Omanwa & 4 others v Maina ; Maina v Omanwa & 4 others Counter Claim (Environment & Land Case E078 of 2022) [2023] KEELC 22412 (KLR) (13 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22412 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E078 OF 2022

JO MBOYA, J

DECEMBER 13, 2023

HEDRICK MASAKI OMANWA.....PLAINTIFF

-VERSUS-

JULIUS KANYUKU.....1ST DEFENDANT

CYRUS KIBERA MAINA.....2ND DEFENDANT

EMBAKASI RANCHING CO. LTD.....3RD DEFENDANT

AND

IN THE COUNTERCLAIM

BETWEEN

CYRUS KIBERA MAINA ..... COUNTER CLAIMER

AND

HEDRICK MASAKI OMANWA .. 1ST DEFENDANT TO THE COUNTERCLAIM

EMBAKASI RANCHING CO LTD .... 2ND DEFENDANT TO THE COUNTERCLAIM

NATIONAL LAND COMMISSION .... 3RD DEFENDANT TO THE COUNTERCLAIM

CHIEF LAND REGISTRAR ..... 4TH DEFENDANT TO THE COUNTERCLAIM

HON ATTORNEY GENERAL ..... 5TH DEFENDANT TO THE COUNTERCLAIM

RULING

Introduction and Background:

1. Vide Notice of Motion Application dated the 19th October 2023, the 1st and 2nd Defendants/ Applicants herein have approached the Honorable court seeking for the following reliefs; [verbatim]:

   i. .....Spent

   ii. That this Honorable Court be pleased to grant an order of stay of the hearing and all Further proceedings in respect of the Instant matter.

   iii. That the Honorable Court be pleased to grant an order of stay of the hearing and all Further proceedings in this suit pending the hearing and determination of Nairobi Court of Appeal Civil Appeal No. E720 of 2023 (Cyrus Kibera Maina & Another vs Hedrick Masaki Omanwa and Others).

   iv. That the Honorable court be pleased to grant such other orders and make such other directions as it may deem fit and appropriate in the circumstances.

   v. That costs of this Application be provided for.

2. The instant Application is premised and anchored on a plethora of grounds, which have been enumerated at the foot of the Application. Furthermore, the Application is supported by the affidavit of the 2nd Defendant/Applicant sworn on even date; and to which the Deponent has annexed one [1] document, namely, a copy of the Memorandum of Appeal filed before the Court of Appeal.

3. Upon being served with the instant Application, the Plaintiff/Respondent proceeded to and filed a Replying affidavit sworn on the 3rd November 2023; and in respect of which, the Deponent has contended, inter-alia, that the current Application is merely intended to delay, obstruct and/or otherwise defeat the expeditious hearing and determination of the suit.

4. Be that as it may, the instant matter was scheduled for and indeed came up for hearing on the 19th October 2023, wherein it transpired that the 1st and 2nd Defendants had filed the instant Application. Consequently and in the premises, it became necessary to issue directions pertaining to and/or concerning the hearing and disposal of the Application beforehand.

5. Furthermore, it suffices to state that the advocate for the Parties agreed to ventilate and/or canvass the instant Application by way of written submissions. In this regard, the court thereafter proceeded to and circumscribed the timeline for the filing and exchange of the written submissions.

6. Pursuant to and in line with the directions issued by the Honourable court, the 1st and 2nd Defendants/ Applicants proceeded to and filed written submissions dated the 13th November 2023; whilst the Plaintiff/Respondent filed written submissions dated the 21st November 2023.

7. For coherence, both sets of written submissions are on record.

Parties' Submissions:

a. Applicants' Submissions:

8. The Applicants' herein adopted the grounds at the foot of the Application, as well as the averments contained in the body of the supporting affidavit; and thereafter same proceeded to and highlighted four [4] salient and pertinent issues for consideration by the Honourable court.

9. Firstly, Learned counsel for the Applicants has submitted that upon the delivery of the Ruling which was rendered on the 11th May 2023, the Applicants herein felt aggrieved and/or dissatisfied and thereafter same proceeded to and filed a Notice of Appeal against the impugned Ruling.

10. Additionally, Learned counsel for the Applicants has submitted that other than the filing and service of the Notice of Appeal, the Applicants herein have since proceeded to and lodged the Substantive Appeal, namely, Court of Appeal Civil Appeal No. E720 of 2023, which appeal is pending hearing and determination.

11. On the other hand, Learned counsel for the Applicant has submitted that the appeal which has since been filed and/or mounted by the Applicants herein, raises substantive and arguable issues, which would require investigations/ interrogation by the Honorable Court of Appeal.

12. Further and in any event, Learned counsel for the Applicants has contended that whilst appraising the argueability of the appeal before the Court of Appeal, this court should take cognizance of the fact that even the existence of one [1] bona fide arguable ground, suffices for purposes of establishing the existence of a prima facie case.

13. Secondly, Learned counsel for the Applicants has similarly submitted that the instant Application has been filed and/or mounted without undue and/or inordinate delay or at all.

14. Instructively, Learned counsel for the Applicants has contended that same procured and obtained the proceedings from the Deputy Registrar on or about the 17th August 2023; and thereafter lodged the substantive Record of Appeal on the 29th August 2023, which is contended to represent a duration of barely 12 days from the date of issuance of the proceedings.

15. Other than the foregoing, Learned counsel for the Applicants has ventured forward and submitted that the current Application, which is dated the 19th October 2023; was thereafter filed, shortly after the filing of the Substantive Appeal before the Honourable Court of Appeal.

16. Arising from the foregoing, Learned counsel for the Applicants has therefore submitted that the Application beforehand has thus been filed, lodged and mounted without undue and inordinate delay.

17. Conversely, Learned counsel for the Applicants has submitted that the instant application, has been filed timeously and with due promptitude and thus same ought to be allowed.

18. Thirdly, Learned counsel for the Applicants has submitted that the Applicants herein have established, demonstrated and proved the existence of a sufficient cause, to warrant the grant of an order of stay of proceedings, pending the hearing and determination of the appeal before the Court of Appeal.

19. Further and at any rate, Learned counsel for the Applicants has submitted that the Applicants herein had sought to procure and obtain witness summons against designated officers of the 3rd Defendant herein, so as to enable the same [witnesses] to attend court and produce assorted documents to show the true status pertaining to and concerning the suit properties.

20. However, Learned counsel for the Applicants has contended that the Application which sought to procure and obtain the witness summonses for and in respect of the officers from the 3rd Defendant, was dismissed by the court.

21. It is the further submissions by Learned counsel for the Applicants that arising from the dismissal of the application, which sought for the issuance of summonses, the Applicants herein are now disposed to suffer inconvenience, prejudice and grave injustice, insofar as critical Evidence, would be excluded from the court; and hence the court will not be adequately briefed about the true ownership status pertaining to and/or concerning the suit property.

22. To this end, Learned counsel for the Applicants has therefore contended that the exclusion of the witnesses, who were supposed to b compelled to attend Court, vide the witness summons, will negate the fair and just determination of the instant suit.

23. Consequently and in view of the foregoing, Learned counsel for the Applicant has therefore submitted that if the instant matter proceeds for hearing and is ultimately determined before the hearing of the appeal before the Honourable Court of Appeal, then the Applicants herein would stand prejudiced.

24. Further and in any event, Learned counsel has submitted that if the matter proceeds to hearing and the appeal to the Court of Appeal is allowed, the court, namely, Environment and Land Court, would be constrained to [sic] re-hear the matter afresh, which in itself, shall be tantamount to wastage of precious Judicial time.

25. In short, Learned counsel for the Applicants has therefore contended that the Applicants have demonstrated and established a basis to warrant the grant of the Orders of Stay of the Proceedings, pending the Hearing and determination of the Appeal before the Court of Appeal.

26. In support of the forgoing submissions, Learned counsel for the Applicants has cited and relied on, inter-alia, the case of Ezekiel Mule Musembi vs H Young & Co East Africa Ltd (2019)eKLR; Ahmed Musa Ismail vs Kumba Ole Ntamurua & 4 Others Court of Appeal Civil Application No. 256 of 2013(UR), Kwale International Sugar Company Ltd vs Ipco Builders Ltd & 2 Others (2020)eKLR and Port Florence Community Health Care vs Crown Health Care Ltd (2022), respectively.

27. Lastly, Learned counsel for the Applicants has submitted that the circumstances pertaining to and concerning the instant matter merits the grounds of the orders sought.

28. Further and in any event, Learned counsel for the Applicants has submitted that the Plaintiff/Respondent, will not suffer any prejudice and/or detriment, insofar as same (Plaintiff/Respondent), has never been in occupation and/or possession of the suit property or at all.

29. To the contrary, Learned counsel for the Applicants has submitted that the 2nd Defendant has however been in occupation of the suit property for more than 24 years. Consequently and in this regard, Learned counsel for the Applicants has thus contended that the person who shall be disposed to suffer prejudice, is the 2nd Defendant/Applicant and not the Plaintiff/Respondent herein.

30. In view of the foregoing, Learned counsel for the Applicants has therefore contended that the Applicants have demonstrated and/or established the requisite circumstances for purposes of the grant/issuance of the stay of proceedings orders.

b. Plaintiff's /Respondent's Submisions:

31. The Plaintiff/Respondent filed written submissions dated the 21st November 2023; and in respect of which same has adopted and reiterated the contents of the Replying affidavit sworn on the

3rd November 2023. Furthermore, the Learned counsel for the Plaintiff/Respondent has thereafter highlighted two [2] issue for consideration by the Honourable Court.

32. First and foremost, Learned counsel for the Respondent has submitted that the current Application, which is dated the 19th October 2023, has been filed and/or mounted with unreasonable and inordinate delay, which delay has neither been accounted for nor explained by the Applicants.

33. Besides, Learned counsel for the Respondent has submitted that Ruling being appealed against was rendered on the 11th May 2023; and yet the current Application was only filed on the 19th October 2023, which comprises of a period of more than three [3] months from the date when the Ruling was filed.

34. In short, Learned counsel for the Respondent has submitted that the duration of three [3] Months which was taken prior to and before the filing of the current Application represents and/or constitutes inordinate delay.

35. Secondly, Learned counsel for the Respondent has contended that an order of stay of proceedings is a grave order and in the given the circumstance, such an order ought to be made, sparingly and with due circumspection, so as to mitigate against the negative consequences that may arise and/ or ensue from such an order.

36. Besides, Learned counsel has submitted that if the Honourable court were to grant an order of stay of proceedings, the hearing and determination of the Plaintiff's claim over and in respect of the suit Property, will be prejudiced; and hence the rights of the Plaintiff/Respondent, shall be defeated.

37. Premised on the foregoing submissions, Learned counsel for the Respondent has implored the Honourable court to find and hold that the impugned Application is not only frivolous and vexatious, but same is calculated to defeat the rights of the Plaintiff/Respondent herein, inter-alia, the right to Fair Hearing in terms of Article 50(1) of *the Constitution*, 2010.

38. To this end, Learned counsel for the Respondent has cited and relied on, inter-alia, the case of Turbo highway Ltd versus Domnick Njenga Muriu (2020) KEELC(KLR); and Kenya Wildlife Service vs Joseph Mutembei (2019)eKLR, respectively.

39. In a nutshell, Learned counsel for the Plaintiff/Respondent has therefore impressed upon the Honourable court to find and hold that the instant Application is devoid and bereft of merits and thus same be dismissed with costs.

Issues For Determination:

40. Having reviewed the Application beforehand and the Response thereto; and upon consideration of the submission filed by the respective Parties, the following issues do emerge and are thus worthy of determination;

    i. Whether the instant Application has been made and/or mounted without unreasonable and inordinate delay or otherwise.

    ii. Whether the Applicants herein would be disposed to suffer any prejudice and/or grave injustice, if the orders sought are not granted or at all.

    iii. Whether the Applicants herein have established and/or demonstrated the existence of Sufficient cause to warrant the grant of the orders sought or at all.

Analysis And Determination

Issue Number 1: Whether the instant Application has been made and/or mounted without unreasonable and inordinate delay or otherwise.

41. It is common ground that the Application beforehand seeks for an order of stay of proceedings pending the hearing and determination of an appeal, which has since been lodged and/or mounted before the Honorable Court of Appeal. For coherence, the Applicants herein have demonstrated that same have since filed Civil Appeal No. E720 of 2023.

42. To the extent that the Application beforehand seeks stay of proceedings and is thus premised on the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules, 2010, it is important to underscore that such an Application must be made timeously and with due promptitude and not otherwise.

43. Arising from the need and/or necessity to mount such an application timeously and without undue delay, it is therefore incumbent upon this Honourable court to interrogate and appraise whether indeed the current Application, by and on behalf of the Applicants, has been mounted without undue delay or otherwise.

44. Conversely, if the court were to find that the Application has been made and/or mounted with unreasonable delay, then it would behoove the court to ascertain whether the Claimant [read the Applicants herein], have endeavored to and accounted for the delay, prior to and before the filing of the Application.

45. To start with, it is imperative to recall and reiterate that the Ruling which aggrieved the Applicants herein was rendered and/or delivered on the 11th May 2023 and shortly thereafter the Applicants herein lodged a Notice of Appeal, evidencing their [Applicants], desire to appeal to the Court of Appeal.

46. Furthermore, it is important to underscore that upon the lodgment of the Notice of Appeal, [which essentially constitutes an appeal], for purposes of an application of such a nature, it was incumbent upon the Applicants herein to proceed and file the Application for stay of proceedings. In this respect, it suffices to cite and highlight the provisions of Order 42 Rule 6(4) of The Civil Procedure Rules 2010, which essentially bespeaks the position that the Notice of Appeal constitutes an appeal.

47. Having pointed out the foregoing, the question that this court must now grapple with and endeavor to answer is; whether the instant Application was filed and/or mounted timeously and with due promptitude or otherwise.

48. First and foremost, it was incumbent upon the Applicants herein to proceed and file the instant Application, [if at all], timeously and immediately upon the lodgment of the Notice of Appeal. For good measure, the Applicants herein did not require to wait for the filing and/or lodgment of the substantive appeal before filing an application for stay of proceedings.

49. In view of the foregoing, it is my humble finding and holding that the time taken by the Applicants herein to procure the typed proceedings and thereafter to lodge the substantive appeal before the Honorable Court of Appeal, does not account for the delay in the filing and lodgment of the instant Application.

50. On the other hand, it is imperative to underscore that the current Application was lodged after a duration of more than four [4] months and eight days, reckoned from the date when the impugned Ruling was delivered. To my mind, the duration of over four [4] Months, which was taken by the

Applicants, prior to and before the filing of the instant application thus constitutes and represents unreasonable delay.

51. Additionally, having taken a duration of more than four [4] months, prior to and before the filing of the instant Application, it was thus incumbent upon the Applicants to venture forward and to avail reasons why same did not file the instant Application earlier and without unreasonable delay.

52. Nevertheless, despite there being a lapse of time, which ipso facto constitutes unreasonable delay, the Applicants herein, did not deem it appropriate to proffer and/or tender any cogent and/or plausible reason, to account for the unreasonable delay.

53. Suffice it to point out that this court has since taken cognizance of the averment that the typed proceedings were only availed to the Applicants on the 17th August 2023; and thereafter the appeal was filed on the 29th August 2023. However, there is no gainsaying that by dint of Order 42 Rule 6(4) of the Civil Procedure Rules, 2010; the Applicants herein did not require the typed proceedings or the substantive appeal, before mounting the current Application.

54. Arising from the foregoing, it is therefore obvious that the averments touching on and/or concerning the delay in obtaining proceedings, [details in terms of the preceding paragraph], cannot be relied upon to explain the length of time taken before the filing of the current Application or at all.

55. Thirdly, having found and held that there was unreasonable delay in the filing of the instant Application and having found that the Applicants herein have neither accounted for nor explained the delay, it is therefore evident that the instant Application was made and/or mounted with unreasonable delay, which has neither been explained or at all.

56. To the extent that the Application beforehand has been made with undue and unreasonable delay, which has not been accounted for, it is thus apparent that the Application has been mounted with inordinate delay, which delay therefore militates against the exercise of discretion of the Honourable Court in favor of the Applicants.

57. Suffice it to point out that where an Applicant, the current Applicants not excepted, are desirous to partake from and or benefit from the discretion of the court, then it behooves the Applicants to approach the court with due promptitude; and where there is delay, to candidly explain same.

58. Further and in any event, it is trite and established that it is the reasons and/or explanations,[if any], availed by the Applicants, that shall enable the court to see whether the failure/delay to approach the Honourable court in good time, is excusable and/or pardonable.

59. To this end, it is appropriate to take cognizance of the holding of the Court of Appeal in the case of Njoroge versus Kimani (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling), where the court held thus;

> " 12. In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success. Condonation cannot be had for the mereasking. An applicant is required to make out a case entitling him to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.

13. Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays."

60. Taking into account the ratio decidendi elaborated in the decision [supra], and after consideration of the time taken prior to and before the filing of the instant Application, I come to the conclusion that the instant Application was filed with unreasonable and inordinate delay, which has neither been accounted for nor explained at all.

Issue Number 2: Whether the Applicants herein would be disposed to suffer any prejudice and/or grave injustice, if the orders sought are not granted or at all.

61. The Applicants herein have contended that if the orders sought at the foot of the application are not granted, then the subject matter would proceed to hearing and may very well be heard and disposed of prior to the hearing and disposal of the appeal, which is pending before the Court of Appeal.

62. Furthermore, the Applicants have also contended that if the matter herein were to be heard and disposed of before the hearing of the appeal, then the Applicants' would be unduly prejudiced insofar as the evidence and documents, which are currently held by the 3rd Defendant, would have been excluded from consideration and evaluation by this Honourable court.

63. On the other hand, Learned counsel for the Applicants has contended that the documents and the Evidence held by the 3rd Defendants; and which were the subject of the Application for issuance of Witness summons, are paramount and essential to just and effective determination of the issue beforehand.

64. Consequently and arising from the foregoing, the Applicants have thus contended that same [Applicants], shall suffer undue prejudice and grave injustice, if the orders sought herein are not granted.

65. Nevertheless, it is important to point out that the Applicants' case before this Honorable Court is to the effect that same were duly allocated the suit properties and thus same are the lawful, legitimate and bona fide owners thereof.

66. If the position taken by the Applicants is (sic) correct, the logical presupposition is that the Applicants herein are in possession of the requisite documents that were issued unto same, during and at the time of the allocation and hence same shall be at liberty to tender such documentation in evidence during the trial.

67. On the other hand, it is also not lost on this Honourable court that this matter may very well proceed for hearing and even be determined before the determination of the appeal at the Court of Appeal, but when the appeal before the Court of Appeal is heard and determined; the orders and directions issued therein shall be taken into and acted upon by this Honourable Court.

68. Further and in any event, it is also not lost on this Honourable court that if [and I say if], the appeal before the Court of Appeal were to be successful, there is a window for the taking of additional evidence, irrespective of the stage where the hearing of the instant case, shall have reached.

69. Notably, it is worth pointing out that additional evidence can be taken even after the delivery of a Judgment [subject to the directions on Appeal], or at the hearing of (sic) any appeal, that may arise from the proceedings and Judgment delivered by this court.

70. Irrespective of whichever way one looks at the matter, the point is that instant matter can very well proceed for hearing and by the time the appeal before the Court of Appeal is heard and determined, the orders therein shall be adopted, taken into account and acted upon.

71. In my humble, albeit considered view, the continuation of the proceedings before this court, would not negate and/or render the pending appeal before the Honorable Court of Appeal, nugatory and academic.

72. Simply put, the appeal before the Court of Appeal would still be available and shall be heard and determined and if successful, the directions therein shall be adopted and acted upon.

73. To the contrary, if the instant matter were to be stayed and thereafter the appeal before the Court of Appeal is found to be devoid of merits, [which is equally a possibility], then a substantial amount of time would have lapsed and the Parties, would have suffered undue prejudiced occasioned by the delay in the hearing and determination of the suit.

74. Consequently and after appraising the pros and cons [read the benefits and consequences], attendant to the subject matter, I am of the persuasion that the grant of an order of stay of Proceedings would negate and/or militate against the necessity to hear and dispose of matters/suits expeditiously and without undue delay, in the manner commanded vide the Provisions of Article 159(2)(b) of *the Constitution*, 2010. [See also the dictum in the Court of Appeal decision in the case of Said Sweilem Gheithan Saanum versus The Commissioner of Lands[sued through the Honourable Attorney General] [2015]eklr]

75. Before departing from this particular issue, it is appropriate to adopt, restate and reiterate the succinct position of the law in the case of David Morton Silverstein v Atsango Chesoni [2002] eKLR, where the court stated as hereunder;

> These remarks aptly apply to the application before us. What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and, if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory.

76. To surmise, I find and hold that the Applicants herein will not suffer any undue prejudice or grave injustice or at all, if the instant matter were to proceed for hearing during the pendency of the appeal before the Court of Appeal.

77. Furthermore, it is also my finding and holding that the continuation of proceedings and even the determination of the instant matter, [if at all], will not render the appeal before the Court of Appeal, nugatory.

78. Conversely, once the appeal before the Court of Appeal is heard and determined, the orders made therein will be duly acted upon and complied with by inter-alia either re-opening the matter or taking additional evidence, depending on the stage, where the matter shall have reached.

Issue Number 3 Whether the Applicants herein have established and/or demonstrated the existence of Sufficient cause to warrant the grant of the orders sought or at all.

79. Given the gravity and consequences that arise from an order of stay of proceedings, [whose net effect is to suspend the proceedings], it is ordinarily incumbent upon the Applicant to establish and demonstrate, to the satisfaction of the court, that there is sufficient cause to warrant the grant of the orders sought.

80. Put differently, any Applicant, the Applicants herein not excepted, who desires to procure and obtain an order of stay of proceedings, must prove the existence of sufficient cause.

81. Consequently and in the premises, a court considering an Application for stay of proceedings pending the hearing of appeal, must therefore endeavor to and interrogate the circumstances, with a view to discerning [sic] the existence of sufficient cause.

82. Before venturing forward and undertaking the duty to appraise the circumstances of the instant matter and to discern whether sufficient cause does exists, it suffices to ascertain, discern and decipher, what then constitutes sufficient cause.

83. Without belaboring the point, the meaning, import and tenor of what constitutes sufficient cause, was calibrated upon and elaborated 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:-
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> > "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"

84. Back to the instant matter. It is the Applicants contention that by filing the appeal before the Court of Appeal, which is contended to raise bona fide and arguable issues, then there does exists a sufficient cause/basis, to warrant the grant of an order of stay of proceedings.

85. To my mind, it is common knowledge that a litigant is at liberty to file and/or mount an appeal to a Higher Court , inter-alia, the Court of Appeal, when and only when there exists arguable issues worthy of interrogation by the higher court and not [sic] for cosmetic purposes.

86. Consequently and to this end, the mere existence of an appeal, does not therefore denote/ constitute sufficient cause.

87. Instructively, it was incumbent upon the Applicants herein to venture forward and demonstrate what is the bona fide and good cause, which should compel and oblige this Honourable Court to suspend the proceedings and thus delay the hearing and determination of the dispute beforehand.

88. On the other hand, it is not lost on this Honourable court that either Party, the Applicants not excepted, who is laying a claim to ownership of the suit properties, shall have the requisite opportunity during the plenary hearing, to place before court documentation underpinning their claim to ownership of the suit properties.

89. Quiet clearly, neither Party, the Applicants not excepted, shall suffer any prejudice, detriment or injustice, to anchor any contention by the Applicants herein, that same have demonstrated a sufficient cause or at all.

90. Further and in any event, it is not lost on this court, that the grant of an order of stay of proceedings is an exercise of discretion and thus the court is called upon to calibrate on and weigh various factors, [taking into account the Interests of both Parties], before making a determination on whether or not to grant the order of stay.

91. Remarkably, the mandate of the Honourable court in undertaking the delicate act of balancing the competing rights of the Parties, was well elaborated in the case of Equity Bank versus West Link MBO Limited[26] Civil App No. 78 of 2011(UR), where the court (Musinga JA) stated and held thus;

> " Courts of law exist to administer justice and in so doing they must balance between competing rights and interests of different parties but within the confines of law, to ensure the ends of justice are met.' 'Thus, there is a need to balance the rights of both parties before the court".

92. Nevertheless, having taken into account the various perspectives and considerations attendant to the subject matter and being alive to the provisions of Article 159(2)(b) of *the Constitution* 2010; and the need to afford the Parties who approach the court the opportunity to canvass their complaints without delay, I hold the considered view that the orders of stay of proceedings sought, are not meritorious.

93. Other than the foregoing, I also beg to point out that an order of stay of proceedings ought to be issued sparingly and with necessary circumspection and not, for the mere asking of a Party who (sic) has filed an appeal.

94. To buttress the foregoing position, it is important to adopt, restate and reiterate the dictum 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)

95. Further and in addition, the gravity attendant to the issuance of an order of stay of proceedings and thus the circumspection that must be applied before such an order can issue was echoed by the High Court in the case of William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR, where the court stated and held thus;

> 22. In short, a stay of proceedings is a radical remedy which is only granted in very exceptional circumstances.

96. Finally, it is also important to pay tribute to the position adverted to by the Learned authors of Halsbury's Law of England, 4th Edition, who at Vol. 37 page 330 and 332, where same have stated thus;

> " The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."
>
> "This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases."
>
> "It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case."

97. In a nutshell, I come to the conclusion that the Applicants herein have neither established nor demonstrated the requisite circumstances, to warrant the grant of the orders of stay of proceedings, [which no doubt], are grave in nature and have the import of delaying the hearing and determination of a matter and thereby negating the constitutional dictates espoused vide Article 159(2)(b) of *The Constitution*, 2010.

Final Disposition:

98. From the discourse, [details in terms of the preceding paragraphs], it must have become evident and/or apparent that the Applicants herein have neither met nor satisfied the stringed conditions necessary to warrant the grant of an order of stay of proceedings.

99. Having failed to meet and or establish the requisite conditions, provided for under the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules, 2010; it is therefore obvious that the impugned Application is devoid and bereft of merits.

100. In a nutshell, the Application dated the 19th October 2023; be and is hereby dismissed with costs to the Plaintiff/Respondent only.

101. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF DECEMBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson - Court Assistant.

Mr. Nderitu for the 1st and 2nd Defendants/Applicants.

Mr. Moindi for the Plaintiff/Respondent.

N/A for the 3rd Defendant/ Respondent.