



**Noorbhai v Noorbhai (Environment & Land Case 106 of 2021)
[2024] KEELC 13784 (KLR) (11 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13784 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 106 OF 2021
LL NAIKUNI, J
DECEMBER 11, 2024**

BETWEEN

RUKIYA AHMED HASSANALI NOORBHAI PLAINTIFF

AND

ZAIN AHMED HASSANALI NOORBHAI DEFENDANT

RULING

I. Introduction

1. The Notice of Motion application before this Honorable Court for its determination is the one dated 4th December, 2023 filed by Rukiya Ahmed Hassanali Noorbhai, the Plaintiff/Applicant herein. It is brought under the provisions of Sections 1A,1B,3A & 95 of the *Civil Procedure Act* Cap. 21 and under the provision of Order 40 Rule 2; Order 50 Rule 6; Order 51 Rule 1 of the Civil Procedure Rules, 2010 and under Section 7 of the Appellant Jurisdictions Act Cap 9 and all enabling provisions of law of Kenya.
2. Upon service of the Application to Zain Ahmed Hassanali Noorbhai the Respondent herein, responded through a Replying Affidavit sworn on 15th October, 2024. The Honourable Court shall be dealing with it indepth at a later stage of the ruling hereof.

II. The Plaintiff/Applicant's case

3. The Plaintiff/Applicant sought for the following orders:-
 - a. Spent.
 - b. That this Honorable Court be pleased to stay execution of the Judgment and subsequent decree/Order issued on the 6th November, 2023 pending hearing and determination of this application inter-parties.



- c. That the Applicant be granted leave to file their Notice of Appeal out of time.
 - d. That the draft Notice of Appeal filed herein be deemed as duly filed upon payment of the requisite court fees/charges.
 - e. That this Honourable Court do make any other order it deem fit in the circumstance.
4. The Plaintiff/Applicant's application was based on the grounds, testimonial facts and the averments founded on the 11 Paragraphed Supporting Affidavit of RUKIYA AHMED HASSANALI NOORBHAI sworn and dated the same day as the application and three (3) annexures marked as "RAHN – 1 to 3" annexed thereto. She deponed that:-
- a. The Judgment on this matter was issued on the 6th November, 2023 and Notice of Appeal ought to have been lodged within 14 days from the date thereof. Annexed in the affidavit a copy of the Judgment marked as "RAHN - 1".
 - b. The delay was occasioned by the delay which occurred during the process of obtaining copy of Judgment from the Court to his office and obtaining Instructions to Appeal.
 - c. The said delay was inadvertent and not intended.
 - d. They were dissatisfied with the said judgment and intend to lodge an Appeal. Annexed and marked as "RAHN - 2" was a copy of the Notice of Appeal.
 - e. The Appeal had high chance of success
 - f. The Respondent would not be prejudiced if the said leave was granted.
 - g. They had applied for certified copies of proceedings and expect to have them expeditiously. Annexed a copy of letter requesting copy of proceeding marked as "RAHN - 3".
 - h. They had made the application within a reasonable time.
 - i. The affidavit was sworn in support of his application for stay pending appeal.

III. The Defendant/Respondent's case

5. The Defendant opposed the Application through a 11 Paragraphed Replying Affidavit sworn by ZAINUDDIN AHMED HASSANALI NOORBHAI, the Defendant herein on 15th October, 2024 where he averred that:-
- i. In response to Paragraphs 2 to 5 of the Supporting Affidavit, the Applicant had not explained the allegation that the failure to file the Notice of appeal on time was due to delay in the process of obtaining Judgement and had not tendered any proof thereof.
 - ii. In response to Paragraph 6 of the Supporting Affidavit, the Applicant had not shown how any intended appeal had high chances of success.
 - iii. In response to the contents of Paragraph 7 of the Supporting Affidavit, he averred that he would be greatly prejudiced as the subject judgment was rendered way back in November 2023, and a year down the line, the Applicant now sought to prolong the litigation of this matter before this Honorable Court.
 - iv. In response to Paragraphs 8 and 9, he averred that the proceedings were applied for a month after the judgment was rendered and similarly the subject Application was filed a month after the Judgement of the Court had been rendered.



- v. Despite having filed the subject Application late, the Applicant never had the same fixed for hearing up until the 16th of October 2024 and only served his Advocates with the said Application on the 1st of October 2024. Annexed in the affidavit a copy of the e-mail showing service of the Application, which was hereby marked as “A.”
- vi. In the foregoing, it could clearly be seen that the Applicant had not been expeditious in the matter in which she had behaved since the delivery of the judgment and since the filing of the subject Application.
- vii. He averred that he would be prejudiced should the subject Application be allowed, as the Applicant kept dragging him in Court despite this matter having been concluded for a period of a year now.
- viii. The subject Application lacked in merit and the same ought to be dismissed with costs.

IV. Submissions

6. On 16th October, 2024 in the presence of all the parties, this Court directed that the Notice of Motion application dated 6th December, 2023 by the Plaintiff/Applicant herein be canvassed by way of written submission. Unfortunately, by the time of penning down this ruling, the Honourable Court had not been able to access the written submissions by the parties herein. Pursuant to that the Honourable Court reserved 2nd December, 2024 for a ruling accordingly.

V. Analysis and Determination

7. I have carefully read and considered the pleadings herein by the Plaintiff/Applicant and the responses by the Defendant/Respondent, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
8. In order to arrive at an informed, just, equitable and reasonable decision, the Honourable Court has three (3) framed issues for its determination. These are:-
 - a. Whether the Notice of Motion application dated 4th December, 2023 seeking to stay execution of the Judgment and subsequent decree/Order issued on the 6th November, 2023 pending hearing and determination of the Appeal is merited?
 - b. Whether leave can be granted to appeal out of time.
 - c. Who will bear the Costs of Notice of Motion application dated 4th December, 2023.

ISSUE No. a). Whether the Notice of Motion application dated 4th December, 2023 seeking to stay execution of the Judgment and subsequent decree/Order issued on the 6th November, 2023 pending hearing and determination of the Appeal is merited.

9. Under this sub – heading, the Honourable Court shall be keenly assessing the merit of the substrata of this matter herein. The law concerning stay of execution pending Appeal is found under the provision of Order 42 Rule 6 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.”

10. Stay of execution pending appeal is a discretionary power bestowed upon this court by the law. At the very initial stage of creating Jurisprudence around this subject matter, 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.”

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* or in the interpretation of any of its provisions.

12. The provision of Section 1A (2) of the *Civil Procedure Act*, Cap. 21 provides that:-

“The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objectives are:-



“The just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”

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 “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...”

21. Having caused an elaborate expose on the legal parameters of the subject matter, I now wish to apply them to the instant case. The Plaintiff/Applicant herein filed an application dated 4th December, 2023 seeking stay of execution of the Judgment delivered by this Court at Mombasa on 6th November, 2023 pending the hearing and determination of the appeal in the Court of Appeal. The 30 days period granted by the trial court on 6th November, 2023 during the delivery of the aforesaid Judgment was set to lapse on 6th December, 2023. Unless this application seeking stay of execution pending appeal is heard urgently and stay granted, the appeal herein shall be rendered nugatory thereby occasioning substantial loss and prejudice to the Appellant.
22. The Intended execution exercise according to the Applicant would render the appeal filed herein totally nugatory and he would thereby suffer irreparable and substantial losses as the Appellant’s tools of trade have since been in the possession of the Respondent’s premises.
23. 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 Applicant unless stay of execution is granted; and thirdly such security as the court orders for the due performance of such decree or order as may ultimately be binding on them has been given by the Applicant. I find the reasons advanced by the Applicant to be sufficient for the grant of stay of execution pending appeal.
24. Regarding the pre-requisite in Order 42 Rule 6, that is substantial loss occurring to the Applicant, the court has already referred the consideration to be made in the case of “Kenya Shell Limited –Versus - Benjamin Karuga Kigibu & Ruth Wairimu (Supra)”. I find that the Applicant has proved that she will suffer substantially if the orders for stay of the execution are not granted as prayed.
25. The second issue to determine is where the application for stay of execution was made without inordinate delay. From the record, the Judgment being appealed against was delivered on 6th November, 2023 and the application herein was filed on 4th December, 2023. This application was filed after about one month and 18 days after the ruling. In this Honourable Court’s opinion, the application was made timeously without any delay. The application was therefore made and filed expeditiously and without undue delay.
26. On the last condition as to provision of security, I find that th provision of Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. Has made no



provisions for security in her application. Further I take note that the suit property was not equated monetarily.

27. However, this court can make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.

28. In the case of “Aron C. Sharma – Versus - Ashana Raikundalia T/A Rairundalia & Co. Advocates” the court held that:

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

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

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

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

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



31. As already demonstrated in the case of:- “James Wangalwa & Another – Versus - Agnes Naliaka Cheseto (Supra)” the three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. It is my finding that the Applicant herein, though they brought this Application without undue delay and adequately demonstrated the substantial loss that they would suffer as stipulated by sub-rule 2b.
32. The end result is that I grant the order for stay of execution of the Judgment of this Court delivered on 6th November, 2023.

ISSUE No. b). Whether leave can be granted to appeal out of time

33. Under this sub - title, the Court shall determine the merits of the application with regards to extension to file an appeal out of time. Section 79G of the *Civil Procedure Act* provides that appeals originating from the subordinate court should be filed within thirty (30) days from the date of the decree or order appealed against. Section 95 of the said Act gives the court discretion to extend the time as it deems fit even if the time originally fixed has expired.
34. As a matter of broad information with regarding to enlargement of time to file appeals out of time, the provision of Section 79G of the *Civil Procedure Act*, Cap. 21 provides as follows:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty 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:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
35. The provision of Section 95 of the *Civil Procedure Act* provides thus:-

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”
36. The principles to be considered in exercising the court’s discretion on whether or not to enlarge time to file appeal were set out in the case of “Leo Sila Mutiso – Versus - Rose Hellen Wangeri Mwangi Civil Appeal 255/ 1997”, the court, in considering the exercise of discretion to extend time, held as follows: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay. Secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”
37. These principles were also reiterated in the case of:- “First American Bank of Kenya Limited – Versus - Gulab P. Shah & Others HCC 2255/2000 [2002] IEA 65” as follows: -
 - 1) The explanation if any, for the delay;
 - 2) The merits of the contemplated action, whether the appeal is arguable;



- 3) Whether or not the respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.
38. This Court will therefore proceed to address each limb of the principles outlined in the cases above and establish whether the Applicant has satisfactorily met each of the said principles. On the length of the delay and the explanation if any. The Applicant filed this present application on 4th December, 2023 after the court delivered its judgment and subsequent decree/Order issued on the 6th November, 2023. The Applicant gave her reason for the delay as being occasioned by the delay which occurred during the process of obtaining copy of Judgment from the Court to his office and obtaining Instructions to Appeal. According to them the said delay was inadvertent and not intended.
39. Even though, the Plaintiff/Applicant never demonstrated this allegations of not being able to obtain the Judgment and proceedings from the trial Court, there is no maximum or minimum period of delay set by the law, anyone seeking this relief must satisfactorily explain the cause of the delay. From the delivery of the Judgment to the filing of the instant Application is about more than a month. This in my view does not amount to inordinate delay. Further, the explanation given by the Applicant is sufficient. Therefore, I find that the Application was filed without undue delay.
40. On the issue of the chances of the success of the intended appeal. I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case at this stage. Having that in mind, I wish to state that from the Draft Memorandum of Appeal, one of the issues the Applicant intends to raise is on the utmost critical importance to the Appellant's Business interests.
41. The third limb is whether the Respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the Applicant. The answer is in the affirmative, I find that no prejudice will be caused to the Respondent that cannot be compensated by an award of costs if the Application is allowed.
42. The principles laid down by the Supreme Court in "Nicholas Kiptoo Korir Arap Salat – Versus - IEBC & 7 Others [2014] eKLR" are pertinent in this case; namely:

“(T)he underlying principles a court should consider in exercise of such discretion include:

1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. whether there will be any prejudice suffered by the Respondent if the extension is granted;
6. Whether the application has been brought without undue delay.
7.”



43. The provision of Section 7 of the *Appellate Jurisdiction Act*, Cap. 9 of the Laws of Kenya which provides:-

“Section 7 Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a Judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.”

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

44. In reliance on the provisions of Section 7 of the *Appellate Jurisdiction Act*, the court in the case of “Diamond Trust Bank of Kenya Limited – Versus - Invesco Assurance Company Limited and Another [2021]eKLR”, held that:-

“ 10. In view of the above provisions, it is explicitly clear that the High Court may extend time for giving Notice of Intention to Appeal from a judgment of the High Court and in my view the said Section 7 does not need any more than a literal interpretation. Therefore, Section 7 of the *Appellate Jurisdiction Act* clearly confers to the High Court jurisdiction to extend time for the filing of a Notice of Appeal and to decide otherwise is akin to completely disregarding a clear provision in the law.”

45. The next issue for consideration by the court is whether it has discretion to extend the time within which to lodge and file an appeal. On this, reliance is placed on the principles that were set out by the Supreme Court in the case of “Nicholas Kiptoo Arap Korir Salat (Supra).
46. Guided by the above principles, the upshot of the foregoing is that the orders sought by the Applicant; for leave to file the Appeal out of time is merited and for that reason Prayer no. (c) and (d) in the Notice of Motion dated 4th December, 2023 is allowed.

ISSUE No. c). Who will bear the Costs of Notice of Motion application dated 4th December, 2023.

47. 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” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).
48. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In this case, this Honourable Court has reserved its discretion in not awarding costs.

VI. Conclusion and Disposition.

49. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to Preponderance of Probabilities and the balance of convenience. Ultimately in view



of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-

- a. That the Notice of Motion application dated 4th December, 2023 be and is hereby found to have merit and hence allowed subject to the fulfilment of the Pre – Conditions stated herein.
- b. That this Honourable Court do hereby issue an order to stay the execution of its decree arising from the Judgment of this Honorable delivered on 6th November, 2023 pending the hearing and determination of the Intended appeal in the Court of Appeal.
- c. That an order be and is hereby made granting the Applicant to file their Notice of Appeal out of time.
- d. That the draft Notice of Appeal filed herein be deemed as duly filed upon payment of the requisite court fees/charges.
- e. That there shall be no orders as to costs.

It is ordered accordingly.

RULING DELIVERED THROUGH THE MISCROFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 11TH 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. Ondieki Advocate holding brief for M/s. Kyalo Advocate for the Plaintiff/Applicant.
- c. Mr. Hassan Advocate for the Defendant/Respondent.

