



REPUBLIC OF KENYA



**KENYA LAW**  
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**The Property Development and Management Company PDM (Kenya)  
Limited v Kasema t/a Millionaire Associates & 2 others (Environment &  
Land Case 137 of 2015) [2022] KEELC 2681 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2681 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 137 OF 2015**

**JO MBOYA, J**

**JUNE 23, 2022**

**BETWEEN**

**THE PROPERTY DEVELOPMENT AND MANAGEMENT COMPANY PDM  
(KENYA) LIMITED ..... APPLICANT**

**AND**

**BERNARD KASEMA T/A MILLIONAIRE ASSOCIATES ..... 1<sup>ST</sup> RESPONDENT**

**CYRUS KAMAU METHU ..... 2<sup>ND</sup> RESPONDENT**

**HASTINGS KYALE MULI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction:**

1. Vide a Notice of Motion dated March 23, 2022, the Plaintiff/Applicant has approached the court seeking for the following Reliefs;
  - (i) There be a Stay of Proceedings in regard to the hearing and determination of the Main suit (which includes the Counter-claim filed in response to the claim) herein pending the hearing and determination of this Application.
  - (ii) There be a Stay of Proceedings in regard to the hearing and determination of the Main suit (which includes the Counter-claim filed in response to the claim) herein pending the hearing of an Appeal against the Ruling and Order of the Honourable Court made on 10<sup>th</sup> March 2022.
  - (iii) Costs of this 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 various grounds which have been enumerated at the foot thereof and same is further supported by the affidavit of one, Anthony Leshan, counsel for the Plaintiffs/Applicants, sworn on the March 23, 2022.
3. Upon being served with the subject application, the Respondents herein responded thereto vide a Replying affidavit sworn by 1<sup>st</sup> Defendant/Respondent on April 7, 2022 and which raised various grounds:

**Grounds of the Application:**

4. The subject Application is premised and/or anchored on the grounds which are enumerated in the body thereof. For clarity, the grounds are as hereunder;
  - (i) It is the 1<sup>st</sup> Defendant's assertion that the application is a further attempt by the Applicant to delay the expeditious disposal of the matter.
  - (ii) Further, that the claim by the Applicant that it was denied opportunity to be heard is fallacious, having been given notice of the hearing and opportunity to cross examine the Defendants/ Respondent's witnesses in relation to their counterclaim.
  - (iii) That it is the Applicant at fault for not availing its witnesses on the date slated for hearing and cannot therefore be heard to say that it was denied opportunity to be heard.
  - (iv) He adds that in any case, the Applicant has not merited a stay of proceedings on account of its failure to satisfy the legal threshold.
  - (v) In addition, that the court having pronounced itself on the very issues raised in the Application, is functus officio and cannot therefore grant the orders sought.
  - (vi) He urges the court to dismiss the application with costs.

**Response by the Defendants'/respondents':**

5. Vide the Replying Affidavit sworn by the 1<sup>st</sup> Defendant, herein referred to as the deponent, same has averred that the subject application by and/or on behalf of the Plaintiff/Applicant is merely an attempt to delay, obstruct and/or defeat the expeditious disposal of the subject matter.
6. Further, the deponent has also averred that the contention by the Plaintiff/Applicant that same was denied an opportunity to be heard during the hearing, which was conducted on the November 3, 2021, is fallacious, misleading and misconceived.
7. Besides, the deponent has further averred that on the scheduled date for hearing, the Plaintiff/Applicant herein duly appeared and attended court, when same mounted an application for an adjournment, but which application for adjournment was declined.
8. On the other hand, it has also been averred that following the refusal of the adjournment, the Plaintiff/Applicant was ordered to proceed with the hearing of her case, but same had no witness before the court and consequently the court was compelled to dismiss the Plaintiff's/Applicant's case.
9. Other than the foregoing, the deponent has further averred that following the dismissal of the Plaintiff's case, the court directed the Defendants counterclaim to proceed and indeed the counterclaim proceeded for hearing, whereupon the deponent testified, was cross examined and thereafter re-examined.



10. In the premises, the deponent has averred that the subject application by the Plaintiff/Applicant is premised on mis-representation and distortion of the obtaining factual position.
11. On the other hand, the deponent has also averred that the Plaintiff/Applicant herein had previously filed another application, namely, the application dated the 26<sup>th</sup> November 2021 and wherein the plaintiff/Applicant sought for inter-alia, orders of stay of proceedings in regards to the counterclaim pending the hearing of an appeal in respect of the order of the court rendered on the 3<sup>rd</sup> November 2021.
12. To the extent that the Plaintiff/Applicant had hitherto filed and prosecuted an application touching on stay of proceedings of the counterclaim, pending appeal, which application was dismissed, the deponent has thus averred that the subject application amounts to an abuse of the Due process of the court and ought to be dismissed.
13. On the other hand, the deponent has also averred that having dealt with and adjudicated upon a similar application, the court herein is Functus officio and hence the court cannot entertain the subject application.

#### **Submissions by the Parties:**

14. The subject application came up for hearing on the 26<sup>th</sup> May 2022, whereupon the Parties agreed to have the application canvassed and/or disposed of by way of written submissions. Consequently, the court proceeded to and fixed timelines for the filing and exchange of the written submissions.
15. Pursuant to the forgoing, the Plaintiff/Applicant proceeded to and filed her written submissions on the May 24, 2022, whereas the Defendants/Respondents also filed their written submissions on even date. For clarity, the two sets of Written submissions are on record.
16. Briefly, the Plaintiff/Applicant has submitted that the ruling of the court rendered on the March 10, 2022, whereby the court declined to set aside and/or review the orders dismissing the Plaintiff's suit for want of prosecution, has denied and/or deprived the Plaintiff/ Applicant of her constitutional right to protect and/or vindicate her property.
17. Secondly, the Plaintiff/Applicant has also submitted that upon the rendition and/or delivery of the impugned ruling, the Plaintiff felt aggrieved and thereby lodged a Notice of appeal, evidencing her intention to appeal to the Court of Appeal.
18. Thirdly, the Plaintiff has submitted that the intended appeal to the Court of Appeal raises pertinent issues of law and thus same is arguable. In this regard, the Plaintiff has therefore underscored the fact that same has sufficient cause and/or basis to warrant the stay of proceedings sought.
19. Fourthly, the Plaintiff has submitted that the intended appeal to the Court of Appeal, for which a Notice of Appeal has been filed and served shall be rendered nugatory and/or academic, unless the proceedings herein and particularly, the prosecution of the counterclaim are stayed.
20. Finally, the Plaintiff has submitted that the current application is separate and distinct from the previous application dated the 26<sup>th</sup> November 2021, insofar as the current application seeks an order of stay of proceedings in regards to the counterclaim pending appeal to the Court of Appeal as the main relief, whereas in the previous application, the order of stay of proceedings was sought in the alternative.
21. Be that as it may, the Plaintiff has invoked and relied on the decisions in *Port Florence Community Health Care v Crown Health Care Ltd* Civil Appeal No. E053 of 2021 and *Niazsons (K) Ltd v Chaina*



*Road & Bridge Corporation (K)* (2001)eKLR, to support the contention that an order of stay of proceedings ought to be granted.

22. On their part, the Defendants/Respondents have submitted that having hitherto filed the Application dated the 26<sup>th</sup> November 2021 and wherein same sought for an order of stay of proceedings pending an appeal to the Court of Appeal and which application was dismissed on the 10<sup>th</sup> March 2022, the subject application amounts to an abuse of the due process of the court.
23. Secondly, the Defendants have further submitted that to the extent that this court has since pronounced itself on the issue of Stay of Proceedings pending appeal to the Court of Appeal, the court is thus *Functus officio*.
24. In support of the foregoing submissions, the Defendants have relied on various decisions, inter-alia, *Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited)* [2014]eKLR; *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others* [2013]eKLR.
25. Other than the foregoing, the Defendants have also submitted that the Plaintiff herein participated during the hearing of the counterclaim and the Plaintiff's/applicant's advocate on record indeed cross examined the Defendants' witness.
26. To the extent that the Plaintiff/Applicant was duly represented and indeed participated in the proceedings relating to the counterclaim, it has been contended that the Plaintiff shall not suffer any prejudice or otherwise, if the proceedings herein were continued.
27. Finally, the Defendants have submitted that the Plaintiff/Applicant has not met and/or satisfied the threshold upon which the court ought to grant the orders of stay of proceedings.
28. In support of the foregoing submissions, the Defendants have relied on the decisions in the cases, inter-alia *Joswa Kenyatta versus Civicon Limited* [2020]eKLR and *Wachira Karani versus Bildad Wachira* [2016]eKLR. and *Cecilia Karuru Ngayu versus Barclays Bank of Kenya & Another* [2016]eKLR.

#### **Issues for Determination:**

29. Having reviewed the subject application, the affidavit in support thereof as well as the Replying affidavit filed in opposition thereto and having similarly considered the written submissions filed by and/or on behalf of the Parties, the following issues are germane for determination;
  - a. Whether the Honourable Court is *Functus Officio*.
  - b. Whether the Plaintiff/Applicant has met and/or established the requisite conditions to warrant the grant of orders of Stay of Proceedings pending Appeal.

#### **Analysis and Determination**

##### **Issue Number 1 Whether the Honourable Court is *Functus Officio*.**

30. It is common ground that the Plaintiff herein had hitherto filed and/or mounted a previous application dated the November 26, 2021, wherein the Plaintiff had sought for various reliefs and orders.
31. For coherence, it may be appropriate and/or desirable to reproduce the reliefs which were sought at the foot of the previous application.
32. In the premises, the reliefs at the foot of the said application are reproduced as hereunder;



- (i) .....Spent.
  - ii. ....Spent.
  - (iii) The Ruling and Order of the Court made on 3<sup>rd</sup> 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 November 3, 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 3<sup>rd</sup> 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.
33. It is apparent and/or evident that vide the previous application which was filed by the Plaintiff herein, same sought specific reliefs pertaining to Stay of proceedings in regards to the counterclaim mounted by the Defendant pending an appeal to the Court of Appeal.
  34. Having sought for the order of stay of proceedings as pertains to the prosecution of the counterclaim pending the hearing and determination of an appeal to the Court of Appeal, this court was obliged to and indeed considered whether or not the Plaintiff had met the requisite conditions to warrant the grant of the orders sought, inter alia, the Orders of Stay of Proceedings pending the hearing and determination of the Intended Appeal to the Court Of Appeal.
  35. Suffice it to note that the court proceeded to and considered the previous application and thereafter came to the conclusion that the Plaintiff/Applicant had not satisfied the basis for the grant of the orders, inter alia, stay of Proceedings pending an Appeal.
  36. Pursuant to and in line with the findings that the Plaintiff/applicant had not satisfied the threshold for the grant of stay of proceedings pending appeal, the court proceeded to and dismissed the said application.
  37. However, despite the fact that the Court had rendered itself on the issue of stay of proceedings, as pertains to the counterclaim, the Plaintiff has yet again filed the subject application, whose import and tenor is to procure and obtain the same relief, namely, stay of proceedings in regard to the hearing and determination of the counterclaim pending the hearing of an appeal to the Court of Appeal.
  38. Whereas the previous application, sought stay of proceedings pending the hearing of an appeal against the decision of the court rendered on the 3<sup>rd</sup> November 2021, yet the subject application relates to an appeal against the order made on the March 10, 2022, the common denominator at the foot of the two applications is the stay of proceedings relating to the prosecution of the Counter-claim.
  39. To my mind, the subject of stay of proceedings pending appeal , is one and the same, namely, the prosecution of the Counter-claim.
  40. In the premises, the question that arises is whether this court having previously dismissed an application seeking orders of stay of proceedings relating to the counterclaim, can now entertain and/or adjudicate on an application seeking similar or the substantially, similar reliefs and/or prayer.



41. In my humble view, having dealt with the issue of Stay of proceedings, as pertains to the Counterclaim, pending the hearing and determination of an appeal to the Court of Appeal, this court is functus officio and cannot seek to have a second bite on the same issue. For clarity, to do so would amount to this Honourable Court sitting on Appeal in respect of own Decision, which is a legal anathema and inimical to the Rule of Law.
42. To buttress the foregoing observation, it is appropriate to take cognizance of the decision of the Supreme Court Of Kenya in the case of Raila Odinga & 2 Others versus Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR, citing with approval an excerpt from an article by Daniel Malan Pretorius entitled, “The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 in defining the doctrine, thus:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or
43. Other than the foregoing decision, the Doctrine of Functus Officio was also canvassed and underscored by the Court of Appeal in the case of Telkom Kenya limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited) [2014] eKLR, where the Court held thus:

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon... The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in re-St Nazaire Co, (1879), 12 Ch. D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division.”
44. Based on the foregoing observation, it is my humble view that the subject application amounts to an invite to the court to revert back to the same issue of stay of proceedings pending appeal and arrogate unto itself a mandate that the court does not have by issuing a second, albeit, contradictory decision.
45. In a nutshell, I find and hold that this Court is functus officio as pertains to the issue of stay of proceedings pending the hearing and determination of the Appeal (Intended Appeal) to the court appeal.

**Issue Number 2 Whether the Plaintiff/Applicant has met and/or established the requisite conditions to warrant the grant of orders of Stay of Proceedings pending Appeal.**

46. Before endeavoring to address and resolve the issue herein, it is worthy to recall that after the Plaintiff's/Applicant's suit had been dismissed for want of prosecution under the provision of Order 17 Rule 4 of the Civil Procedure Rules 2010, the court ordered and/or directed the counterclaim to proceed.
47. Pursuant to the orders and/or direction of the court, the counter claimer indeed testified, giving Evidence in- Chief and thereafter being duly cross-examined by counsel, namely, Mr. Ben Murei, who appeared for the Plaintiff/Applicant during the trial.
48. Based on the fact, that the proceedings relating to the counterclaim were carried out and/or undertaken in the presence and with participation of the Plaintiff's duly appointed counsel, it is difficult to



appreciate how the continuation and further proceedings and essentially, the filing of submissions thereon shall prejudice the Plaintiff.

49. Be that as it may, the Parameters of Stay of proceedings pending appeal were discussed extensively in *Kenya Wildlife Service v James Mutembei* [2019] eKLR. For coherence, 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.”

50. 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 on stay of proceedings pending Appeal. 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)

51. 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.”

52. 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.

53. 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.



54. To buttress the observation alluded to in the preceding paragraph, I am minded to take guidance from the decision of the Court of appeal vide the decision in the case of Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR, where the court stated 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.”

55. In respect of the subject matter, the Plaintiff, who was not been keen to prosecute the suit on the scheduled Hearing Date and instead preferred to prioritize own internal Issues, 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.

56. In a nutshell, I come to the conclusion that the Plaintiff/Applicant is not entitled to the grant of orders of Stay of proceedings pending appeal in the manner sought.

**Final Disposition:**

57. Based on the foregoing analysis and having addressed the twin issues which were outlined for determination, I come to the conclusion that the subject Application is not only misconceived, but is also an abuse of the Due process of the court.

58. On the other hand, having previously dealt with a similar Application seeking same or substantially the same reliefs, this court is barred by the Doctrine of Functus officio from entertaining and/or adjudicating the subject Application.

59. Consequently and in the premises, the Application dated the 23<sup>rd</sup> March 2022 be and is hereby dismissed with costs to the Defendants/Respondents.

60. It so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JUNE 2022.**

**OGUTTU MBOYA,**

**JUDGE**

In the Presence of;

Kevin Court Assistant

Mr. Mitto h/b for Mr. Muchiri for the Plaintiff/ Respondent.

N/A for the Defendants/ Respondents

