REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Petition 218 of 2012

HAITHAR HAJI ABDI.....1ST PETITIONER

ABDI BAHIM HAITHAR HAJI .....2ND PETITIONER

AND

SOUTHDOWNS DEVELOPERS LTD.....1ST RESPONDENT

OFFICER COMMANDING POLICE DIVISION (OCPD)

LANGATA POLICE DIVISION.....2ND RESPONDENT

PROVINCIAL POLICE OFFICER (PPO).....3RD RESPONDENT

THE HON. ATTORNEY GENERAL .....4TH RESPONDENT

AND

KENYA NATIONAL

CAPITAL CORPORATION.....1ST INTERESTED PARTY

PAUL OMONDI MBAGO.....2ND INTERESTED PARTY

RULING

The Application

1. The Chamber Summons dated 5th June 2012 seeks the following orders;

(1) That this application be certified as urgent and service thereof be dispensed with in the first instance due to reasons of urgency.

(2) That this Honourable Court be inclined to issue a stay order against the decision and ruling of the Hon. Justice Majanja delivered on the 30th day of May 2012 pending the hearing and determination of this application inter parties or further orders of this Honourable court.

(3) That this Honourable Court be inclined to issue a stay order against the decision and ruling of the Hon. Justice Majanja delivered on the 30th May 2012 pending the hearing and determination of the intended appeal.

(4) That this Honourable Court be inclined to issue such directions as to the hearing of the chamber summons and petition herein in light of the unique circumstances of the case.

(5) That costs be in the cause.

2. The application is supported by the affidavit of Haithar Haji Abdi sworn on 30th May 2012 and it is grounded on the fact that on 30th May 2012 I delivered a ruling wherein I held that the matters which were raised in the petition were *res judicata* and abuse of the court process. I therefore struck out the petition with no order as to costs.

3. The petitioners claim that the petition and the application before the Court was not heard yet it raised serious matters of law which under the Constitution merited serious consideration through a full hearing as such I misdirected myself in dealing with the matter in the manner I did. Dr Khaminwa argued the procedure adopted constituted a substantial ground of appeal. The petitioners have now lodged a notice of appeal and filed the letter bespeaking proceedings in accordance with the *Court of Appeal Rules* evincing their intention to pursue an appeal from my order of 20th May 2012.

4. The petitioners now implore this court to stay the order pending the hearing and determination of intended appeal as they shall suffer deprivation of their property as they may be evicted therefore rendering the intended appeal nugatory and an academic exercise.

5. Dr Khaminwa urged me to take a liberal view of my jurisdiction and take into account the provisions of **Articles 19**, **48, 50(1)** and **259** of the Constitution in considering the petitioners' case. He urged me to grant the orders sought in the application.

1st Respondent's Case

6. Only the 1st respondent appeared in these proceedings. Mr Njenga, who appeared on its behalf, relied on the grounds of opposition dated 8th June 2012 to oppose the petitioners' application.

7. Counsel argued that the order sought to be stayed was not a positive order capable of execution hence there was nothing to stay. Mr Njenga contended that this court lacked the jurisdiction to grant orders of

stay under **rules 20** and **21** of the ***Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006***. He further submitted that even if there was such jurisdiction, it would be under **Order 42** of the ***Civil Procedure Rules*** in which case the conditions for the grant of stay had not been met by the petitioners.

8. Finally, Mr Njenga submitted that the court should take into account the fact that the litigation relating to the suit property has been ongoing for the last 20 years and in accordance with the provisions **Article 159(2)(b)**, this matter must come to an end as the 1st respondent continues to be prejudiced by delay in concluding the matter.

Determination

9. In response to the arguments by Mr Njenga, I would like to dispose of jurisdiction of this court to grant orders of stay under **Article 22**. It is not novel issue and was considered in the case of ***Joseph Ihugo Mwaura and 82 Others v The Attorney General & Others*** **Nairobi Petition No. 498 of 2009 (Unreported).** In its ruling the court stated as follows; *"**[35]The question as to whether this court has jurisdiction to grant orders of stay or injunction pending appeal must be seen in light of the provisions of Article 22 and 23 of the Constitution. [36]The provisions of Articles 22 and 23 are the gateway to the Bill of Rights in the sense that without them, the rights and fundamental freedoms guaranteed remain non-justiciable. It is the fact that the court can be moved to grant relief in case of infringement, violation or threat that gives the Bill of Rights teeth. Commenting on the effect on the equivalent provision of the former Constitution, Justice Shields stated in the case of Felix Njagi Marete v Attorney General (1987] KLR 690 "The Constitution is not a toothless bulldog nor is it a collection of pious platitudes. It has teeth and those teeth and in particular are to be found in Section 84". [37] Article 23(3) entitles the High Court to grant appropriate relief in respect of matters brought under Article 22. Apart from the specific relief in the nature of an injunction set out in Article 23(2) the Court can frame any relief that is appropriate in the circumstances. It follows therefore such relief must also include such as is necessary to secure the applicant's right to appeal and ensure that the appeal is not rendered nugatory and the right thereby protected is watered down. [38] To argue that the relief secured by Article 23 is diminished merely because there is lack of a specific provision in the Constitution or under the Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 is to undermine the Bill of Rights and its efficacy. I do not read rule 23 to prohibit the court from granting further relief after hearing and determining a matter. [39] I reject the respondent's argument that this court lacks jurisdiction to grant interim relief pending appeal. I find and hold that this court's exercise of its power under Article 23(3) is entitled to give orders that give effect to the Bill of Rights including such orders as are necessary to preserve the subject matter pending appeal. [40] In my view, it does not matter that the application to enforce fundamental rights has been dismissed. The applicant has an undoubted right of appeal and the appellate court may take a different view of the matter. It is the obligation of the trial court to consider the facts before it and decide whether interim relief pending appeal is warranted. To decline jurisdiction would be to undermine the very essence of the Bill of Rights. [41] Finally, I refer to the principle stated in the well known case of Erinford Properties Ltd v Cheshire County Council (1974) 2 All E R. 488. The principle is that a judge who has dismissed an interlocutory application for injunction is entitled to grant the unsuccessful applicant an injunction pending appeal against the dismissal. This principle is well established in our jurisdiction and there is no reason why such a principle should not apply to these proceedings."***

10. The petitioners have an undoubted right of appeal and the issue of whether there is merit in the intended appeal is not is a matter for this court's consideration. The application is one that calls for the exercise of the court's discretion on the basis of the material before the court. The court is also called upon to balance the rights of the respective parties.

11**.** The petitioner seeks a stay of execution. A stay of execution envisages that the court has issued a positive order capable of enforcement. As rightly pointed out by counsel for the 1st respondent, the petition was struck out and no positive order having been made by the Court, there is nothing to stay and therefore an order of stay cannot be issued as prayed in the application. I adopt the sentiments of Law,

VP in the case of ***Western College of Arts and Applied Sciences v Oronga*** **(1976) KLR 63, 66** where he stated, *"But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs ….. In the instant case, the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this court in an application for stay, to enforce or to restrain by injunction."* (See also ***Sonalux Limited and Another v Barclays Bank of Kenya Limited*** **Civil Application No. NAI 219 of 2007 (Unreported)** and ***David Thiong'o t/a Welcome General Stores v Market Fancy Emporium*** **Civil Application No. NAI 47of 2007 (Unreported)**)

12. Even if I were to consider the merits of the application is deciding whether and in the interests of justice I should give an order to preserve the status quo pending appeal, I am afraid that the weight of evidence leans heavily against the petitioners.

13. The application is another step is the escalator of litigation that has been going on for the last twenty years. The parties respective rights to the suit property were litigated in the ***Nairobi HCCC No. 6054 of 1991*** consolidated with ***Nairobi HCCC No. 1181 of 1992*** wherein Hon. Justice Waki delivered judgment on 18th December 2003. Subsequent litigation, which I alluded to in my ruling striking out the petition, did not change this basic fact.

14. I have already held that these matters are *res judicata.* There is also a ruling of Hon. Justice Muchelule to that effect and even though the petitioners have the right of appeal from my ruling, it is fact that has weighed heavily on my mind. I am not prepared to extend the life of this litigation for one more day.

Conclusion

15. I find that the application lacks merit and is hereby dismissed with no order as to costs.

DATED and **DELIVERED** in **NAIROBI** this 14th day of June 2012

D.S. MAJANJA

JUDGE

Dr Khaminwa instructed by Khaminwa and Khaminwa Advocates for the Petitioners.

Mr Njenga instructed by D. Njogu and Company for the 1st respondent.