother to attend the Court only for them to later claim that the ruling was done secretly at the time they sought staying the Tribunal Court.
  - c. The present application intends to deprive the respondent his right to enjoyment of his premises whose ownership was not disputed and further economic earning as the applicants have not pay rent which has accrued to a turn of Kenya Shillings Four Million Four Hundred Thousand (Kshs. 4,400,000.00) presently.
  - d. The Notice of Termination was determined on merit and even after the same was confirmed the Applicants tried to obtain a stay of execution in the Tribunal and in this Court at the same time.
  - e. The Applicants were just but only forum shopping for Court orders in a bid to further prejudice the Respondent further whilst they are not paying any rent.
  - f. The present application intends to deprive the Respondent the opportunity to enjoy the fruits of the Ruling or Judgment and the uses of his property and its only meant to cause more prejudice to him. (Attached in the affidavit was the ruling order and Termination Notice).
  - g. There were cogent factors that should be met for a stay of execution pending appeal which the applicants are ignoring, thus the forum shopping.
  - h. For the Advocates to be granted a stay of execution they need to first demonstrate that they are paying rent which now stands in arrears of Kenya Shillings Four Million Four Hundred Thousand (Kshs. 4,400,000.00).
  - i. The present application was flawed as from the Court record at the Business Premises Tribunal, the Notice to Terminate Tenancy dated 12<sup>th</sup> April, 2024 which was by law taken and issued by him the same has never been challenged by the Applicants.
  - j. To further demonstrate that the Applicant do not deserve the orders sought, he challenged the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Applicants to produce any payment that they had done whilst they were in the property meaning they were doing business at his expense to utilize his property.



- k. The Application by the Applicant was an abuse of the process of this Honourable Court as they could not have two application of stay in two different courts.
- l. The Appeal was not merited and the same should be dismissed with cost following the notion that for the appellants to be granted stay or even extension of the Temporary stay, they must first deposit the rent arrears either in Court or to a joint Interest Earning account pending the determination of the intended appeal.
- m. The said applications be dismissed with cost.

#### **IV. Submissions**

- 6. On 5<sup>th</sup> November, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 24<sup>th</sup> September, 2024 be disposed of by way of written submissions. Subsequently, on the ruling date was reserved for the 11<sup>th</sup> December, 2024 accordingly.

#### **A. The Written Submissions by the Appellants/Applicants**

- 7. The Applicants through the Law firm of Messrs. Orlando & Co. Advocates filed their written submissions dated 25<sup>th</sup> November, 2024. The Learned Counsel for the Appellants submitted that what was before the Court for determination was the Appellants Notice of Motion Application dated 24<sup>th</sup> September, 2024 for Orders:
  - a. That this matter be certified urgent and be Heard ex - parte (Spent)
  - b. That pending Hearing and determination of this Application, this Hon Court be pleased to Grant Stay of Execution Orders against the Ruling and/or Order issued by the Hon. Gakuhi Chege on 22<sup>nd</sup> August,2024. (Spent).
  - c. That this Hon Court be pleased to Grant Stay of Execution against the Ruling /Orders issued by the Hon .Gakuhi Chege on 22<sup>nd</sup> August, 2024 pending hearing and determination of the Appeal herein i.e. Mombusa ELCLA No. E035 of 2024:Issach Ahmed & 4 Others v. Ismail Sheikh Nur)
- 8. In support of the Application the Appellants/Applicants have filed a Supporting Affidavit, a Further Affidavit and an supporting affidavit sworn by Hassan Adan Hassan dated 24<sup>th</sup> September, 2024, 22<sup>nd</sup> November, 2024 and 26<sup>th</sup> November, 2024. In to the Application the Respondent filed a Replying Affidavit dated 23<sup>rd</sup> October,2024. The Learned Counsel relied on the following issues for determination:-
  - i. Whether the prerequisites for granting stay of execution as provided for under order 42 rule 6 of the Civil Procedure Rules have been met.
  - ii. Whether the prerequisites for granting stay of execution as provided for under order 42 Rule 6 of the Civil Procedure Rules have been met
- 9. According to the Learned Counsel, in the instant Application, the Ruling was on 22<sup>nd</sup> August, 2024 and the Appellants filed Memorandum of Appeal dated 16<sup>th</sup> September, 2024 on 17<sup>th</sup> September, 2024.Thus the Appellants came to this Court within the time allowed. The Appellants/Applicants



soon thereafter filed this Application which is dated 24<sup>th</sup> September, 2024. The provision of Section 79G of the Civil Procedure Act, Cap. states:

“Every Appeal from a sub - ordinate Court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the decree or order.

10. The relevant law governing applications for stay of execution pending appeal is Order 42 Rule 6 (1)(2) of the Civil Procedure Rules. The Rule states as follows:-

- “(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.”

11. On the substantial loss and unreasonable delay, the Learned Counsel submitted that the substantial loss was the cornerstone of the jurisdiction of Stay pending Appeal, as emphasized by the court in the case of “James Wangalwa & Ano- Versus - Agnes Naliaka Chesete, (2012), eKLR”. The court stated that:-

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

12. On 17<sup>th</sup> July, 2024 the Landlord/Respondent herein filed an Application at the Business Premises Rent Tribunal (BPRT) seeking to evict the Tenants/Appellants herein from the Suit Premises pursuant (BPRT) seeking to evict the Tenants/Appellants herein from the suit Premises pursuant to alleged Landlord Notice to Terminate Tenancy dated 12<sup>th</sup> April, 2024 which was never served upon the named Appellants/Applicants herein. The alleged process server was cross-examined and his testimony impeached on 14<sup>th</sup> August, 2024 before Hon. Patricia May i.e. who has to recuse herself) Submissions were filed and ascertained in Court before Hon. Gakuhi Chege. The matter was set for Ruling on 22<sup>nd</sup> August, 2024.

13. A lot of bias, mystery and secrecy surrounded the conduct of the said BPRT matter and the Ruling delivered thereof. This necessitated the Recusal of the said Hon. Patricia May for want of impartiality and outright bias exhibited in Court. Upon recusing herself, she referred the matter to Hon. Gakuhi Chege where the Ruling was taken (i.e. 22<sup>nd</sup> August, 2024). On the said 22<sup>nd</sup> August, 2024 when the matter was coming up for Ruling; we logged in Court and were duly informed that the matter was coming up for Ruling but the Ruling was not ready and that the same would be ready on 30<sup>th</sup> August, 2024.

14. Early on the morning of Thursday 29<sup>th</sup> August, 2024 the Tenants/Appellants herein were served with a Two-Hour Eviction Notice Le, they were served with an Eviction Order dated 22<sup>nd</sup> August, 2024 and verbally asked by the Landlord's Advocate to vacate the Business Premises within Two Hours. The intended eviction was an ambush, a clear affront to cause of justice AND an outright attempt to deny the Appellants/Applicants an opportunity to seek recourse justice elsewhere. The Appellants/



Applicants herein have been running their businesses in the said premises for the last Fifteen Years and have, inter alia, established goodwill through the years. They risk suffering irreparable damages.

15. In the case of “Halal & Another – Versus - Thornton & Turpin 119631 Ltd 119901 eKLR” the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag. J.A) held that:

“...that the superior court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course, be made without unreasonable delay.”

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of Hassan Guyo Wakalo -vs- Straman E4 Ltd(2013) as follows: “In addition the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory.”

16. The purpose of an order for stay of execution pending appeal is to preserve the subject matter of the Appeal. If the subject is not maintained before the determination of the Appeal, then it would render the appeal nugatory or an academic exercise. During the pendency of this matter (i.e. on the night of 3<sup>rd</sup> November, 2024) the Respondent’s Advocate on record led a team of fifty goons to the suit premises at midnight and began vandalizing the premises in an effort to forcefully evict the Appellants from the Business Premises. If he would have succeeded then this Appeal would have been rendered a nugatory. No amount of damages would compensate the Appellants/Applicants for having been left destitute and their business closed for as the eviction is bound to happen anytime if the Stay of Execution is not granted. The Appellants/Applicants have invested in the business for 15 years and have a huge customer base which will be lost should the situation go unchecked.

17. They relied on the case of the decision of the court in the case of:- “RWW – Versus - EKW (2019) eKLR” where it was held:-

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

18. On the issue of security, the Learned Counsel submitted that the Appellants/Applicants are willing to deposit any reasonable security that the Court may come up with this decision, this Honourable court ought to consider the fact the Tenant entered into an Agreement with the Landlord where the Landlord Respondent agreed to lease Business premises located on Plot No.46 on L.R XVII 1068 Bondeni Mombasa to the 3<sup>rd</sup> Appellant/Applicant for a rent of a sum of Kenya Shillings Fifty Thousand (Kshs. 50,000/-) per month. The 3<sup>rd</sup> Appellant/ Applicant had been faithfully paying the rent and was not in any arrears. The Landlord/Respondent in his reference herein before the Tribunal and as captured in the impugned Ruling claims that the Tenant/Appellant is in arrears of a sum of Kenya Shillings Four Hundred Thousand (Kshs. 400,000.00/=) at the time of the notice and/or the Reference was filed on 17<sup>th</sup> July, 2024. How the alleged Rent arrears has suddenly accrued to a sum of Kenya Shillings Four Million Four Hundred Thousand (Kshs. 4,400,000.00/-) as claimed is a misstatement. The Tenant/Appellant had produced proof of all the receipts of payment of rent.



19. The Learned Counsel relied on the case of “Githanga – Versus - Kinsa Overland Limited (Environment and Land Appeal E139 of 2024) 1[20241 KEELC 6892 (KLR) (17 October 2024) (Ruling)” where the Hon. Judge M.D Mwangi held:-

“ 12. I do not consider the provision of security necessary in the circumstances of this case. However, I will direct that the Appellant continues paying rent for the suit premises to the Respondent pending the outcome of this appeal.

13. The upshot is that the court finds merit in the Appellant's application and issues an order of execution of the ruling of the BPRT delivered 12<sup>th</sup> September 2024 and the consequential orders thereto pending the hearing and determination of this appeal. The Appellant shall continue paying rent in respect of the suit premises, the subject matter of this appeal pending hearing and determination of this appeal. The costs of this application shall be in the cause.”

20. Odunga J (as he then was), in the case of “Victory Construction- Versus - B.4, (a minor suing through next friend-one PNM), 2019,eKLR”, made a somewhat liberal observation geared towards advancement of justice and the overriding objective which the Learned Counsel appropriate in consideration of applications either for stay of execution or proceedings, when he stated that,

“What is expected of the court is to ensure that the aims and intendment of the overriding objective as stipulated in Section IA as read with Section IB of the *Civil Procedure Act* are attained. It is therefore important that the court takes into consideration the likely effect of granting the stay of proceedings in question. In other words, the court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the court do not render nugatory the ultimate end of justice. The court in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.”

21. In conclusion, the Learned Counsel averred that from the foregoing the Appellants/Applicants have met the threshold for grant of orders for stay of execution pending hearing and determination of the Appeal; the Appellants have demonstrated that this Application was filed without unreasonable delay and that substantial loss may result to the Applicants unless the order was granted. In the Circumstance, the Appellants/Applicants pray that the Notice of Motion dated 24<sup>th</sup> September, 2024 be allowed with Costs to the Appellants/Applicants.

## **B. The Written Submissions by the Landlord/Respondent**

22. The Respondent filed their written submissions dated 27<sup>th</sup> November, 2024 through the Law firm of Messrs. Abdirazak & Co. Advocates submitted that the Tenant 3<sup>rd</sup> Applicant herein filed a Notice of Motion dated 24<sup>th</sup> September, 2024 seeking stay of execution of the ruling/orders issued by Honourable Gakuhi Chege on 22<sup>nd</sup> August, 2024. The Landlord opposed the application by way of a replying affidavit dated 23<sup>rd</sup> October, 2024 and shall entirely relied on the same and these submissions.

23. The Respondent relied on the following issued for consideration:



- a. Whether the Applicant has satisfied the set conditions to warrant a grant of stay of execution?
  - b. Whether the applicants should deposit Kshs. 4,400,000/- rent arrears to a joint interest earning account.
  - c. Whether the Landlord should be awarded Cost
24. The Learned Counsel submitted that their clear position on this matter is that the termination of tenancy was duly taken at Mombasa Business Premises Tribunal as per the law and that enough time was given to the tenant on several occasions at the Tribunal on which they had an opportunity to either object to the Termination or not to object. Their choice was not to object to the termination since they clearly knew that they were not paying rent.
25. The issue was stay of orders and stay of execution of the decree all was canvassed before the Tribunal and the present application was only meant to further prejudice the rights of the Respondent landlord herein. On whether the Applicant had satisfied the set conditions to warrant a grant of stay of execution, the Learned Counsel submitted that the Landlord being a law abiding Citizen and well acquitted with procedure is to date following the same whilst being prejudiced with the current orders as bills are still accumulating.
26. On the issue of whether the Applicant has satisfied the conditions to warrant a grant of stay of execution, we humbly submit that the Applicant is obliged under the provision of Order 22 Rule 22 to show sufficient cause to warrant the grant of stay of execution orders. The principles for granting stay of execution are provided for under Order 42 rule 6(1). The Applicants needed to satisfy the Court on the following conditions before he can be granted the stay orders:
- a. Substantial loss may result to the applicant unless the order is made.
  - b. The application has been made without unreasonable delay, and
  - c. Security
27. The Learned Counsel submitted that the 3<sup>rd</sup> Tenant herein has not demonstrated sufficient cause to warrant the grant of the orders of stay. Specifically, the 3<sup>rd</sup> Tenant had not demonstrated that he would suffer substantial loss if the orders sought were denied. The 3<sup>rd</sup> Tenant had not clearly articulated and stated the loss he stands to suffer, further the other Tenants who seem to be joyriders and silent individuals drugged forcefully by the 3<sup>rd</sup> Tenant to court are not keen to move out of the Premises. Their main intention is only to buy time and be in the premises conducting business at the expense of the Landlord's loss and frustrations.
28. The application herein has been brought with unreasonable and inordinate delay. The same was filed by the 3<sup>rd</sup> Tenant simply because they want to waste time and overburden the Landlord with lengthy litigations. The 3<sup>rd</sup> Tenant had not complied with the order issued by the Court by paying Cost of the reference to the Landlord to date, as such the court should not give the 3<sup>rd</sup> Tenant any more Audience. Additionally, the 3<sup>rd</sup> Applicant had rallied the other tenants not to pay any rent to the Landlord and they are operating freely in the premises as if they are the owners of the land.
29. On whether the Applicants should deposit Kshs 4,400,000/- rent arrears to a joint interest earning account, the Learned Counsel submitted that the record will bear the landlord witness that ISSACH AHMED, ABDITAJIR ABDI, SOFIA NOOR and SOMIA KASSION the alleged Tenants HAVE NEVER PAID A SINGLE SHILLING TO THE LANDLORD, what the 3<sup>rd</sup> Applicant was trying to cleverly hide to the Court, is that by the time the Notice to Terminate tenancy was issued he had



arrears of a sum of Kenya Shillings Four Hundred Thousand (Kshs.400,000/-) himself alone which to date have not been paid and he has been enjoying the Landlords Premises nonetheless, without caring.

30. The simple logic the tenants are failing to understand is you cannot have your cake and eat it too; due process was followed to terminate the entire Tenancy as such even the appeal itself has been overtaken by events considering the fact that the Notices to Terminate were never objected.
31. In the case of: “Gitahi & Another – Versus – Warugongo [1988] eKLR 621;1KAR100; [1988-92]2KAR 100” the court of appeal expressed itself as 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 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 judgment 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 appeal.”

32. The Learned Counsel submitted that similar decisions have followed recently at Garissa Environment and Land Court in the case of:- “Ahmed Dolal – Versus - Kengen And Kenya Power and Lightning Co. Limited ELC NO. 10 of 2017 through a ruling delivered on 13<sup>th</sup> November, 2024” through a similar application as the one before Court. The Honorable court departing from the same position as other courts of similar Jurisdiction and even appellate Jurisdiction have held.
33. On what was the order as to costs, the Learned Counsel submitted that the general rule in civil matters is that costs follow the event. Section 27(1) of the *Civil Procedure Act* stated the Court has discretion to determine who to award of costs, from what property the costs are to be awarded, to what extent the costs are awarded and to give directions as to costs notwithstanding the fact that the court has no jurisdiction on the matter. However, a proviso to the section states that costs follow the event.
34. In the Supreme Court case of “Jasbir Singh Rai & 3 others – Versus - Tarlochan Singh Rai & 4others [2014] eKLR”, the Supreme Court discussed the issue of costs. The Court stated that as a general rule, the costs follow the event and the court must give reasons whenever costs do not follow the event. They prayed that the stay be denied and, in the event, it is granted then applicants be ordered to deposit a sum of Kenya Shillings Four Million Four Hundred Thousand (Kshs.4,400,000/-) being rent arrears in a joint Interest earning account.

## **V. Analysis & Determination.**

35. I have carefully read and considered the pleadings herein by the 1<sup>st</sup> Defendant/Applicant, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
36. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
  - a. Whether the Notice of Motion application dated 24<sup>th</sup> September, 2024 seeking to stay execution orders against the Ruling/Orders issued by the Hon. Gakuhi Chege on 22<sup>nd</sup> August,



2024 pending the hearing and determination of the Appeal herein (i.e. Mombasa ELCLA No. E035 of 2024: Issach Ahmed & 4 Others v. Ismail Sheikh Nur) is merited?

- b. Whether the parties herein were entitled to the reliefs sought.
- c. Who will bear the Costs of Notice of Motion application dated 24<sup>th</sup> September, 2024.

**ISSUE No. a). Whether the Notice of Motion application dated 24<sup>th</sup> September, 2024 seeking to stay execution orders against the Ruling/Orders issued by the Hon. Gakuhi Chege on 22<sup>nd</sup> August, 2024 pending the hearing and determination of the Appeal herein (i.e. Mombasa ELCLA No. E035 of 2024: Issach Ahmed & 4 Others v. Ismail Sheikh Nur) is merited**

37. Under this Sub – title, the main gist of the matter is on whether or not to grant Stay of Execution from a delivered Ruling/Orders issued by the Hon. Gakuhi Chege on 22<sup>nd</sup> August, 2024. 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.

38. It is trite law that stay of execution pending appeal is a discretionary power bestowed upon this court by the law. In the initial stages of building Jurisprudence around this legal aspect, the Court of Appeal in the case of “Butt –Versus- Rent Restriction Tribunal {1982} KLR 417” gave guidance on how a court should exercise the said discretion and held that:

- “ 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the Judge’s discretion.
3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.



4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
  5. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
39. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in the provision of Sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act*, cap. 21 or in the interpretation of any of its provisions.
40. 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:- “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.”
41. 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.
42. 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
43. 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”.
44. 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.



45. 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.”

46. 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.”

47. 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)”}.

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

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

#### **ISSUE NO. b). Whether the parties herein were entitled to the reliefs sought**

49. Under this sub heading, the Honourable Court now wishes to apply the above legal principles to the instant case. From the proceedings, the genesis of the dispute herein began in BPRT No. E074 of 2024: Hassan Adan Hassan (i.e. 3<sup>rd</sup> Appellant herein) – Versus – Ismail Sheikh Nur where upon receiving a Notice of Termination of Tenancy dated 23<sup>rd</sup> February, 2024 from the Landlord/ Respondent herein, he filed a Reference before the said BPRT on 11<sup>th</sup> March, 2024 objection to the decision to evict him from the suit Business Premises. The said Landlord/Respondent’s NOTICE OF PRELIMINARY OBJECTION and the said Landlords subsequent application were dismissed on 12<sup>th</sup> July, 2024 and 13<sup>th</sup> August, 2024 respectively by the-named Hon. Joyce Osodo and Hon. Gakuhi Chege. (Attached in the affidavit and marked as “HAH - A4 (a)” and “HAH - A4(b)” were copies the said TWO Orders dismissing the Landlords P.O and the Application.

50. Unknown to them, during the subsistence of the aforementioned Reference which he had filed as a Tenant objecting to the intended termination of tenancy and/ or eviction, the Landlord Appellant herein had instituted another and/ or similar process by drafting a new set of Termination Notice



which was served upon them. This was meant to fool them and ensure that they did not file a Reference on their new set of Termination Notices within the requisite 30 days as required under the law. This was mischief, an affront to the Rule of Natural Justice and a violation of their Constitutional Right to a Fair Hearing under Article 50 of Constitution.

51. They only learnt of the Landlord's intention to evict them when they were served with his Reference in "BPRT No. E172 of 2024: Ismail Sheikh Nur – Versus – Issach Ahmed & 4 Others". By this time, ninety days had lapsed and the Landlord created a wrong/ false impression that they had been served but failed to file their Reference objecting to the said Notice of Termination. This was a ploy to defeat the cause of justice to our prejudice. It was undertaken with a predetermined mind and/or outcome i.e. to evict him and his said workers assigns at his Premises through dubious-means.
52. Accordingly, they were desirous of seeking Stay of Execution Orders against the impugned Ruling pending Hearing and Determination of the Application herein and the said Appeal least it be rendered nugatory and they were exposed to untold loss and suffering in the hands of the Landlord and his agents who are using unprocedural means to evict us from the suit Business Premises.
53. 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.
54. I also note that the Appellant never sought for leave to file appeal out of time being that they only filled a memorandum of appeal without filing a notice of Appeal. The Court of Appeal in the case of "In re Estate of Harish Chandra Hindocha (Deceased) [2021] eKLR", opined itself that:-

"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.

Rule 5(2) (b) of the Rules of the Court provides as follows:

"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."

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".

55. Rule 82 (1), of the Court of Appeal Rules provides for institution of appeals and states as follows:
  - a. memorandum of appeal, in quadruplicate
  - b. the record of appeal, in quadruplicate;
  - c. the prescribed fee; and
  - 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).

56. 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.
57. 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.

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;

“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).



58. I need not say more. The non-compliance with the clear timelines set by this Court's rules is not a technicality that can be cured under Article 159 (2) (d) of *the Constitution*. For this reason I find the Notice of Motion Application and the subsequent Appeal unprocedural and proceed to strike them both out entirely.

**ISSUE No. c). Who will bear the Costs of Notice of Motion application dated 24<sup>th</sup> September, 2024.**

59. 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".

60. 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 Respondent the costs.

**VI. Conclusion & Disposition**

61. 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 24<sup>th</sup> September, 2024 and the subsequent Appeal herein are struck out for being unprocedural.
- b. THAT the Stay of Execution of the Ruling/Orders issued by the Hon. Gakuhi Chege on 22<sup>nd</sup> August, 2024 pending the hearing and determination in the interim issued to the Appellants/ Applicants are hereby vacated.
- c. THAT the Respondent shall have the costs of the Notice of Motion Application dated 24<sup>th</sup> September, 2024.

It is so ordered accordingly.

**RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS.....11<sup>TH</sup> .....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. Mr. Orlando Advocate for the Appellants.
- c. Mr. Abdirazak Advocates for Respondent.

