REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 137 OF 2015

THE PROPERTY DEVELOPMENT AND MANAGEMENT

COMPANY PDM (KENYA) LIMITED.....PLAINTIFF/APPLICANT

VERSUS

BERNARD KASEMA

T/A MILIONNAIRE ASSOCIATES.....1ST DEFENDANT/RESPONDENT

CYRUS KAMAU METHU.....2NDDEFENDANT/RESPONDENT

HASTINGS KYALE MULI.....3RD DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. Vide Notice of Motion dated 26th November 2021, and supported by the Affidavit of Anthony Leshan, Advocate of even date, the Applicant approached the court seeking the following Orders:

i. Spent.

ii. Spent.

iii. The Ruling and Order of the Court made on 3rd November 2021, dismissing the Plaintiff's/Applicant's suit on account of want of prosecution be set aside and the Suit re-instated.

iv. The Proceedings of 3rd November 2021, relating to the Defendants/Respondents counter-claim be set aside.

v. Directions be issued for the hearing of the Plaintiff's/Applicant's suit and the Defendant's/Respondent's counterclaim.

vi. In the alternative to prayers 2, 3 and 4, above, there be a stay of proceedings in regards to the counter-claim pending Appeal against the Ruling and order of the Honourable Court made on 3rd November 2021 Dismissing the Plaintiff's/Applicant's claim on account of want of Prosecution.

vii. Costs of the Application be in the cause or abide the outcome of the Appeal, as the case may be.

2. The subject Application is premised and/or anchored on the grounds contained at the foot thereof and same is supported by an Affidavit, in respect of which the Plaintiff/Applicant has enumerated the chronology of events, including various attempts to fix the matter for hearing.

3. On the other hand upon being served with the subject Application, the Defendants/Respondents have responded to the subject Application vide a Replying Affidavit sworn by the 1st Defendant/Respondent and same is sworn on the **21st December 2021**. For clarity, the deponent of the Replying Affidavit has contended that the proceedings of the **3rd November 2021**, including the denial of an Application for adjournment, arose because of want of diligence and apathy on the part of the Plaintiff/Applicant.

BACKGROUND:

4. The subject matter was fixed and indeed came up for hearing on the **3rd November 2021**. For clarity, when the matter was called out during the call over, counsel for the Plaintiff applied for an adjournment and informed the court that same was not ready to proceed with the hearing on the reason that the Plaintiff's/Applicant's Representative, who was to testify in the matter, for and on behalf of the Plaintiff, was engaged in a Board meeting convened by the Plaintiff.

5. In the premises and based on the foregoing, counsel for the Plaintiff therefore implored the court to grant indulgence to and in favour of the Plaintiff and thereby adjourn the matter to another date.

6. The Application for adjournment by and/or at the instance of the Plaintiff herein was vehemently opposed by the counsel for the Defendant, who stated *inter-alia* that the Plaintiff herein has not been keen to prosecute the subject suit and that in any event, the Plaintiff's Representative ought to have exercised his choices or elections, appropriately.

7. On the other hand, counsel for the defendant contended that by choosing to attend a board meeting of the Plaintiff company, at the expense of Court attendance, in respect of a matter in which the same company is a Party, was/is the epitome of contempt and disregard of the Due Process of the law.

8. Nevertheless, it was further submitted that the Plaintiff's counsel had similarly, not exhibited and/or displayed any evidence that the Plaintiff's company had called for and/or convened any Board meeting, on even date, to warrant attendance by the designated witness.

9. After evaluating the submissions for and or against the application for adjournment, the court found and held that no sufficient basis and/or cause had been placed before the court to warrant exercise of Discretion in favor of the Plaintiff. Consequently, the Court proceeded to and made a Ruling in respect of the Application for adjournment and the said application was dismissed.

10. Following the rendition of the Ruling, whereby the court declined to grant the adjournment, the court ordered and/or directed that the matter shall proceeded for hearing and indeed time allocation was granted to and in favor of the Parties.

11. Be that as it may, when the allotted time arrived, counsel for the Plaintiff revisited the issue of adjournment, which the court had dealt with and disposed of during the call over. In this regard, the court pronounced itself as being *Functus officio.*

12. Based on the foregoing, the Court thereafter invited the Plaintiff to tender evidence, but because there was no representative in court, no evidence was tendered and/or adduced. In this regard, the court thereafter proceeded to and dismissed the suit for want of prosecution under the provision of **Order 17 Rule 4 of the Civil Procedure Rules 2010.**

13. On the other hand, counsel for the Defendant then indicated to the court that same had a counter-claim, which same was keen to proceed with and/ or to prosecute. Consequently, the Honourable Court ordered and directed that the Counter-claim does proceed for hearing.

14. Suffice it to note that the Defendant/ Counter- claimer thereafter took to the witness box, same was sworn and tendered his evidence in chief and also produced the various Documentary exhibits which had been filed before the court in terms of the Bundle of Documents.

15. Upon the adduction of the Evidence in chief, it was thereafter time for the Plaintiff's counsel to cross examine the Defendant/counter claimer. For clarity, the Plaintiff's counsel proceeded to and indeed cross examined the counter claimer, up to and including the point when same signaled that he had no further Question(s).

16. Following the conclusion of cross examination, counsel for the Defendant/Counter Claimer indicated that same had no question in re-examination and in this regard same sought to close the counter claimers case. Suffice it to say, that the counter claimers case, was indeed closed.

17. Subsequently, the court was enjoined to issue further directions, pertaining to the filing and exchange of written submissions. For clarity, both parties proposed to file and exchange written submissions and thereafter timelines were set for the filing and exchange of such submissions.

SUBMISSIONS:

18. When the Application dated the **26th November 2021**, came up for hearing, the advocates for the Parties herein proposed to have the Application heard and/or canvased by way of written submissions.

19. Premised on the request by the advocates for the Parties, the Court directed that the Application be canvased by way of written submissions. Consequently, the Plaintiff proceeded to and filed her written submissions, in respect of which same has contended that this court has jurisdiction to set aside orders for Dismissal of the suit for want of Prosecution and to reinstate same for hearing *de-novo.*

20. On the other hand, counsel for the Plaintiff has submitted that the jurisdiction of the court to review and/or set aside the dismissal order, is anchored and/or premised on the provisions of **Order 12 Rule 7 of The Civil Procedure Rules 2010**, which Order allows the Court the Liberty to set aside any Dismissal for Want of Prosecution.

21. Further, the Plaintiff counsel have submitted that it is important for the court to ensure that matters are heard and disposed of on merits, other than dismissal of same on technical grounds, which do not accord with the Right to Fair Hearing. In this regard, the Plaintiff invited the

Court to take cognizance of the provisions of Article 50(1) of the Constitution, 2010.

22. Finally, the Plaintiff's counsel has placed reliance on the Decisions in the cases of **Daniel Kaloki Mule v Alice Ngina Mutisya & 2 Others [2021]eKLR** and **Joseph Kinyua v GO Ombachi [2019]eKLR.**

23. On his part, counsel for the 1st Defendant filed written submissions dated the **9th February 2022**, and in respect of which counsel submitted that the Plaintiff herein has not established and/or placed before the court any sufficient cause and/or basis to warrant the review, variation and/or setting aside of the orders dismissing the suit for want of prosecution.

24. On the other hand, counsel for the 1st Defendant has further submitted that it was inappropriate for the Plaintiff's witness to purport to choose to attend an internal meeting of the Plaintiff company and not to attend court, yet it is the same Plaintiff that had filed the suit.

25. In this regard, counsel for the 1st Defendant has argued that the Plaintiff has shown contempt to the court and that such behavior cannot be sanctioned by the court, in the name of setting aside the orders for Dismissal for want of prosecution.

26. Owing to the foregoing, the 1st Defendant has therefore implored the Court to find and hold that no Sufficient cause has been placed before the court and hence Application beforehand is not merited.

27. Other than the foregoing, counsel for the 1st Defendant has placed reliance in the decisions in the cases of **Gichuhi Macharia & Another v Kiai Mbaki & 2 Others [2016]eKLR; Karatina Municipal Council & Another v Kanyi Karoki [2015]eKLR; Mukunya Mugo 'A' & Another v Mugure Mukunya [2019]eKLR; Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others [2009]KLR 229; Joswa Kenyatta v Civicon Limited[2020]eKLR.**

ISSUES FOR DETERMINATION

28. Having reviewed the Notice of Motion Application dated the 26th November 2021, the affidavit in support thereof, as well as the Replying Affidavit sworn in Opposition thereto and having similarly considered the submissions that were filed by the respective Parties, the following issues are germane for determination;

a. Whether the Dismissal of the Plaintiff's suit for want of Prosecution, which transpired in the presence of the Plaintiff's counsel is amenable to being set aside.

b. Whether this court is seized of Jurisdiction to entertain the subject Application and more particularly, where a Notice of Appeal has been filed in respect of the said Decision.

c. Whether the Proceedings relating to the Counter-claim are amenable to setting aside, in the manner sought.

d. Whether the Plaintiff has laid a basis for the grant of the orders of stay of proceedings.

ANNALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether the Dismissal of the Plaintiff's suit for want of prosecution, which transpired in the presence of the Plaintiff's counsel is amenable to being set aside in the manner sought or at all.

29. When the subject matter was called out during the call over, counsel for the Plaintiff mounted an application for adjournment, but which application was dismissed.

30. Following the dismissal of the application for adjournment, the court was obliged to and indeed granted time allocation for the hearing of the matter. In this regard, the Parties were therefore enjoined to make necessary arrangements to bring their witnesses to open court.

31. Nevertheless, when the matter was called out a second time, counsel for the Plaintiff did not have any witness and same revisited the application for adjournment. However, to the extent that the application for adjournment had hitherto been dealt with, the court invited the counsel to call his witness and lead evidence on behalf of the Plaintiff.

32. Notwithstanding the foregoing, counsel for the Plaintiff had no evidence to offer and at this juncture, the court was enjoined to make a determination and indeed determined that the Plaintiffs suit was ripe for dismissal for want of prosecution.

33. Suffice it to note, that the Dismissal for want of prosecution was made and/or rendered inter-partes, in the presence of counsel duly instructed and retained by the Plaintiff. For clarity and coherence, at the time of rendition of the decision under reference, there was appearance on behalf of the Plaintiff.

34. To the extent that the decision was made inter-partes, such a decision is not amenable to the provisions of Order 12 Rule 7 of the Civil Procedure Rules, 2010, which essentially relate to and/or deal with consequences of non-attendance.

35. In my humble view, the dismissal for want of prosecution pursuant to and under Order 17 Rule 4, is a final Judgment and hence same is appealable to the Court of Appeal and not otherwise.

36. In support of the foregoing observation, it is imperative to take cognizance of the Decision in the case of **Njue Ngai v Ephantus Njiru Ngai & Another (2016) eKLR**, where the honourable court of appeal observed as hereunder;

> **"Another issue may arise as to whether a dismissal of a suit for non-attendance of the plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the plaintiff to attend court in the case of** *Peter* ***Ngome vs Plantex Company Limited [1983] eKLR*** **stating:-**
>
> > **Rule 4(1) does not say "judgment shall be entered for the defendant or against the plaintiff". It uses the word "dismissed". The Civil Procedure Act does not define the word "judgment". According to Jowitt's Dictionary of English Law 2nd ed p 1025:**
> >
> > **Judgement is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding or/one of the questions, if there are several."**
> >
> > **Mulla's Indian Civil Procedure Code, 13th Ed Vol 1 p 798 says: "Judgment" means the statement given by the judge on the grounds of a decree or order," "Judgment – in England, the word judgment is generally used in the same sense as decree in this code".**
>
> **In my view, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order 1XB or under any other provision of law. A dismissal of a suit, under Rule 4(1) is a judgment for the defendant against the plaintiff. An application under Rule 3 of Order 1XB includes application to set aside a dismissal. This must be so because, when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order 1XB. This, I think, clearly shows that Rule 7(2) was intended to bar a plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a plaintiff from applying for the dismissal to be set aside under Rule 8". [Emphasis added]**

ISSUE NUMBER 2

Whether this court is seized of Jurisdiction to entertain the subject Application and more particularly, where a Notice of Appeal has been filed in respect of the said Decision.

37. The Plaintiff/Applicant herein has indicated and/or underlined that upon the rendition of the impugned decision, same felt aggrieved and thereafter same proceeded to and filed a Notice of Appeal, thereby signaling her desire and/or intention to appeal to the Court of Appeal.

38. On the other hand, the Plaintiff/Applicant has similarly indicated that same has also lodged a Letter bespeaking proceedings of this court so as to facilitate the compilation and preparation of the Record of Appeal. Certainly, the Plaintiff herein has invoked the the Jurisdiction of the Court of Appeal.

39. By filing a Notice of appeal, the Plaintiff has therefore approached the jurisdiction of the court of appeal and all the outstanding complaints, touching on the veracity of the impugned decision can only be addressed by the court of appeal.

40. In any event, to the extent that an appeal has since been lodged against the impugned decision, the said decision cannot therefore be disturbed by way of setting aside and/or review. For clarity, any attempt to disturb the impugned decision, would amount to affecting the appeal which has been filed and thereby rendering the Appeal before the Court of Appeal *otiose.*

41. On the other hand, it is also imperative to note that a party cannot attack a single impugned Decision in various fora, at the same time. Clearly, the filing of the subject application, long after the filing a Notice of Appeal, amounts to trifling with the Due process of the court.

42. In the premises, I hasten to add that the conduct of the Plaintiff of approaching the jurisdiction of the Court of Appeal and at the same time reverting to this court, by way of an Application to Set aside the Dismissal Orders, amounts to an abuse of the Due process of the court and such conduct ought and must be frowned upon.

43. In support of the observation, that the subject Application amounts to abuse of the Due process of the court, it is imperative to take cognizance of the decision in the case of **MUCHANGA INVESTMENTS LTD v SAFARIS UNLIMITED (AFRICA) LTD & 2 others [2009] eKLR,** where the court observed as hereunder;

> **"What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process." It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective."**
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> **Again the Court of Appeal in Abuja, Nigeria in the case of ATTAHIRO v BAGUDO 1998 3 NWLL pt 545 page 656, stated**

that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

In the Nigerian Case of KARIBU-WHYTIE J Sc in SARAK v KOTOYE (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-

> **"The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice …"**

The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-

> **a. "Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.**
>
> **b. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.**
>
> **c. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.**
>
> **d. (sic) meaning not clear)**
>
> **e. Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness."**

44. Simply put, the conduct displayed and/or exhibited by the Plaintiff exemplifies abuse of the due process of the court.

ISSUE NUBMER 3

Whether the proceedings relating to the counterclaim are amenable to setting aside.

45. The Plaintiff herein had also sought that the court be pleased to set aside the proceedings carried out and/or conducted on the 3rd November 2021, pertaining to and/or concerning the counter-claim.

46. Before venturing to address the subject issue, it is imperative to recall that after the Dismissal of the Plaintiff's case for want of prosecution, the 1st Defendant indicated that same had filed a counterclaim and that in any event, same was ready to proceed with the counter-claim.

47. Pursuant to the foregoing, the Court ordered and/or directed that the counter-claim shall proceed, and in this regard, the counter claimer proceeded to and tendered his evidence in support of his counter-claim.

48. On the other hand, it is also worthy to note that after the counter claimer had completed his evidence in chief, the court called upon counsel for the Plaintiff, who was present, namely Mr. Ben Munge, to cross examine the counter claimer. In this regard, counsel for the Plaintiff proceeded to and indeed cross examined the counter claimer.

49. Upon the conclusion of the cross examination by counsel for the Plaintiff, the counter claimer was duly re-examined by his own counsel, Dr. Benjamin Musau and thereafter, the Counter-claimer's case, was closed.

50. From the foregoing it is evident and/or apparent that the proceedings pertaining to the counter claim, were carried out and/or conducted in the presence of counsel for the Plaintiff, who duly and substantially participated therein.

51. In my humble view, to the extent that counsel for the Plaintiff duly participated in the proceedings touching on and/or concerning the counter claim, the Plaintiff cannot now be heard to seek to set aside the very proceedings for which he was party and privy to.

52. It is also imperative to point out that where proceedings are carried out and or conducted in the presence of counsel duly appointed by a Party, such proceedings cannot be termed to be ex-parte nature. Consequently, the provision of Order 12 of the Civil Procedure Rules, 2010, which deal with and/or carter for situation of non-attendance, do not therefore apply.

53. In the premises, I find and hold that the request to set aside the proceedings of 3rd November 2021, pertaining to the counterclaim, is not well founded. Simply put, the Application to that effect is not only misconceived, but is bad in law and thus legally untenable.

54. Nevertheless, even assuming that the proceedings conducted on the 3rd November 2021 relating to the counter claim could be amenable to setting aside, in the manner proposed by the Plaintiff (which is not the case), then the Plaintiff would still be obliged to offer a sufficient cause and/or basis to warrant the setting aside.

55. However, in respect of the subject matter the Plaintiff has not tendered and/or availed any sufficient cause and/or basis to warrant the exercise of discretion and essentially the setting aside of the orders sought.

56. For clarity, sufficient cause must relate to a rational and plausible reason, being advanced by a Party to justify the inability and/or failure to perform the act that was required of her in the first instance. At any rate, the explanation must also be reasonable and truthful.

57. In support of the foregoing observation, I can do no better than to reproduce and reiterate the decision in the case **Attorney General v Law Society of Kenya & another [2013] eKLR,** where the court observed as hereunder;

> **"Sufficient cause" or "good cause" in law means:**
>
> > **"…..the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused". See BLACK'S LAW DICTIONARY, 9th Edition, page 251.**
> >
> > **Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events.**

58. As pertains to the subject matter, the Plaintiff was already aware of the scheduled hearing date and the necessity that same was required to attend court and adduce evidence, not only in support of her case but also in defence of the counterclaim.

59. However, instead of choosing to attend court, same curiously chose to attend an internal board meeting of the Plaintiff company, at the expense of the court. Clearly, one cannot anticipate a court of law to sanction and/or whitewash such contemptuous behavior.

60. In my humble view, the Plaintiff and/or Plaintiff's representative, were obliged to exercise good reason as to whether to attend to the court case or attend to personal engagement. Either way, it was incumbent upon the Plaintiff to prioritize between her personal or Internal engagments and Court Business.

61. Be that as it may, I must point out that the manner in which choices are made, also attract consequences and in this regard, the Plaintiff must square up to the consequences of her own choices.

62. Finally, I also beg to point out that time has come when Parties and litigants must appreciate that the court business is neither owned nor controlled by the Parties. To the contrary, the business of the court is run and controlled by the court and the court is enjoined to ensure that Justice is not delayed.

63. In this regard, due attention and recognition is given to the provisions of Article 159 (2) (b) of the Constitution, 2010, which provides as hereunder;

> **In exercising judicial authority, the courts and tribunals shall be guided by the following principles—**
>
> **2 (a) justice shall be done to all, irrespective of status;**
>
> **(b) justice shall not be delayed;**

64. To fortify the foregoing thinking and essentially that Parties/litigants must be proactive, it is appropriate to adopt and reiterate the observation by the Court of Appeal in the case of **Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR,** where the court observed as hereunder;

> **"Justice shall not be delayed" is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the Civil Procedure Act are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge's conclusion that the suit in the High Court was not properly handled by the appellant's advocate. The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation. Likewise it cannot be fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed cannot be visited upon them. The warning of Madan JA in Belinda Murai & others v Amos Wainaina (1978) LLR 2784, reigns true today. He said:**
>
> > **"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel…..The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate…" (our emphasis)**
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> **We also reiterate Lord Griffith's words is in Ketterman v Hansel Properties Ltd (1988) 4 All ER 769, that;**

> **"Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their heads…"**

65. In the premises, no credible basis has been laid, to warrant the setting aside of the proceedings relating to the counterclaim, for which the Plaintiff duly and ably participated.

ISSUE NUMBER 4

Whether the Plaintiff has laid a basis for the grant of the orders of stay of Proceedings.

66. The Parameters of Stay of proceedings pending appeal were discussed extensively in **Kenya Wildlife Service v James Mutembei [2019] eKLR.** The nature and import of the stay was described thus:

> **"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."**

67. On the other hand, Ringera J, as he then was, in the case of **Global Tours &Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000,** aptly captured the matters to be considered by the court in making its determination of stay of proceedings. He rendered himself as follows:

> **"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)**

68. Notwithstanding the foregoing,the following passages in **Halsbury's Law of England, 4th Edition. Vol. 37** page 330 and 332, are equally instructive:

> **"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."**

69. In view of the foregoing, it is imperative to note that a Party who seeks to accrue an order for stay of proceedings, pending an appeal, is obliged to place before the court exceptional circumstances, which may require that the proceedings before the trial court be stayed and/or suspended.

70. In any event, it must also be noted that courts are enjoined to ensure that proceedings filed before them are heard and disposed of without undue delay. In this regard, it is imperative to take note of the provisions of **Article 159 (2) (b) of the Constitution 2010**, whose import and significance I have alluded to hereinbefore.

71. In respect of the subject matter, the Plaintiff, who has not been keen to prosecute the suit is now asking for stay of proceedings and/or suspension thereof and the import of such an application, is to enable the proceedings herein to continue hanging in balance without determination.

72. Clearly, such an endeavor would be inimical to the import, tenor and the values of **Articles 10(2),27(1), and 159 (2) (b) of the Constitution 2010.**

FINAL DISPOSITION:

73.Based on the foregoing analysis, it must have become apparent that the subject Application, is Devoid and bereft of Merits. For clarity, same is not befitting the exercise of Judicial discretion.

74.Notwithstanding the foregoing, I have also pointed out that the Subject Application is an abuse of the Due Process of the Court. Consequently and in the premises, the Application be and is hereby Dismissed with Costs to the Defendants.

75. In the premises, the Application dated the 26th November 2021, be and is hereby Dismissed with Costs to the Defendants/Respondents.

76. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MARCH, 2022

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Mr. Antony Leshan for the Plaintiff/Applicant

Miss. Matui H/B for Dr Musau for the Defendant/Respondent