



Raas Residents Limited v M Dalmar Trading Company Limited & another (Environment and Land Appeal E046 of 2023) [2023] KEELC 22486 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22486 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E046 OF 2023**

**JO MBOYA, J
DECEMBER 20, 2023**

BETWEEN

RAAS RESIDENTS LIMITED APPELLANT

AND

M DALMAR TRADING COMPANY LIMITED 1ST RESPONDENT

MARY WAMBUI GAKIBE 2ND RESPONDENT

RULING

Introduction and Background

1. The Appellant/Applicant has approached the Honourable court vide Notice of Motion Application dated the 15th November 2023; brought pursuant to inter-alia, the provisions of Order 42 Rule 6 (21) of the Civil Procedure Rules, 2010; and in respect of which same has sought various reliefs, whose details are as hereunder;
 - i.Spent.
 - ii. That pending the Inter-Partes hearing and determination of this Application, this Honourable Court be pleased and/or issue an order directing a stay of proceedings, further pronouncement, and/or actions in Milimani MCCC No. E5742 of 2022; Mary Gakibe Wambui & M. Dalmar Trading Company Ltd & Another.
 - iii. That pending the Inter-Partes hearing and determination of this Application, this Honourable Court be pleased and/or issue an order directing a stay of execution and/or implementation of the status quo orders issued on the 31st May 2023 by the Hon. Chief Magistrate, in Milimani MCCC No. E5742 of 2022; Mary Gakibe Wambui & M. Dalmar Trading Company Ltd & Another.



- iv. That pending the hearing and determination of this Appeal, this Honorable Court be pleased to and/or do issue an order directing a stay of proceedings, further pronouncement, and/or actions in Milimani MCCC No. E5742 of 2022; Mary Gakibe Wambui & M. Dalmar Trading Company Ltd & Another.
 - v. That pending the hearing and determination of this appeal, this honorable Court be pleased to and/or do issue an order directing a stay of execution and/or implementation of the status quo orders issued on the 31st May 2023 by the Hon. Chief Magistrate, in Milimani MCCC No. E5742 of 2022; Mary Gakibe Wambui & M. Dalmar Trading Company Ltd & Another.
 - vi. That this Honourable court be pleased to grant any other orders as it may deem fit and just in the interests of justice and fairness.
 - vii. That costs of this Application be provided for.
2. The subject Application is premised and/or anchored on various grounds which have been alluded to and enumerated in the body thereof. Furthermore the Application is supported by the affidavit of Omar Mohamed Hussein sworn on even date and a Further affidavit sworn on the 6th December 2023, respectively; and to which the deponent has annexed a plethora of documents in support of the Application.
 3. Upon being served with the subject Application, the 1st Respondent herein filed a Replying affidavit sworn on the 4th December 2023; and in respect of which same has annexed/exhibited one document, namely, a Letter dated the 15th September 2023, wherein it is indicated that the dispute between the 1st and 2nd Respondents herein is currently being dealt with by an arbitrator.
 4. On the other hand, the 2nd Respondent herein though served with the current Application, same has neither filed Grounds of opposition nor Replying affidavit.
 5. Moreover, the instant Application came up for hearing on the 11th December 2023, whereupon the advocate for the respective Parties covenanted to canvass and ventilate the subject Application vide oral submissions.
 6. Consequently and in this regard, the Application thereafter proceeded by way of oral submissions and which submissions form part of the record of the Honourable court.

Parties' Submissions:

- a. Applicant's Submissions
7. The Applicant herein adopted and relied on the grounds enumerated in the body of the Application and thereafter reiterated the averments contained in the Supporting affidavit, as well as the Further affidavit sworn by Omar Mohamed Hussein.
 8. Furthermore, Learned counsel for the Applicant thereafter raised, highlighted and amplified four [4] pertinent issues for consideration and determination by the Honourable court.
 9. Firstly, Learned counsel for the Applicant has submitted that the 2nd Respondent herein filed and/or lodged a suit before the Chief Magistrate's Court as against the 2nd Respondent; and which suit touches on and/or concerns the legality of the termination of the lease agreement hitherto entered into between the said 1st Respondent and the 2nd Respondent.



10. Besides, Learned counsel contended that upon being served with the pleadings filed by and on behalf of the 2nd Respondent, the 1st Respondent duly entered appearance and filed a counterclaim, raising a plethora of issues. However, Learned counsel has highlighted that the counterclaim by the 1st Respondent does not touch on and/or concern ownership of the suit property.
11. Secondly, Learned counsel for the Applicant has submitted that whilst dealing with the matter pending before the Chief Magistrate's Court, the Learned Chief Magistrate (sic) proceeded to and granted various orders including an order for maintenance of status quo which was issued on the 31st May 2023; and whose effect was to stop and/or restrain the Applicant herein from continuing with the construction on the suit property, which had been sold and transferred to the Applicant.
12. Arising from the foregoing, Learned counsel for the Applicant has submitted that the Applicant was thus constrained to file an Application seeking to be joined in the suit and/or proceedings before the Chief Magistrate's Court, so as to have the requisite opportunity to ventilate her position.
13. Be that as it may, Learned counsel for the Applicant has submitted that the Learned Chief Magistrate proceeded to and rendered a ruling on the 6th November 2023 touching on various applications, inter-alia, an application dated the 30th October 2023, which sought to cite the Applicant herein for contempt of court, whereas the said application had neither been canvassed nor argued before the Chief Magistrate or at all.
14. Thirdly, Learned counsel for the Applicant has submitted that the suit property which forms the subject of the proceedings before the Chief Magistrate's Court is valued in the sum of more than Kes.110, 000, 000/= Only, which figures [monetary value] is well within the knowledge of the Chief Magistrate in terms of the various valuation Reports filed; but nevertheless, the Learned Chief Magistrate has insisted on entertaining and adjudicating upon the dispute, irrespective of [sic] lack/want of Jurisdiction.
15. Consequently and in the premises, Learned counsel for the Applicant has submitted that the continuation of the proceedings before the Chief Magistrate, despite the contention of lack of Jurisdiction, is bound to render the entire proceedings and any resultant order arising therefrom void and a nullity ab initio.
16. Fourthly, Learned counsel for the Applicant has submitted that the dispute which is currently being entertained by the Learned Chief Magistrate and which touches on the suit property, namely, L.R No. 36/VII/435, located in Eastleigh, within the City of Nairobi, has been the subject of a plethora of suits before the Environment and Land Court ; as well as the Court of Appeal.
17. Nevertheless, Learned counsel for the Applicant has contended that despite the issues concerning the various suit, being brought to the attention of the Chief Magistrate, same has disregarded the decisions emanating from the Superior Court and same [chief magistrate], is still intent on proceeding with the hearing of the matter before her, which is likely to culminate into issuance of contradictory orders.
18. Further and in addition, Learned counsel for the Applicant has submitted that in her [Chief Magistrate's] zeal to proceed with and entertain the dispute in respect of the suit property, the Learned Chief Magistrate has even proceeded to and scheduled a visitation to the Locus in quo on the 21st November 2023, even before the question of Jurisdiction has been addressed and resolved.
19. Arising from the foregoing, Learned counsel for the Applicant has submitted that there is need to stay the proceedings and/or further proceedings, inter-alia the proceedings pertaining to contempt/punishment of the Applicant for contempt, pending the hearing and determination of the instant appeal.



20. Further and in any event, Learned counsel for the Applicant has added that if the proceedings before the Chief Magistrate court are not stayed, in the manner sought, then the Learned Chief Magistrate would proceed and arrogate unto herself Jurisdiction, which she [chief magistrate], does not possess, in the first instance.
21. In a nutshell, learned counsel for the Applicant has thereafter implored the Honourable court to find and hold that the appeal beforehand raises salient and pertinent issues, inter-alia the Doctrine of Res-Judicata, abuse of the court process and lack of Jurisdiction on the part of the Chief Magistrate, which require due interrogation by this court, before any further proceedings can be taken or at all.
 - b. 1st Respondent's Submissions:
22. The 1st Respondent herein adopted and reiterated the contents of the Replying affidavit sworn by one, namely, Mustapha Abdullahi Omar, on the 4th December 2023; and thereafter raised and highlighted four [4] salient issues for consideration by the Honourable court.
23. First and foremost, Learned counsel for the 1st Respondent has submitted that Parties are bound by their pleadings and hence it behooves the Applicant herein to confine herself to the issues that have been raised and impleaded in the Application beforehand.
24. Nevertheless, Learned counsel for the 1st Respondent has submitted that the Applicant herein has proceeded to and canvassed before the Honourable court issues which do not form part of the current Application and hence, Learned counsel for the 1st Respondent has implored the court to disallow any issue(s) which falls outside the purview of the current Application.
25. Secondly, Learned counsel for the 1st Respondent has submitted that the dispute between the 1st Respondent and the 2nd Respondent, which was raised before the Chief Magistrate's court vide Milimani CMCELC E5742 of 2022, has since been referred to arbitration and hence the said dispute is no longer alive before the Chief Magistrate's court or at all.
26. Thirdly, Learned counsel has submitted that an order of stay of proceedings, like the one being sought for by the Applicant is an Equitable order and hence it behooves any Party, the Applicant not exempted, to approach the Honourable court with clean hands and not otherwise.
27. Be that as it may, Learned counsel for the 1st Respondent has submitted that the Applicant herein engaged in the transactions touching on and concerning the suit property during the pendency of the proceedings vide Milimani CMCELC No. 5742 of 2022; and hence the sale to and in favor of the Applicant was undertaken in contravention of the doctrine of Lis-pendens.
28. Owing to the foregoing, Learned counsel for the 1st Respondent has thereafter contended that the Application by and on behalf of the Applicant is wrought with and replete of mala fides.
29. Fourthly, Learned counsel has submitted that the suit property, which is the subject of the proceedings before the Chief Magistrate's court, is a property that was condemned and hence the value of the property has neither been ascertained nor authenticated.
30. In the premises, Learned counsel for the 1st Respondent has added that the question of the value of the suit property [namely, the monetary value thereof], is yet to be determined and hence same cannot be the basis of seeking an order of stay of proceedings.
31. Based on the foregoing, Learned counsel for the 1st Respondent has therefore contended that the Applicant herein, who is stated to have approached the court with unclean hands, has neither



established nor demonstrated any lawful basis to warrant the grant of the orders of stay of proceedings or at all.

32. Arising from the foregoing, Learned counsel for the 1st Respondent has therefore implored the court to find and hold that the current Application, is not only misconceived, but same is legally untenable.
33. Consequently and in this regard, Learned counsel has impressed upon the court to dismiss the Application with costs to the 1st Respondent.
 - c. 2nd Respondent's Submissions:
34. As pointed out elsewhere hereinbefore, the 2nd Respondent has neither filed any Grounds of opposition nor Replying affidavit to the Application beforehand.
35. Similarly, though Learned counsel for the 2nd Respondent was present in court, when the Application under reference was canvassed, same however intimated to the court that she [counsel], would leave the matter to the Honourable court.
36. Consequently and in view of the foregoing, the determination of the instant Application shall be informed by the submissions rendered and/or ventilated on behalf of the Applicant and the 1st Respondent, respectively.

Issues For Determination

37. Having reviewed the Notice of Motion Application dated the 15th November 2023; together with the Supporting affidavit and the Further supporting affidavit thereto; and upon taking into account the Response filed thereto; and upon consideration of the oral submissions rendered on behalf of the Applicant and the 1st Respondent, respectively; the following issues do arise and are thus germane for determination;
 - i. Whether the current Application has been filed and/or mounted timeously and without unreasonable delay.
 - ii. Whether the Applicant has established sufficient cause and/or basis as a precursor to invoking the Jurisdiction of the court.
 - iii. Whether the orders of stay of proceedings and or further proceedings ought to be granted or otherwise.

Analysis And Determination:

Issue Number 1

Whether the current Application has been filed and/or mounted timeously and without unreasonable delay.

38. It is common ground that the Application before the court touches on and/or concerns grant of stay of proceedings and/or further proceedings, pending the hearing and determination of the instant appeal.
39. To the extent that the Application beforehand touches on and/or concerns the grant of an order of stay of proceedings, it is imperative to state and observe that such an Application is by law required to be filed and/or lodged timeously and without undue delay. [See Order 42 Rule 6(1) and (2) of the Civil Procedure Rules 2010].
40. Based on the foregoing, it is therefore incumbent upon the Honourable court to interrogate and ascertain whether the instant application has been filed timeously and with due promptitude, or otherwise.



41. To start with, it is not lost on the court that the ruling which is sought to be appealed against was rendered on the 6th November 2023 and upon the delivery of the said ruling, the Applicant herein (sic) felt aggrieved and/or dissatisfied and thereafter proceeded to and lodged the Memorandum of appeal dated the 15th November 2023.
42. Furthermore, the Applicant herein also proceeded to and filed the current Application which is similarly dated the 15th November 2023. Quiet clearly, the instant Application was filed contemporaneously with the appeal.
43. Arising from the foregoing, it is evident that the Application seeking for stay of proceedings was filed and mounted on the same date, namely, when the appeal before the court, which anchors the application, was filed.
44. Instructively and for good measure, there is no gainsaying that the instant Application was thus filed and/or mounted timeously, with due promptitude, and thus without undue delay or at all.

Issue Number 2

Whether the Applicant has established sufficient cause and/or basis as a precursor to invoking the Jurisdiction of the court.

45. Having found and held that the instant Application was filed and/or mounted without unreasonable delay, the next hurdle to be surmounted by the Applicant touches on and/or concerns whether there exists sufficient cause and/or basis, to warrant the invocation of the Jurisdiction of the Honourable court to grant an order of stay of proceedings.
46. Before venturing forward and determining whether or not, the Applicant has established and/or demonstrated the existence of sufficient cause or otherwise, it suffices to discern, decipher and/or ascertain the import, meaning and tenor of what constitutes sufficient cause.
47. Without belaboring the point, it suffices to point out that what constitutes sufficient cause was adverted to and elaborated upon by the court in the case of Wachira Karani versus Bildad Wachira [2016] eKLR, where the court held thus;

“It’s important for me to mention that in the above case, the court defined what constitutes sufficient cause and in this respect the following paragraph is highly relevant to the issues before me:-

“Once the defendant satisfies the court on either, the court is under duty to grant the application and make the order setting aside the ex parte decree, subject to any conditions the court may deem fit. However, what constitutes ‘sufficient cause’ to prevent a defendant from appearing in Court, and what would be ‘fit conditions’ for the court to impose when granting such an order, necessarily depend on the circumstances of each case.

Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions”

The applicant is required to satisfy to the court that he had a good and sufficient cause. What does the term “sufficient cause” mean.? The Court of Appeal of Tanzania in the case of The



Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others[9] discussing what constitutes sufficient cause had this to say:-

“It is difficult to attempt to define the meaning of the words ‘sufficient cause’. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant” (Emphasis added)

In Daphene Parry vs Murray Alexander Carson[10] the court had the following to say:-

‘Though the court should no ‘doubt’ give a liberal interpretation to the words ‘sufficient cause,’ its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy,”(Emphasis added)

Examining the provisions relating to setting aside ex parte judgements, Justice Adoyo of the High Court of Uganda in Transafrica Assurance Co Ltd vs Lincoln Mujuni[11]stated that:-

“The rationale for this rule lies largely on the premise that an ex parte judgement is not a judgement on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing”

The well established principles of setting aside interlocutory judgements were laid out in the case of Patel vs East Africa Cargo Handling Services[12]where Duffus,V.P. stated;

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication”

The fact that setting aside is a discretion of the court is not disputed. What is contested is whether the applicant has demonstrated “sufficient cause” to warrant the exercise of the courts discretion in its favour. I again repeat the question what does the phrase “Sufficient cause” mean. The Supreme Court of India in the case of Parimal vs Veena observed that:-

“sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously”

48. From the elaborate excerpt cited and reproduced in the foregoing paragraph, what becomes evident and apparent is that sufficient cause denotes the existence of a genuine cause being pursued in good faith by the Claimant/Applicant, with a view to attracting a determination/adjudication by the court.



49. In view of the foregoing, this Honourable court is therefore called upon to interrogate whether the Applicant beforehand, has indeed placed before the court a genuine case/claim, worthy of interrogation by the court.
50. In my humble albeit considered view, the Applicant herein has raised a plethora of issues, touching on and/or concerning, inter-alia, whether the Learned Chief Magistrate is seized of the requisite Jurisdiction to entertain the impugned proceedings, touching on a property, which (sic) is contended to exceed her pecuniary Jurisdiction.
51. Furthermore, it has also been contended that the issue which is being canvassed before and entertained by the Chief Magistrate, touches on issues which have hitherto been ventilated before the Superior courts, namely, the Environment and land court; as well as the Court of Appeal, respectively.
52. Premised on the foregoing, the Applicant herein has highlighted that there is a likelihood that the Learned Chief Magistrate is entertaining a dispute, which has hitherto been adjudicated upon by Superior courts; and hence, same is likely to bring the Rule of law into disrepute.
53. Other than the foregoing, there is also the question pertaining to the import and tenor of Jurisdiction and more pertinently, that where proceedings are taken by a court without Jurisdiction, then the resultant proceedings and the incidental orders, if any, are a nullity and amounts to nothing.
54. Notably, the issues which the Applicants intends to raise and canvass in the appeal beforehand are ex-facie critical and paramount. Consequently and in this regard, there is apparent basis to allow the highlighted issues to be canvassed and thereafter determined vide the Instant Appeal, before the suit in the lower court can be allowed to proceed, [if at all].
55. To my mind, the issues that have been alluded to in the preceding paragraphs, truly represent genuine and bona fide issues, worthy of due investigations by this court. Consequently and in this regard, it is evident that the Applicant has established sufficient cause.

Issue Number 3

Whether the orders of stay of Proceedings and or Further proceedings ought to be granted or otherwise.

56. One of the pertinent issues, which the Appellant/Applicant seeks to highlight before this court on appeal relates to whether or not the Chief Magistrate can entertain and adjudicate upon a matter whose monetary value is indicated to be in region of Kes.110, 000, 000/=Only.
57. Other than the foregoing, there is also the incidental question as to whether the Chief Magistrate's court was seized of the requisite Jurisdiction to entertain the dispute and thereafter (sic) purport to invoke Section 7 of the *Arbitration Act*, 1995; and refer same to arbitration.
58. Pertinently, it is not lost on this court that Jurisdiction is a critical and integral question/issue, which ought to be addressed and disposed of at the very earliest. Simply put, Jurisdiction is a threshold question and hence whenever same is raised, then it behooves the designated Judicial officer to address same at once without postponing same to either to undertake further evidence; or to visit locus in quo, in the manner purported by the Learned Chief Magistrate herein.
59. To underscore the importance of Jurisdiction and the need to address same at the very earliest, it suffices to cite and highlight the holding of the Court of Appeal in the case of Owners of Motor Vessel Lilian S vs Caltex Oil (K) Ltd (1989)eKLR, where the court stated and held as hereunder;

“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The



limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist.

Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

60. Furthermore, the role played by Jurisdiction in the proceedings before the court was also highlighted and amplified by the Court of Appeal in the case of Phoenix of E.A. Assurance Company Limited versus S. M. Thiga t/a Newspaper Service [2019] eKLR, where the court held as hereunder;

1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?
2. . In common English parlance, ‘Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae. It is for this reason that this Court has to deal with this appeal first as the result directly impacts Civil Appeal No.6 of 2018 which is related to this one. We shall advert to this issue later. In the meantime, it is important to put this appeal in context.

61. Similarly, the question of Jurisdiction was also adverted to and elaborated upon by the Supreme Court of Kenya in the case of Samuel Kamau Macharia versus Kenya Commercial Bank Ltd (2012)eKLR, is apt and succinct.

62. For coherence, the Supreme Court stated and held thus;

- (68) A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.

This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits.

It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution*



confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

63. Arising from the foregoing, there is therefore no gainsaying that it behooves each and every court, [the Chief Magistrate not excepted], to ascertain and discern whether same (court) is seized of the requisite Jurisdiction, before venturing to entertain and adjudicate upon a particular dispute.
64. Additionally, it is worth recalling that where the question of Jurisdiction is raised and/or arises by implication from the pleadings filed by the Parties, then the court must address and determine the issue of Jurisdiction, without postponing same pending production of further evidence or for that matter, undertaking a visitation to the locus in quo.
65. Be that as it may, in respect of the dispute before the Chief Magistrate's court, the value of the suit property, which is at the core of the dispute pertaining to Jurisdiction, us stated to exceed the monetary Jurisdiction of the said Court.
66. In any event, the Applicant contends that there two [2] sets of valuation Report(s), which have been placed before the court and which clearly show that the suit property is valued in excess of Kes.110, 000, 000/= Only, but despite the existence of the valuation report(s), the Chief Magistrate is said to be still keen to entertain and adjudicate upon the matter.
67. Further and in addition, it has also been contended that the counterclaim filed by and on behalf of the 1st Respondent before the Chief Magistrate's court is also beyond the monetary Jurisdiction of the said court by dint of Section 7 of the Magistrate's Court Act, 2015.
68. Despite the foregoing, it has been reported that the Learned Chief Magistrate is neither keen nor desirous to address and dispose of the question of Jurisdiction and instead same is keen to undertake a visitation to the locus in quo, with a view to, inter-alia, determining the value of the suit property.
69. To my mind, it was incumbent upon the Learned Chief Magistrate to address the question of Jurisdiction, from the onset and in any event, without postponing the said question to a later date.
70. Consequently and in view of the foregoing, it is crystal clear that the question/issue of Jurisdiction, which is one of the issue to be canvassed on appeal, is indeed a very pertinent issue and hence, there is need to grant stay of proceedings, pending the determination of the said pertinent issue.
71. Before departing from this particular issue, there two [2] issues and/or questions that merits mentioned and a short address.
72. Firstly, there is the question that if the impugned proceedings before the Chief Magistrate are allowed to proceed and thereafter a determination is made that same (chief magistrate) was devoid of Jurisdiction, then the totality of the proceedings taken, [if any], shall amount to annulity.
73. Secondly, it is not lost on this Honourable court that stay of proceedings is such a grave order, which ought to be issued sparingly and with necessary circumspection, given its implications on the Right to Fair Hearing as envisaged under Article 50(1) of *the Constitution*, 2010, as read together with Article 159(2) (b) of *the Constitution* 2010.
74. Furthermore, I am also alive to the dicta espoused by the court in the case of Kenya Wildlife Service versus James Mutembei [2019] eKLR, where the court stated and held thus;

“Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without



delay and overall, right to fair trial. Therefore the test for stay of proceeding is high and stringent. See Ringera J in the case of Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000 persuasively stated thus;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added)

75. Notwithstanding the caution that an order of stay of proceedings, ought to be granted sparingly and with due circumspection, it is worthy to underscore that the court is still seized of the requisite discretion to decree and grant an order of stay of proceedings, where the circumstances necessitate.
76. Furthermore, it is also important to underscore that prior to and before granting an order of stay of proceedings, the Honourable court is called upon to undertake a delicate balance between the competing interests of the Parties, but at all times endeavoring to foster and cultivate the interests of Justice.
77. Consequently and in respect of the instant matter, I hold the firm view that the interests of justice would be better served by granting an order of stay and thus averting the continuation of the proceedings before the Chief Magistrate’s court, whereas the question of Jurisdiction is outstanding and pending determination.
78. To surmise, I therefore come to the conclusion that the Applicant herein has duly established and demonstrated a lawful basis, to warrant the exercise of discretion by granting the orders of stay of proceedings and/or further proceedings, pending the hearing and determination of the instant Appeal.

Final Disposition

79. Having analyzed the various issues for determination, [whose details were highlighted elsewhere in the body of the Ruling], it must have become crystal clear that the Appellant/Applicant has duly established and demonstrated the requisite ingredients to warrant the grant of the orders sought.
80. Consequently and in the premises, the court finds and holds that the Application dated the 15th November 2023; is meritorious and thus worthy of being allowed.
81. In a nutshell, the court proceeds to and do hereby make the following orders;
 - i. The Application dated the 15th November 2023; be and is hereby allowed in terms of prayer number (iv), namely, that there be and is hereby granted an order of stay of proceedings and/or issued an order directing a stay of proceedings, further pronouncement, and/or actions in Milimani MCCC No. E5742 of 2022; Mary Gakibe Wambui & M. Dalmar Trading Company Ltd & Another, pending the hearing and determination of the appeal.
 - ii. Costs of the Application shall abide the outcome of the appeal.



- iii. Furthermore, the Applicant herein is ordered and directed to procure the typed proceedings and thereafter to file the Record of Appeal within 60 days from the date hereof [excluding the exempted timelines in terms of Order 50 of the Civil Procedure Rules].
- iv. Thereafter the Appeal shall be subject to directions in accordance with the provisions of Order 42 Rule 13 of the Civil Procedure Rules 2010, on a date to be agreed upon.
- v. Either Party shall be at liberty to apply.

82. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson - Court Assistant.

Mr Mohammed Billow h/b for Mr. Peter Muchoki for the Appellant/Applicant.

Mr. S. Nyaberi for the 1st Respondent.

N/A for the 2nd Respondent**

