Gikunda v Bogani Gardens Management Company Ltd (Environment & Land Case E034 of 2022) [2022] KEELC 15547 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15547 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E034 OF 2022

JO MBOYA, J

DECEMBER 20, 2022

BETWEEN

MARTIN KOOME GIKUNDA ..... PLAINTIFF

AND

BOGANI GARDENS MANAGEMENT COMPANY LTD ..... DEFENDANT

RULING

Introduction and Background

1. Vide Notice of Motion Application dated the July 19, 2022, the Defendant/Applicant herein sought for various Reliefs/ Orders:

    i. That the Honourable Justice Oguttu Mboya be pleased to recuse himself from further hearing of this dispute between the Parties.

    ii. That pending the hearing and final determination of the COA Civil Appeal No E244 of 2022, there be a Stay of Further Proceedings in this matter.

    iii. That Costs be provided for.

2. The instant Application is premised on the grounds outlined and enumerated at the foot thereof and same is further supported by the affidavit by one Aldrin Ojiambo, Advocate, sworn on the July 19, 2022 and to which the deponent has attached/annexed assorted documents/annexures.

3. Upon being served with the said application, the Plaintiff/Respondent filed a Replying Affidavit sworn on the September 7, 2022 and in respect of which same has controverted and disputed the allegations contained in the body of the Application and the supporting affidavit thereof.

4. Be that as it may, when the instant Application came up for hearing, the Advocates for the respective Parties agreed to have the Application be canvassed and be disposed by way of written submissions.

5. Consequently, the court proceeded to and issued directions pertaining to and concerning the timelines within which the Parties were to file and exchange their respective submissions.

6. Pursuant to and in line with the directions, the Defendant/Applicant proceeded to and indeed filed her written submissions dated the October 11, 2022, whilst on the other hand, the Plaintiff/Respondent filed her written submission dated the November 1, 2022.

7. For clarity and completeness, the two sets of submissions forms part and parcel of the record of the court.

Submissions By The Parties

a. Defendant's/applicant's Submissions

8. Vide written submission dated the October 11, 2022, the Defendant/Applicant has identified, isolated and highlighted five salient issues for due consideration by the Honourable court.

9. First and foremost, counsel for the Defendant/Applicant has contended that the Judge readily and easily accepted the Plaintiff's/Respondent's case in the course of crafting and delivery of the Ruling on the March 28, 2022, whilst on the other hand dismissing/shutting his eyes to the many allegation of fraud and breach of trust that were alluded to against former officials, who were responsible for the registration of the suit property in the name of the Plaintiff/Respondent.

10. Secondly, learned counsel for the Defendant/Applicant has further submitted that the Judge similarly disregarded and ignored several decisions which were cited and quoted by and on behalf of the Defendant/Applicant herein.

11. For clarity, counsel for the Defendant/Applicant has singled out two decisions namely, *Pan African Holding Ltd & Another v Dickson Ngatia Gachuche* (2021)eKLR and *Nyandrua Progresive Agencies Ltd v Cyrus Wahome Nduhiu & Another* (2017)eKLR, which same contend to be very important but, were disregarded by the Honourable Judge.

12. Thirdly, it has been submitted by the counsel for the Defendant/Applicant that the decision and the reasoning of the Judge contained in the elaborate Ruling rendered on the March 28, 2022 were/ are slanted and constitute a misconception of the totality of the circumstances underlining the impugned transaction leading to the transfer and registration of the suit property in favor of the Plaintiff/ Respondent

13. In particular, learned counsel for the Defendant/Applicant has contended that it was not possible for the Judge to reject the entire evidence presented *vide* a 51 paragraph long Replying affidavit, unless the Judge had a pre-meditated and a pre-formed opinion in the dispute beforehand.

14. Fourthly, learned counsel for the Defendant/Applicant has also submitted that despite the fact that the Judge was dealing with an interlocutory application, the Judge proceeded to and delve into the merits of the matter and essentially by accepting one set of evidence, namely, the set of Evidence tendered by the Plaintiff/ Respondent and disregarding the other set.

15. Premised on the foregoing, counsel for the Defendant/Applicant has therefore submitted that it was erroneous on the part of the Judge to proceed and accept one set of the conflicting affidavit evidence whilst rejecting the other set in its entirety.

16. Additionally, it has been contended that the Judge also proceeded to and dealt with the matter whilst knowing that same was conflicted and hence same ought to have recused or disqualified himself from entertaining and adjudicating upon the subject matter.

17. In view of the foregoing, counsel for the Defendant/Applicant has therefore submitted that the foregoing issues which have been raised and alluded to and better still which have been amplified in the body of the impugned application, it is appropriate and desirable that the Judge be pleased to recuse himself from hearing and dealing with the subject matter.

18. To buttress the submissions relating to the recusal of the Judge, the Defendant/Applicant has cited a plethora of authorities inter-alia, *Kalpana H Rawal versus Judicial Service Commission & 2 Others* (2016)eKLR and *Glady's Boss Shollei versus Judicial Service Commission & Another* (2018)eKLR

19. Finally, counsel for the Defendant/Applicant has further submitted that the Defendant/Applicant has since filed and lodged an Appeal before the Court of Appeal *vide* Court of Appeal Civil Appeal No E244 of 2022, whereby same has challenged the entire Ruling and decision rendered by this Honourable court.

20. In any event, counsel has further submitted that the Appeal before the Honourable Court of Appeal has overwhelming chances of success insofar as the impugned Ruling reeks and is wrought of several Errors of law and partisan findings of facts.

21. Premised on the foregoing, counsel for the Defendant/Applicant has therefore implored the Court to find and hold that there ought to be stay of further proceedings as pertains to the subject matter pending the hearing and determination of the Appeal before the Court of Appeal.

22. In support of the foregoing submissions, learned counsel for the Defendant/Applicant has cited and relied on inter-alia, the decision in the case of *Ndade versus The DPP & 2 Others* (2022)eKLR and *Tom versus DPP & 2 Others; KNHA & Another* (2022)eKLR

b. Plaintiff's/respondent's submissions

23. The Plaintiff/Respondent filed written submissions dated the November 1, 2022 and in respect of which same has highlighted and amplified two issues for consideration by the Honourable court.

24. First and foremost, counsel for the Plaintiff/Respondent has submitted that where a Party seeks recusal/disqualification of a Judge/Judicial officer, it is incumbent upon the claimant to put before the court cogent, credible and believable Evidence, which would persuade a reasonable and fair-minded person that indeed there is bias or a likelihood of bias in the mind of the impugned Judge/Judicial officer.

25. In respect of the subject matter, counsel for the Plaintiff/Respondent has contended that the entirety of the supporting affidavit does not exhibit or show any reasonable ground for assuming the existence of Bias or a likelihood of bias or at all.

26. Secondly, counsel for the Plaintiff/Respondent has submitted that the Judge in respect of the subject matter took Oath of Office and that same is obliged/obligated to adhere to and comply with the Oath of office.

27. In any event, counsel has added that the Judge also has a Duty to sit unless there exists cogent and reasonable basis to warrant recusal/disqualification, in respect of a Particular matter.

28. Other than the foregoing, counsel has added that in respect of the subject matter the allegations contained and alluded to at the foot of the application do no warrant recusal, either in the manner sought by the Defendant/Applicant or at all.

29. To vindicate the foregoing submissions, counsel for the Plaintiff/Respondent has cited and relied on *inter-alia*, the decision in the case of *Oloolulo Game Ranch Ltd versus National Land Commission & 2 Others; Chief Land Registrar & 2 Others (interested parties)* (2020)eKLR and *Kaplan & Straton versus L Z Engineering Construction ltd & 2 Others* (2000)eKLR, respectively.

30. Premised on the foregoing submissions, counsel for the Plaintiff/Respondent has therefore implored the Honourable court to find and hold that the subject Application is devoid of merits and thus same ought to be Dismissed.

Issues for Determination

31. Having reviewed the Application dated the July 19, 2022, together with the Supporting affidavit thereto and having reviewed the Replying affidavit sworn on the September 7, 2022; and having considered the elaborate submissions filed on behalf of the respective Parties, the following issues do arise and are worthy of determination;

    i. Whether the Defendant/Applicant has established and demonstrated a reasonable basis to warrant Recusal/Disqualification of the Judge in respect of the subject matter.

    ii. Whether the Defendant/Applicant has satisfied the requisite threshold for the grant of an order of Stay of Proceedings pending Appeal in the manner sought or at all.

Analysis and Determination

Issue Number 1 Whether the Defendant/Applicant has established and demonstrated a reasonable basis to warrant Recusal/Disqualification of the Judge in respect of the subject matter.

32. The subject application touches on and concerns inter-alia recusal of the Judge premised on various allegations, which have been alluded to and articulated both in the grounds in the application and the supporting affidavit.

33. Be that as it may, it is imperative to state and underscore that where a litigant/claimant seeks the recusal of a Judge/Judicial officer in a matter, it is incumbent upon the Applicant/claimant to provide cogent, credible and reasonable basis to anchor and ground an application for such recusal.

34. Put differently, an application for recusal or Disqualification ought not to be made merely because a Judge/Judicial officer has made a decision which the Applicant/Claimant finds to be unpleasant.

35. Notwithstanding the foregoing, it is also imperative to underscore that where a particular party is dissatisfied with a decision/ruling of a Judge/Judicial officer, it behooves such a Party to pursue an appeal to the Court of Appeal or such other Appellate court as may be prescribed or be provided for under the *Constitution*, 2010.

36. Be that as it may, it is appropriate to state that the law pertaining to circumstances where a Judge/Judicial officer ought to recuse him/herself from hearing and entertaining a particular matter has variously been expounded and espoused by various courts, inter alia, the Supreme Court of Kenya and the Court of Appeal.

37. Without belaboring the point, it is appropriate to take cognizance of the holding of the Court of Appeal in the case of *Philip K Tunoi & another versus Judicial Service Commission & another* [2016] eKLR it was held:

> 40. The test in *R v Gough* was subsequently adjusted by the House of Lords in *Porter v Magill* [2002] 1 All ER 465 when the House of Lords opined that the words "a real danger" in the test served no useful purpose and accordingly held that –
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> > "[T]he question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."
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> 41. In determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias.
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> 42. In *Taylor v Lawrence* [2003] QB 528 at page 548, in which an application was made to reopen an appeal on the ground that the Judge was biased, the Judge having instructed the plaintiffs' solicitors many years previously the House of Lords in the judgment of Lord Woolf CJ reiterated:
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> > "... we believe the modest adjustment in R V Gough is called for which makes it plain that it is, in effect, no different from the test applied in most of the commonwealth and in Scotland."
> >
> > "The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

38. Additionally, the test to be applied prior to and before a Judge/Judicial officer recuses himself/herself from hearing a particular matter was also ventilated and expounded on by the Court in the case of *Republic versus Honourable Jackson Mwalulu & others* Civil Application No 310/2004, (unreported), where the Court of Appeal held;

> " That being the position as l see it when the Courts in this country are faced with such proceedings as this (i.e. proceedings for the disqualification of the judge) it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice.
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> The test is objective and the facts constituting bias must be specifically established. It is my view that where any such allegation is made, the Court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their cases before a Court or quasi-judicial tribunal they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the judge, magistrate or Tribunal".

39. In any event, it is also imperative to note that the issue of recusal/disqualification of a Judge/Judicial officer was also calibrated and expounded on by the Supreme Court of Kenya. For clarity, the decision in the case of *Gladys Boss Shollei versus Judicial Service Commission & another* [2018] eKLR, is relevant, apt and succinct.

40. For coherence, the Supreme court stated and observed as hereunder;

> (26) In respect of this doctrine of a judge's duty to sit, Justice Rolston F Nelson; of the Caribbean Court of Justice in his treatise – "Judicial Continuing Education Workshop: Recusal, Contempt of Court and Judicial Ethics; May 4, 2012; observed:
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> > "A judge who has to decide an issue of self-recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartiality and instilling public confidence in the administration of justice. On the other hand, a judge has a duty to sit in the cases assigned to him or her and may only refuse to hear a case for an extremely good reason" (emphasis mine).
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> (27) In the case of *Simonson vs General Motors Corporation USDC* p425 R Supp, 574, 578 (1978), the United States District Court, Eastern District of Pennsylvania, had this to say:-
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> > "Recusal and reassignment is not a matter to be lightly undertaken by a district judge, While, in proper cases, we have a duty to recuse ourselves, in cases such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reasons for recusal, there remains what has been termed a "duty to sit" . . ."

41. Duly nourished and guided by the observations contained in the fore-cited decision, it is now appropriate to discern whether the Defendant/Applicant has indeed established and demonstrated reasonable basis upon which recusal should be anchored or premised.

42. First and foremost, it is contended that Judge herein stated/ alleged that same is a member of Citam Church and therefore same is knowledgeable and familiar with the facts underlining the dispute beforehand. For clarity, the supporting affidavit that alludes to the impugned allegations has been sworn by Aldrin Ojiambo Advocate.

43. Nevertheless, it is worthy to recall and reiterate that when the impugned ruling was delivered on the March 28, 2022, the said advocate who has made the impugned allegations was not in court. In this regard, the record of the court expressly shows that the advocate who appeared in court was Dr Omondi R OwiNo

44. To the extent that the said advocate who has sworn to the impugned allegations was not in court, there is no gainsaying that same could therefore not have heard the alleged words, which have been alluded to in the Supporting Affidavit, namely, that the Learned Judge is a Member of CitamChurch.

45. In the premises, it is appropriate and worthy to state and underscore that the allegations/ averments that are contained in the Body of the Supporting Affidavit are the subtle inventions and innovation of the Deponent.

46. On the other hand, it is also not lost on the Court that a Deponent to an Affidavit, is obliged and duty bound to swear to Facts, which are within his Knowledge and not otherwise. Clearly, the impugned allegations are and constitutes Hearsay.

47. Secondly, it has also been contended that the Judge was knowledgeable and privy to the impugned wrangles between the previous official of Citam Church and current officials. However, it is important to point out that the contents of 51 paragraphs long affidavit, filed by the Defendant and which was prolix in nature, brought to the fore the Dispute and hence the Judge was obligated to address the same in the impugned Ruling.

48. Premised on the foregoing, the issue pertaining to the existence of a dispute between the previous bearers and (sic) the current office bearers is one that was duly placed before the Honourable court by the Defendant/Applicant herself and not otherwise. For clarity, the Judge did not go out to fish for such Evidence.

49. Having placed the impugned Evidence before the Honourable court, obviously, the court was called upon to calibrate and address the resultant issues and to weigh same as against the position taken by the Plaintiff/Respondent.

50. Clearly, the Honourable court was not to take a slumber and by extension, gloss over the Issues which had been placed before same by one Party and denied by the Other. In my humble view, the Honourable Judge is not obligated to be a Crowd Pleaser in the course of the Discharge his/her Constitutional mandate.

51. Other than the foregoing, the Judge has also been accused to have ignored and disregarded the various Case law and Decisions which were quoted by and on behalf of the Defendant/Applicant.

52. To my mind, the Judge is not obligated to refer to and to apply only the decisions quoted and cited by the Parties in the matter. For clarity, my understanding of the law is that the Judge and by extension all Judicial officers are at liberty to apply the law to the best of their Understanding and ability and not otherwise.

53. Consequently and it is also imperative to state and observe that a Judge/Judicial officer is similarly at liberty to do own research and thereby to arrive at the decisions/ Case law that suits the dispute beforehand and which accords with the Interests of Justice.

54. Premised on the foregoing, it is my finding and holding that the allegation that the Judge disregarded or ignored the case law cited and quoted by the Defendant/Applicant, is informed by a vindictive and narrow appreciation of the Constitutional and Statutory mandate of a Judge/Judicial officer, whilst discharging/exercising Judicial authority.

55. Other than the foregoing, it has also been submitted and contended that the Judge adopted a slanted approach in dealing with the dispute beforehand. In this regard, the Judge has been accused of wholesomely accepting the affidavit evidence propagated by the Plaintiff/Respondent whilst disregarding the affidavit evidence tendered by and on behalf of the Defendant/Applicant.

56. Whereas I agree and accept the statement of the law that whilst dealing with an Interlocutory Application, the Judge/Judicial officer is not called upon to make precipitate and substantive findings on issues of facts and law, I must point out that the Judge/Judicial officer is still obligated to weigh the affidavit evidence on behalf of the contesting Parties and to form an opinion, one way or the other.

57. To this end, the observation of the Court of Appeal in the case of *Thomas Mumo Maingey (Suing on his own behalf and on behalf of the Franciscans of Our Lady of Good Counsel Sisters Registered Trustees) vwersus Sarah Nyiva Hillman & 3 others* [2018] eKLR, is apt, relevant and succinct.

58. For coherence, the Honourable Court observed and stated as hereunder:

> 23. It was not the role of the court when considering the interim applications to make a final determination on the conflicting affidavit evidence. As Lord Diplock warned in *American Cyanamid Co (No 1) vs Ethicon Ltd* [1975] UKHL 1 "it is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt

with at the trial." This Court expressed a similar view in *Mbuthia vs Jimba Credit Finance Corporation & another* [1988] KLR 1 where it was held that "the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions."

59. In my humble view, the court herein was called upon to calibrate on the two versions, which were placed before the court by the two disputants and upon calibrating on the two sets, it behooved the Honourable court to make certain observations, useful and relevant to the Just determination of the Dispute beforehand.

60. Suffice it to point out, that a legal contest like the one beforehand could not result into a draw. For clarity, the Honourable court was enjoined to make a decision one way or the other, depending on the persuation of the Facts/ Evidence tendered.

61. Be that as it may, the fact that a court made a decision, which may be wrong or otherwise, does not by itself connote that the Honourable court had a pre-meditated and pre-determined mindset.

62. Additionally, the fact that a Judge/Judicial officer has made a decision one way or the other, which is neither pleasant nor palatable to one Party, in this case the Defendant/Applicant, does not found a basis for recusal/disqualification, either in the manner sought or at all.

63. In this regard, it is appropriate to take cue from the dictum of the Court of Appeal in the case of *Galaxy Paints Ltd versus Falcon Guards Ltd* (1999)eKLR, where the Court of Appeal stated and observed as hereunder;

> As a result of the failure on the part of counsel to observe the Rules, many like Mrs Dias, have turned to scurrilous abuse and unfounded allegations against the learned Judges and applications to disqualify them, which were formerly very rare, are now a common feature. As we have said elsewhere this practice is nothing but an attempt to shop around for Judges favourable to their cause. It is strongly deprecated.
>
> Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour. See R*aybos Australia Pr operty Limited & another v Tectram Cooperation Property Ltd & Others* 6 NSWLR 272.

64. From the foregoing exposition of the law, it is my humble conclusion that the totality of the allegations that have been alluded to and which color the affidavit in support of the current application for recusal, do not meet the requisite threshold for recusal of a Judge/Judicial officer.

65. With a heavy heart, I share in the observation of the Court of appeal enumerated and alluded to in the decision in the case of Galaxy Paints Ltd (*supra*). Clearly, if the impugned decision/ruling rendered on the March 28, 2022 reeks and is wrought with grave errors (sic) in the manner alluded to, it behooves the Defendant/Applicant to ventilate her appeal and persuade the Honourable Judges of the Court of Appeal to find and hold in her favor.

Issue Number 2 Whether the Defendant/Applicant has satisfied the requisite threshold for the grant of an order of Stay of Proceedings pending Appeal in the manner sought or at all.

66. Other than the limb of the impugned application that sought for recusal/disqualification of the Judge, there is also an aspect of the Application that seeks stay of proceedings pending the hearing and determination pending before the honourable Court of Appeal.

67. From the submissions filed by the Defendant/Applicant, it has been contended that the impugned ruling rendered on the March 28, 2022, which essentially granted orders of mandatory injunction, have the effect of finally resolving the dispute beforehand. In this regard, it has been contended that it would therefore be superfluous to proceed with the hearing of the main suit during the pendency of the appeal.

68. Secondly, the Defendant/Applicant has submitted that the appeal before the honourable Court of Appeal has overwhelming chances of success on the face of (sic) the grave errors of the law, contained and or reflected on the body of the impugned ruling of this honourable court.

69. Thirdly, it has been submitted that unless the orders of stay of proceedings are granted, the appeal before the Court of Appeal would be rendered nugatory.

70. Before venturing to address and deal with the merits of the Limb herein, it is imperative to state and observe that an order of stay of proceedings is a discretionary order and therefore the grant or refusal of such an order depends on the circumstances underlying the case beforehand.

71. In this respect, the law pertaining to the grant or refusal of an order of stay of proceedings was well amplified and expounded in the case of *Kenya Wildlife Service versus James Mutembei* [2019] eKLR.

72. For coherence, the Court observed and stated as hereunder;

> " 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."

73. 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)

74. 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."

75. From the foregoing corpus of case law, which have been referred in the preceding paragraphs, what becomes apparent is that an order of stay of proceedings ought to be reluctantly granted, given the impact and consequences that same has in respect of the hearing and expeditious disposal of cases.

76. In any event, whilst considering an application of stay of proceedings, the honourable court is enjoined to take cognizance of inter-alia, the Constitutional imperative enunciated vide the provision of Article 159(2) (b) of the *Constitution* 2010.

77. In my considered view, other than contending that the appeal before the Court of Appeal has high chances of success because of (sic) the alleged grave errors contained on the impugned ruling rendered on the March 28, 2022, the Defendant/Applicant has not measured up to the strict requirements envisaged by the law relating to the grant of stay of proceedings.

78. Notwithstanding the foregoing, it is also important to underscore that the appeal before the Honorable Court of Appeal may very well be prosecuted to its conclusion and upon the determination thereof, the proceedings before the Environment and Land Court shall thereafter abide by the outcome of the decision of the Court of Appeal.

79. Additionally, the fact that there is a pending appeal before the honourable Court of Appeal does not by itself, constitutes a basis to warrant the grant of an order of stay of proceedings. For clarity, if that were the legal position then the provisions of Order 42 Rule 6(1) of the *Civil Procedure Rules*, 2010, would have been worded differently.

80. Finally, it instructive to re-state and reiterate the holding of the Court of Appeal in the case of *David Morton Silverstein v Atsango Chesoni* [2002] eKLR, where the Court of Appeal stated and observed as hereunder;

> "... The onus of satisfying us on the second condition, that un less stay is granted, the intended appeal would be rendered nugatory, is also upon the applicant. In our view, it has unfortunately failed to discharge this onus. We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay is not granted. The appeal may be heard and, if successful, the proceedings in the superior court would be determined in accordance therewith. The hearing in th e superior court might have been unnecessary for which appropriate costs can be ordered but the appeal will not have been worthless."

81. Having considered the second limb of the subject application, touching on and concerning the grant of stay of proceedings pending the Hearing and determination of the Appeal before the Court of Appeal, I am afraid that the Defendant/Applicant has similarly failed to demonstrate/ establish a basis for the grant of such an order.

82. Suffice it to point out that the grant of an order of stay of proceedings pending the hearing and determination of an appeal is not a matter of right but one of discretion, albeit to be exercised in a judicious and reasonable manner, taking into account the obtaining circumstances of each case.

Final Disposition:

83. Having evaluated and analyzed the issues that were highlighted and amplified in the body of the subject Ruling, it must have become evident and apparent that the numerous allegations which color the affidavit in support of the Application did not disclose any cogent, credible or reasonable basis to warrant the grant of the reliefs sought thereunder.

84. Suffice it to point out that the mere fact that a particular Party, (in this case the Defendant/ Applicant), has lost and or is dissatisfied with the out come of a particular matter/issue, does not by itself found a basis for recusal of the Judge/Judicial officer.

85. In any event, if such latitude were to be afforded to Parties and their advocates, then the honourable court will be flooded with several Application of a like nature and manner, propagated and informed by a desire to have disputes heard by (sic) Judges/Judicial officers who may be perceived to be (sic) friendly.

86. In view of the foregoing, it is my finding and holding that the Application the July 19, 2022, is not only Misconcieved, but is devoid and bereft of merits. Consequently same be and is hereby Dismissed with costs to the Plaintiff/Respondent.

87. Be that as it may and despite the elaborate observations contained in the body of the subject Ruling, I am still minded to direct that this Honourable court/ Judge, shall no longer entertain and handle the impugned matter, as a matter of principle.

88. Consequently, the subject file shall henceforth be placed before the Honourable Presiding Judge of the Environment and Land Court with a view to re-allocating the subject suit to any of the other Honourable Judges of the Environment and Land Court.

89. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson - Court Assistant.

N/A for the Plaintiff/Respondent.

Mr. Nyboma h/b Aldrin Ojiambo for the Defendant/Applicant.