**Mwangi v Mokaya (Environment and Land Appeal 17 of 2022)
[2022] KEELC 14835 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14835 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL 17 OF 2022

FO NYAGAKA, J

NOVEMBER 17, 2022

BETWEEN

RAFAEL WAIGANJO MWANGI .... APPELLANT

AND

DOMINIC OGETO MOKAYA .... RESPONDENT

(Application for stay of proceedings in Kitale CMC Land Case No. 82 of 2020 - Dominic Ogeto Mokaya v Raphael Waiganjo Mwangi.)

RULING

On stay of proceedings pending the hearing of an appeal

The Application

1. This is a Ruling on a Notice of Motion dated 31/10/2022 which was brought by the Appellant on the same date. It was anchored on the provisions of Sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act* and Order 42 Rule 6 of the *Civil Procedure Rules 2010*. It sought for prayers that:

    1. ...spent.
    2. ...spent.
    3. That there be stay of proceedings in Kitale CMC Land Case No. 82 of 2020 - Dominic Ogeto Mokaya v Raphael Waiganjo Mwangi pending the hearing and determination of appeal.
    4. That costs of the application be in the cause.

2. It was supported by the Affidavit of one Rafael Waiganjo Mwangi and a number of grounds on the face of it. The grounds were that the trial magistrate had, on 17/10/2022, summarily struck out the applicant's application dated 17/10/2022 seeking leave to amend Defence in Kitale CMC Land Case

No. 82 of 2020. He then stated the reason the trial Magistrate gave for taking the step, which was that the Plaintiff/Respondent had already testified and closed his case hence it would be prejudicial to him to allow the Defendant to amend his defence. The other ground of the instant Application was that as a result of the dismissal of the application the matter had proceeded without the evidence that the applicant wished to introduce through the amendment and further documents and that the suit was now fixed for judgement on 28/11/2022. The third ground was that he was aggrieved by that decision and therefore appealed to this Court. He listed the grounds of appeal, and I need not enumerate them here but will analyse them further below.

3. A further ground was that the appeal was arguable, raised serious triable issues and had overwhelming chances. He stated the appeal would be rendered nugatory were the lower Court matter permitted to proceed to the delivery of judgment by not granting the orders sought. He then stated that he would suffer substantial loss in view of the fact that the judgement would be delivered without considering his case as per the proposed amendment and documents and he was likely to be evicted from the suit land on which he had stayed since the year 1982. The other ground was that the application was made in good faith and without undue delay, and the Respondent would not be prejudiced by the orders sought hence the interest of justice demanded that the Application be granted.

4. The Supporting Affidavit repeated the contents of the grounds of the Application save that to it were annexed and marked as RWM1, RW2, RW3, RW4, RW5, RW6 and RW7, copies of the Applicant's national Identity Card; order dismissing his application dated 17/10/2022; copy of the said application, memorandum of appeal; letters dated 29/06/2022 and 22/08/2022; letter from the area chief and photographs of his homestead in the suit land; the Defence and Draft Defence. I will not repeat the content of the grounds, where it is repeated in the Supporting Affidavit.

5. He swore that the trial magistrate summarily struck out his application dated 17/10/2022 in Kitale CMC Land Case No. 82 of 2020 where he was sued by one Dominic Ogeto Mokaya and in which he wished to amend his defence and introduce a counter claim. He deponed that in so doing the learned trial magistrate denied him the opportunity to bring all issues for determination before Court and ventilate his case on merit. As a result of the denial the suit had been heard and was fixed for judgement on 28/11/2022. He appealed from the Ruling. He annexed a copy of the memorandum of appeal and summarized the grounds therein in the paragraph containing the ground. He then summarized the evidence he intended to adduce in the trial Court through the proposed amendment. Again, I see no need of reproducing it here since at this stage I am only being asked to consider whether or not to grant the order of stay of proceedings in the lower Court or not.

6. The Respondent opposed the Application very strongly. He relied on the Affidavit of Nyakundi George Stephen Advocate which was sworn on 07/11/2022. In it he deponed that the Appeal offended the provisions of 75(1) of the *Civil Procedure Act* and Order 44 Rule 1(2) and (3) of the *Civil Procedure Rules* which require leave of the Court to be granted before an order of such a nature is appealed from. He then gave a chronology of events leading to the grant of the order appealed from. He stated how the parties had by consent agreed that the County Surveyor of Trans Nzoia County visits the land and he did so and a report given. Then that after that the suit proceeded to hearing and on 12/09/2022 the Applicant applied for adjournment and it was granted to 26/09/2022 when the matter proceeded to hearing and the Plaintiff closed his case and the Defence hearing fixed for 17/10/2022.

7. He deponed further a detailed account of how from 17/10/2022 the Defendant/Applicant acted in the lower Court. He stated that on that date, the Court fixed the suit for hearing at 10.30 am. Instead of the Defendant adducing evidence that time, he came up with an application dated the same date to seek leave to amend the Defence. The Respondent opposed the application as an afterthought. It was struck out. The trial Court ordered the matter to proceed and learned counsel for the Applicant

prayed for ten (10) minutes to prepare the Applicant and witnesses to testify. That did not happen but instead the Respondent was served with a Notice of Change of Advocates by the firm of Jason Kimani and Company Advocates. This caused the Court to adjourn the suit to 24/10/2022. On 24/10/2022, the Applicant informed the Court that he did not want the services of a lawyer and would be acting in person. He proceeded with the Defence hearing that date and 31/10/2022 and closed his case. After that the suit was fixed for judgment on 28/11/2022.

8. He stated further that the suit was being fast tracked because the Respondent herein was very old and frail, having been diagnosed of throat cancer. His deposition was that the Applicant was intent on prolonging the trial court proceedings without any justifiable cause or reason. He then summed up evidence on the ownership of the suit land in question. He asked for the dismissal of the instant application with costs.

Submissions

9. The Court gave the parties change to ventilate their respective positions by way of written submissions. The Applicant filed his on 02/11/2022 while Respondent did on 10/11/2022. The Applicant, while restating the provisions under which the Application was brought, summarized the facts leading to it. He reproduced Order 42 Rule 6(1) and (2). He then stated that the annexed memorandum of appeal was arguable and raised serious triable issues (sic) and would be rendered nugatory if the orders sought were not granted.

10. He submitted how the trial magistrate misdirected himself in the decision made on 17/10/2022. While submitting that the application be granted, he relied on the case of *Niazsons (K) Ltd. v China Road & Bridge Corporation (Kenya)* [2001] eKLR, cited in the case of *Port Florence Community Health Care v Crown Health Care Limited* [2022] eKLR. In the matter, the learned judge stated that, "Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay... should be granted."

11. This Court did not have the benefit of reading the Respondent's submissions, if any were filed: there was none on the record. However, since the Court of Appeal has stated, and it is true, that submissions do not constitute evidence of parties but are just a "marketing language", in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR, it is not an issue to bog this Court down or make it to render an unbalanced Ruling. In *Patrick Simiyu Khaemba v Kenya Electricity Transmission & Another* [2021] eKLR http://kenyalaw.org/caselaw/cases/view/222978 this Court found as much, in regard to submissions. On 10/11/2022 this Court fixed the Ruling on the Application for 17/11/2022.

Issues, Analysis and Determination

12. I have considered the Application before me. I have also given due regard of the Replying Affidavit, the submissions filed, both the statutory and case law regarding the subject matter, and I am of the view that the following issues commend themselves to me for determination:

    a. Whether the Application is properly before me;

    b. Whether the Application is merited;

    c. Disposition and who to bear the costs of the Application.

13. I will begin with making a finding on the first issue.

(a) Whether the Application is properly before me

14. Although the parties did not raise the issue, it is worth considering whether the Application is properly before me because such an issue is a matter of law. The Application seeks to stay proceedings in Kitale CMC Land Case No. 82 of 2020 pending the hearing and determination of the appeal preferred from a Ruling made therein on 17/10/2020. Admittedly, by the Appellant/Applicant, apart from Sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act*, the Application is brought under Order 42 Rule 6 of the *Civil Procedure Rules.*

15. Order 42 Rule 6 of the *Civil Procedure Rules 2010* provides generally for the grant of stay (of execution or proceedings) in case of an appeal being preferred. Of relevance to the instant Application is Sub-Rule 1 of the Order. It provides that,

> "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court decision the appeal is preferred may apply to the appellate court to have such order set aside" (emphasis mine).

16. A plain grammatical or textual reading of this terminology reading of the text above, particularly, the underlined phrase is to the effect that a party is not permitted to skip the must important point as the first point of call: the respective trial magistrate or judge against whose order or judgment an appeal is preferred. After he or she has moved the Court and his Application is granted or not, depending on how he views the decision, then he/she will file another application in the Court appealed to. It is upon this step having been taken that the application for stay of proceedings in the trial can be considered by the appellate Court. Absent of this step, the application filed for stay of execution or proceedings directly to the appealed to is improper.

17. In the instant case, both the Applicant and the Respondent deponed that after the decision of 17/10/2022 the Applicant filed the instant appeal. But from the record the appeal was filed on 28/10/2022. It is not shown anywhere by the depositions of the parties that the Applicant sought stay of the proceedings in the trial Court and it was either granted on conditions or refused. This Court therefore concludes that a stay similar to the one sought herein was not sought in the lower Court. Without that, it is clear to me that the Applicant did not take an important step as required by the Rules. That being the case, then the Application before me is improperly before me.

18. I would be clear to state here that Laws and Rules of procedure were not enacted and/ or made in vain. They are made for a purpose and the same should be served. Even where their application would occasion what may seem to be an injustice by being applied, the procedure or step they lay down ought to be followed otherwise the situation of failure to apply them would lead to a system slowly grinding to a halt, anarchy, chaos, impunity and absence of the Rule of Law.

19. The situation described in the preceding sentence is a manifestation of a state or country which is brutish and barbaric: one that fits an uncivilized nation. Kenya has gone way far ahead of that. We are in a place where the common phrase that used to fly around that "this person is illiterate and primitive" is long forgotten and should never arise. In any event, one of the national values and principles that this Country prides in is, under Article 10(2)(a) of the *Constitution* of 2010, the rule of law.

20. I am aware that time without number, courts have stated earlier that rules are supposed to be hand maidens of justice and not masters hence they should serve the ends of justice (see *Hind Construction Co. Ltd V Wilson Ongeso* [2007] eKLR; *Sarah Hersi Versus Kenya Commercial Bank* Civil Appeal No. NAI 165/1999; *Shashikant C. Patel v Oriental Commercial Bank* [2005] eKLR; *Inland Beach Enterprises Ltd v Sammy Chege & 15 Others* [2012] eKLR, etc). And it has been restated that Article 159(2)(d) of the *Constitution* of 2010 mandates Courts not to determine matters based on technicalities but substantive justice, so much so that the prejudice to be occasioned on the innocent and offending parties by reason of the Court taking a drastic step such as striking out pleading because of failure to follow procedure should be weighed keenly.

21. This Court is prepared to give substantive justice herein. Substantive justice must be given within the confines of the observance of the Rule of Law and be balanced to all parties. As the Court of Appeal stated in *Abdirahman Abdi v Safi Petroleum Products Ltd & 6 others* [2011] eKLR,

> " The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice...In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the *Appellate Jurisdiction Act*, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the *Constitution* of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the *Constitution* makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion."

22. However, as I weigh the effect of failure to move the trial Court first about the issue before me and the step taken by the Applicant to this Court "directly from the showroom", that is to say, from the point of the order sought to be stayed, I am inclined to find, and I hereby do, that greater injustice is made to the innocent party if the appellate Court were to treat the skipping of the request for halting the proceedings in the trial Court so as to appeal from its decision as a minor infraction which can clothe the appellate Court with jurisdiction to hear the application (as one of first instance). For instance, had the Applicant herein, immediately after filing this appeal, sought the stay of proceedings in the lower Court before moving this Court, it would have put the Court and the Respondent on notice that the steps being taken in the trial Court would one day be a subject of being appealed against.

23. Halting of proceedings, without reasonable excuse in the era of expeditious determination of matters is itself an injustice. Worse, is when both the other party and the trial Court proceed on the premise that the matter has no obstacle hence, for instance, cross-examine witness and prepare submissions, and prepare a judgment respectively, only to be ambushed with an order of stay of proceedings from an appellate Court. Not only is that a waste of the precious judicial time but an ambush that manifests malice, spite and scorn.

24. Thus, as the Court of Appeal stated in *Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 Others* [2013] eKLR:

> "The right of appeal goes to jurisdiction and is so fundamental that we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159 (2) (d) of the *Constitution*. We do not consider Article 159 (2) (d) of the *Constitution* to be a panacea, nay, a general white wash, that cures and mends all ills, misdeeds and defaults of litigation".

25. Similarly, the requirement, under Order 42 Rule 6(1) of the *Civil Procedure Rules, 2010*, to first approach the trial Court for an order of stay of proceedings is not a mere technicality of procedure. It is a matter of substantive justice, intended for good order and purpose, and would save a lot of judicial time and agony on the part of the parties. To lower or 'elevate' it to a technicality which Article 159(2) (d) of the *Constitution* of Kenya, 2010, would require that its infraction be glossed over would cause injustice to the innocent party.

(b) Whether the Application is merited

26. Having said as much above, and although I would have moved to strike out the application after that, I now, for good reason, consider the merits of the Application. The parties went into great lengths to discuss the merits of the appeal herein. While that was plausible, it was not the main issue before in this application. All that the Applicant was required to demonstrate was that he has an arguable appeal (not that the appeal raises triable issues - that to me was a strange argument because an appeal is not tried, it is argued: suits, claims and petitions and the kind are the ones tried before courts where they are brought). Again, the Applicant argued that he would suffer substantial loss. While it may be taken that he wanted to convince the Court about the damages that he may suffer which cannot be compensated by way of damages, that is not akin to substantial loss which applies to issues to consider in applications on injunctions. Learned counsel would do well to do more on his homework on the study of law so that they would help to guide the Courts to the proper directions and decisions. The Applicant also needed to show that the appeal would be rendered nugatory of the order sought was not granted.

27. In my view, there is appeal against the order issued on 17/10/2022. As to whether it is arguable, I consider two issues: first, that the order impugned is a discretionary one. It is arguable whether or not it was exercised judiciously. Second, the Respondent raised the issue of leave to file the appeal not having been sought. That is arguable.

28. Regarding whether the appeal herein shall be rendered nugatory or not, I consider the circumstances prior to and after the order of 17/10/2022 as made by the trial Court, and they play out as a short movie. From the depositions of the parties, for reason of age and illness of the respondent that were stated by learned counsel in the Replying Affidavit, the trial Court fast-tracked the suit whose order is the subject of the instant appeal. On 12/09/2022 the Plaintiff/Respondent applied for adjournment and given the 26/09/2022 to proceeded with his case. He did so on that date and closed his case. Defence hearing fixed for 17/10/2022. On the latter date the Applicant requested for the matter to procced at 10.30 am. After that time, instead of him adducing evidence made an application dated the same date, seeking leave to amend the Defence.

29. Upon the same being opposed, it was struck out and the trial Court ordered the matter to proceed. Learned counsel for the Applicant prayed for ten (10) minutes to prepare the Applicant and witnesses to testify. It appears he was sacked within the ten minutes and his Advocate instructed another firm of lawyers who filed and served the Respondent with a Notice of Change of Advocates. Cognizant

of the right to counsel of any party, the Court adjourned the suit to 24/10/2022. On 24/10/2022, the Applicant seems to have sacked the “new” advocate and now acted in person. He proceeded with his Defence hearing that date and 31/10/2022. He closed his case and judgment was fixed for on 28/11/2022.

30. A new light of dawn must have come upon him on 28/10/2022 and it caused him to file the instant Appeal against the order of 17/10/2022. It is clear that on and after the 17/10/2022 the Applicant did not move the trial Court for stay of proceedings. What is more baffling than that is that even after filing the appeal three days prior to the 31/10/2022 when he adduced his further evidence, he did not seek the order of stay of the proceedings either immediately or on the 31/10/2022. He chose to remain silent about it and instead, was busy drafting the instant detailed and long application because from what appears to me, the receipt of payment FCU-0019833 for Kshs. 2250/= was issued at 13:26:07 hours.

31. Given that the judgment in the lower Court is due on 28/11/2022 yet there is an appeal preferred from the orders the trial magistrate issued on 17/10/2022, the question that I must answer is, will the appeal be rendered nugatory if the order of stay of proceedings sought herein is not granted? The Court of Appeal, in *Reliance Bank Limited vs Norlake Investments Limited* [2002] 1 E.A. 227 explained that the circumstances of each case must be considered in arriving at a decision as to whether or not an appeal may be rendered nugatory. It stated as follows:

> “What may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.”

32. Additionally, in the case of *Kenya Airports Authority vs. Mitu-Bell Welfare Society & Another* (2014) eKLR, that:

> “The nugatory limb is meant to obviate the spectre of a meritorious appeal, when successful, being rendered academic the apprehended harm, loss or prejudice having come to pass in the intervening period. Our stay of execution jurisdiction is meant to avoid such defeatist eventualities in deserving cases.”

33. Also, in *Tabro Transporters Ltd. vs. Absalom Dova Lumbasi* [2012] eKLR, the Court stated thus:

> “The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”

34. In *Katangi Developers Limited v Prafula Enterprises Limited & another* [2018] eKLR, the same Court stated as follows:

> “Therefore, the issue before us is whether the intended appeal will be rendered futile or a mere academic exercise if the order for stay of proceedings is not granted. It is evident that if an order of stay of proceedings is not granted, the case in the ELC Court will proceed to hearing and determination. To an extent that may lead to determination of some of the issues intended to be raised in the intended appeal. It will not however, render the intended appeal otiose or irrelevant unless the suit is determined in the applicant’s favour. As was

stated by this Court in the Silverstein Case, where a similar order of stay of proceedings was sought:

"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 is already heard, determined and, 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"".

(16) In short, the failure to grant an order of stay will not render the applicant's intended appeal nugatory."

35. I must agree in totality with the reasoning of their Ladyships and Lordship of the Court of Appeal that the fact that the trial Court proceedings will go to the full conclusion of their life does not of itself render the appeal nugatory. Costs are a sufficient remedy should the said proceedings be found unnecessary in the event that the appeal succeeds. Even as noted in the preceding authorities to the last Court of Appeal one, an Applicant in an application of this nature should demonstrate to the Court the threatened harm or loss which cannot be remedied by payment of costs shall have passed in the intervening period unless stay of proceedings is not granted. I see no harm in a judgment being prepared and delivered in the lower Court case. Not every appeal should call for an automatic stay of proceedings (or even execution). There must be special circumstances to call for that. They did not manifest themselves in the instant case.

36. However, I must hasten to state that even though the reasoning of their Lordships could have been different from mine, the circumstances of the instant case would have nevertheless led me to make a finding that the appeal would not be rendered nugatory because, by the conduct of the party/ Applicant he already made appeal rendered nugatory, to use the term loosely. I say so because, by his own conduct, the Applicant 'acquiesced' or 'agreed' to the proceedings going on. He did not in any way, at the earliest instance, that is to say, on 17/10/2022 or so soon thereafter apply to stay the proceedings. Instead, he proceeded with the hearing on 24/10/2022 and 31/10/2022. He did not 'protest'. He cannot be heard to cry "wolf" afterwards when he has been dining and wining in one sheep pen with the same wolf. The conduct of the Applicant is akin to and can be best exemplified by, although not the same and should not be equated to, such conduct as promissory estoppel or equitable forbearance, and/or affirmation as known in the law of contract. If a party by his conduct express or otherwise leads to another (and the Court) to believe that the state of things are as they appears to be, as in the instance case, that he has no 'protest' to the proceedings going on, and both the Court and the other parties act believing that to be the case, he cannot be heard to revile that position later.

37. Lastly, but not least, the grounds of appeal stated in Annexture RW4 and the prayers sought in the said Memorandum of Appeal are, in my view, 'static' in the sense that they only point to, if successful, the varying or setting aside of the order of striking out issued on 17/10/2022 and nothing more. This Court wonders aloud as to what would become of the proceedings subsequent to the order, should the appeal succeed. This Court wonders so because, it is clear that the Defendant in the lower Court matter/Applicant herein has so far testified and closed his case. In the Appeal there is no prayer for setting aside of the proceedings subsequent to that. Additionally, there was prayer, in the Application dated 17/10/2022 which was struck out, to the effect that the Defendant be granted leave to adduce more and new evidence which was not within his reach after due exercise of diligence before the hearing or close of pleadings. It therefore means that if the appeal is successful, once the prayers in the application are granted, the Applicant/Appellant will embark on making further applications about leave to set aside proceedings, file further or additional documents and or witness statements, and so on. Such is an example of the many the delaying tactics that litigants employ to ensure that matters

prolong in courts hence causing backlog. This Court shall not bend towards engendering such practice. Whilst this Court is not determining the merits of the appeal herein, it is clear to me that the appeal will therefore not be rendered nugatory since the proceedings subsequent to the impugned order would still be intact after the appeal succeeds, if it does, hence calling for further applications to alter the steps subsequent to the order of 17/10/2022. Thus, the application before me for a prayer for staying the proceedings is nothing but a mere academic exercise.

38. Before I conclude, I would, in passing, state nostalgically that legal practice in Kenya seems to be evolving by the day, but not necessarily to the better professional stature. At times learned counsel play into the gallery of the unprofessional by accepting to be used to play tricks or have sharp practice. It is sad! In this matter, it appears to me that by his act of applying for adjournment, 'sacking' his learned counsel at the hearing and appointing another and 'sacking' him on the subsequent hearing and proceeding, only for the former learned counsel to be re-instructed on appeal, the Applicant was using instructions to and learned counsel as a gimmick to hoodwink the trial Court into granting him adjournments. It is a clear case of intention to delay the matter in the trial Court and the trail magistrate should not "buy into it". Also, it is unprofessional for learned counsel to be allow themselves or their law firms to be used by parties to play such tricks.

(c) Disposition and who to bear the costs of the Application

39. The upshot of the analysis above is that the Application dated 31/10/2022 which was in the first place improperly before me is absolutely unmeritorious and in my view an abuse of the process of the Court. I dismiss it with costs to the Respondent.

40. For avoidance of delay in this appeal, and to ensure that the process of this Court is not subject to further abuse, it is hereby directed that the record of appeal herein shall be filed within thirty (30) days of the delivery of the judgment of the lower Court, and both the lower Court file and this one be placed before this Court for mention on 24/01/2023 for further directions on the appeal. A copy of this Ruling be served on the trial Court by the Deputy Registrar of this Court within seven (7) days of delivery.

41. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 17TH DAY OF NOVEMBER, 2022.

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC KITALE