



Highland Plaza Limited v Ondieki & 6 others (Environment & Land Case 104 of 2016 & 35 of 2007 (Consolidated)) [2022] KEELC 15459 (KLR) (9 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15459 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 104 OF 2016 & 35 OF 2007 (CONSOLIDATED)
LL NAIKUNI, J
DECEMBER 9, 2022

BETWEEN

HIGHLAND PLAZA LIMITED PLAINTIFF

AND

EVANS ONDIEKI 1ST DEFENDANT

MANYALA AWUOR 2ND DEFENDANT

GEORGE OMONDI 3RD DEFENDANT

MOSES KURGAT 4TH DEFENDANT

SAMUEL KENYATTA 5TH DEFENDANT

CHARLES KOTUT 6TH DEFENDANT

SAFARICOM LIMITED 7TH DEFENDANT

RULING

I. Introduction

1. The 1st and 2nd Defendants/Applicants, Mr Evans Ondieki and Mr Manyala Awuor, formally moved this Honorable Court through filing a Notice of Motion application dated July 7, 2022 and filed on July 8, 2022 for its determination. The application was brought under the dint of Section 7 of the [Appellate Jurisdiction Act](#), Chapter 9, Sections 1A and 1B of the [Civil Procedure Act](#), Cap 21 and Section 59 of the [Interpretation & General Provision Act](#) Chapter 2 and Order 50 Rule 5 of the [Civil Procedure Rules, 2010](#) of the Laws of Kenya.



II. The 1st and 2nd Defendants/Applicants' case

2. The 1st and 2nd Defendants/Applicants sought for the following orders that:
 - a. Spent.
 - b. Upon the hearing of this application ex - parte there be a stay of further proceedings in this court in this case pending the hearing and determination of this application inter parties.
 - c. The Honourable Court do extend time for the appellant to give a notice of intention to appeal against its ruling dated May 10, 2022 by fourteen (14) days from the date of its delivery of the ruling in this application.
 - d. Upon the hearing of this application inter parties there be a stay of any further proceedings in this matter pending the hearing and determination of the intended appeal herein to the Court of Appeal.
 - e. Costs.
3. The said application was based on the summarized grounds that:
 - a) The Notice of Motion application dated November 22, 2021 by the Plaintiff came up for hearing on February 1, 2022.
 - b) The matter was set down for delivery of ruling on March 31, 2022.
 - c) On March 31, 2022, the Court never sat and no directions were given hence the Applicant believed the ruling would be delivered on notice taking that the Court never sat.
 - d) On May 24, 2022, the Applicant was served with an amended Plaint meaning the Court had delivered the ruling.
 - e) The said ruling was delivered in the absence of all parties.
 - f) The Appellant was dissatisfied with the said ruling and intended to prefer an appeal against it at the Court of Appeal.
 - g) Time for lodging a notice of appeal lapsed on May 24, 2022 and the intended Appellant became aware of the ruling 14 days after lapse of that period.
 - h) There was no fault whatsoever on the part of the Appellant in failing to file the notice of appeal within time and he should not be prejudiced because of a failure that was not of his making.
 - i) The delay, in any event, was not inordinate. It was explained and granting the orders sought would not be prejudicial to the Respondent in any way.
 - j) The Applicant was only on May 22, 2022 that he was to access the full Ruling delivered by this Court and was advised to appeal.
 - k) The mistakes of the Court and an Advocate should not be vested on the litigant.
4. The full details of the application by the 1st and 2nd Defendants/Applicants herein was supported by a twenty one (21) Paragraphed Supporting Affidavit sworn by the Evans Ondieki Anyona, dated November 23, 2021 together with three (3) annexures marked as "EOA 1 – 3". The Deponent averred as follows that: -



- a) The Notice of Motion application dated November 22, 2021 herein by the Plaintiff came up before the Honorable Court for hearing on February 1, 2022.
- b) On February 1, 2022 the honorable Court indicated that the ruling on the above application would be delivered on March 31, 2022.
- c) On March 31, 2022, the Honorable Court never sat and no directions were given on the ruling date. Hence, the parties expected to be served with a ruling notice.
- d) On May 24, 2022, the 1st and 2nd Defendants/Applicants were served with an Amended Plaint meaning that the ruling to the said application had been delivered.
- e) The said ruling was delivered in the absence of all the parties.
- f) On May 26, 2022 upon writing to the ELC Registry the Applicant's advocate was provided with a copy of the ruling on June 2, 2022 wherein the Applicants noted that the ruling had been delivered on May 10, 2022 hence time for issuing of a notice of appeal had lapsed.
- g) The Applicants were dissatisfied with the said ruling and intended to file an appeal at the Court of Appeal.
- h) Time for lodging a notice of appeal lapsed on May 24, 2022 and the Appellants became aware of the ruling eight (8) days after lapse of that period.
- i) There was no fault whatsoever on the part of the Applicants in failing to file the notice of appeal within time they should not be prejudiced because of a failure that was not of their making.
- j) The delay in any event was not inordinate. It was explained and granting the orders sought ought not be prejudicial to the Respondents in any way.
- k) The Amendment made had a substantial effect on the direction that this case would take. Hence, it was prudent that the outcome of the appeal be awaited before the case could proceed any further.
- l) Proceeding with the case in the meantime would negate the purpose of this application and the appeal. Substantial loss would result to the Applicants occasioning them to irreparable loss and damage if stay of execution was not granted.
- m) The application was meritorious made in good faith and was not aimed at delaying the trial of this matter nor merely locking out a successful litigant from the fruits of its judgment but to ensure that justice if done and seen to be done at the conclusion of this matter.
- n) In the circumstances he would respectively request this Honourable Court to grant a stay of proceedings pending the determination of the intended appeal.
- o) The application was made promptly without any delay upon discovering that the ruling was delivered in the absence of the parties and the chances of the appeal succeeding were high.
- p) The grant of the orders sought would not in any way prejudice the Respondents but would only ensure that the Court made a just and conclusive determination of the matter as required under Article 159 of the [*Constitution of Kenya 2010*](#).



III. The Replying Affidavit by the Plaintiff/Respondent

5. On August 23, 2022, the application was opposed through a filing of a seventeen (17) Paragraphed Replying Affidavit sworn by Beatrice Mbela, a director at the Plaintiff Company dated August 23, 2022 together with one annexure marked as “BM – 1” annexed thereto. The Deponent averred as follows that:
- a) She swore this affidavit in opposition to the 1st Defendant’s Notice of Motion dated July 7, 2022 seeking, ‘*inter alia*’ stay of proceedings the pending hearing and determination of the instant application as well as the intended appeal and an extension of time for the 1st Defendant to file its Notice of Appeal.
 - b) The Plaintiff vide an Application dated November 22, 2021 sought to amend its Plaint which application was heard and determined.
 - c) The Ruling over the above application was indeed delivered on the May 10, 2022 in favor of the Plaintiff.
 - d) When no notice of the Ruling to the above application was forthcoming, her advocates on record perused the file to know the position vide letter dated May 19, 2022, marked herein as “BM – 1”.
 - e) Pursuant to the ruling of May 10, 2022 the Applicant was served with the amended Plaint on the May 24, 2022.
 - f) According to the provision of the law, the notice of appeal ought to be lodged within 14 days of the Judgment/Ruling.
 - g) The Applicant became aware of the ruling on the May 24, 2022 and therefore had till the June 7, 2022 to lodge its Notice of Appeal.
 - h) In any case, the matter came up for Pre - trial conference on the June 27, 2022 where no mention was made of the intended appeal.
 - i) The Deponent was surprised that the Applicants had filed this instant application on the 8th July, 2022 seeking *inter alia* to stay this matter.
 - j) The Application and the attached Notice of Motion filed on the July 8, 2022 way out of time, was an aforethought on the part of the Applicants.
 - k) In any case, the Applicants had already filed and served its amended Defence in response to the Amended Plaint.
 - l) It is evident that this application was another attempt by the Applicants to drag this matter further, the Consolidated files having been filed in the years 2007 and 2016 respectively but never heard on merit.
 - m) The Applicants currently enjoyed possession of a portion of the suit property part of which they had leased to the 7th Defendant.
 - n) Based on the foregoing, it was evident that the sole purpose of this Application was to continue delaying the hearing and final determination of this suit while enjoying possession of the suit property.



- o) Great prejudice and injustice would be occasioned to the Respondents if this matter was delayed further.
6. In view of this, the Deponent urged Court to have the Application dismissed and the matter be set down for hearing.

IV. Submissions

7. On June 27, 2022, while all parties were present in Court, directions were provided by the Honorable Court to have the Notice of Motion application dated July 7, 2022 be disposed off by way of written submissions with stringent timelines. Pursuant to that, the Plaintiff/Respondent, 1st and 2nd Defendants/Respondents being the only parties participating in this application fully complied with the directions. The Honorable Court reserved a date for delivery of the ruling accordingly.

A. The Written Submission of the 1st and 2nd Defendants/Applicants.

8. On September 5, 2022, the Learned Counsels for the 1st and 2nd Defendants/Applicants herein the Law firm of Messers. Jengo Associates filed their written submissions dated 1st September, 2022. Mr Jengo Advocate submitted that the crust of the application was that the Court delivered its impugned ruling in the absence of the parties and without giving notice of the intended delivery after the ruling was not delivered on its due date.
9. He submitted that in its reply, the Plaintiff/Respondent admitted that the ruling was delivered without notice to the Parties on the May 10, 2022. The Plaintiff/Respondent also stated that it served the 1st and 2nd Defendants/Applicants with an Amended Plaintiff on May 24, 2022 hence the Defendants/Applicants became aware of the Ruling 14 days after the delivery of the ruling. However, subsequently the Plaintiff/Respondent wrongly stated that time for filing of a notice of appeal would run from the date of knowledge ie (May 24, 2022) and not the date of the delivery of the ruling ie (May 10, 2022). According to the Counsel this was a wrong construction of the law. The Counsel argued that time ran from the date of the ruling and not the date of becoming aware. The Counsel stated that this was provided under Rule 75(2) of the Court of Appeal Rules 2010. To buttress this legal reasoning, the Counsel cited the Court of Appeal case of:- "Kenya Power and Lighting Company Limited v Green Power Generation Company Limited & Another (Civil Application E056 of [2021] [2022] KECA 441(KLR)(March 18, 2022)(Ruling) Neutral Citation; [2022]KECA 441 (KLR) which expressed itself thus;

“Rule 75 of the Court of Appeal Rules provides as follows in this regard:

1. Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.
 2. Every such notice shall, subject to Rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”
10. The Counsel averred that having become aware of the ruling intended to be appealed against after the lapse of 14 days from the date of ruling for no fault of its own, this Honorable Court the jurisdiction under the provision of Section 9 of the Appellate Jurisdiction Act to grant leave to file and serve the



notice of appeal out of time. The Counsel on this point referred Court to the case of:- "[Nathaniel Ngure v Housing Finance](#) [2018] eKLR where this reasoning was set out as follows:-

"7. Now to the substance of the application, the same seeks an extension of time to lodge the notice of appeal and further seeks leave to file the Appeal. The relevant provision here is Order 50, Rule 6 of the Civil Procedure Rules which grants the High Court the power to enlarge time. Similarly, Section 7 of the Appellate Jurisdiction Act cited in the motion clothes the High Court with power to extend the time required for a party to give notice of intention to appeal."

11. The Counsel for the Applicants submitted that the factors to be considered in allowing the Application were set out in the case of:- "[Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission and 7 Others](#) [2014] eKLR where the Court held:-

"From the above caselaw, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

12. The Counsel for the Applicants' contention was that the reason for the delay in filing the Notice of appeal against the ruling delivered by this Court was not of the Defendant's making so its sufficiently explained. The delay was also not inordinate and the Plaintiff had not indicated any prejudice it would suffer if the Application was allowed. For the alleged delay in the conclusion of the matter that may be occasioned in the High Court matter, the same could not be attributed to the Applicants. The Counsel held that, in any case, the Plaintiff took close to fourteen (14) years, between the years 2007 and 2021 when it filed the suit before it applied to amend its Plaintiff and concretize it. That they took 14 years to apply to amend did not negate from the Applicant's right to appeal. For these reasons, the Counsel urged Court to allow the application as prayed.



B. The Written Submissions by the Plaintiff/Respondents

13. On October 21, 2022, the Learned Counsels for the Plaintiff/Respondent, the Law firm of Messrs Kittony Maina Karanja & Company Advocates filed their written submissions dated October 17, 2022. M/s Rimunya Advocate submitted that it would be relying on the filed Replying Affidavit by the Plaintiff/Respondent. She held that while the Court had unfettered discretion to extend the time for giving notice of intention to appeal from a Judgment/Ruling of the High Court, Courts had ruled numerously that this discretion was not as of right but an equitable remedy. The Counsel argued that the Applicant had the onus to prove that equity should be extended to them. In this instant case, the 1st and 2nd Defendants/Applicants wished to rely on the fact that the ruling to which they wished to appeal against was delivered without notice and therefore the time within which to put in the Notice of Appeal lapsed. The said Ruling was indeed delivered on the May 10, 2022 without notice to parties. It was the 1st and 2nd Defendants/Applicants' submission that by the time they became aware of the ruling, time had already ran out.
14. The Counsel submitted that the 1st and 2nd Defendants/Applicants became constructively aware of the ruling on May 24, 2022 when they were served with an Amended Plaintiff. Further, it was deponed that they received a copy of the said ruling on the June 2, 2022. Even after learning of the ruling, it was not until July 8, 2022 that the Applicants conceived the idea of lodging an appeal. Further, that in the intervening period, the matter was mentioned on the June 27, 2022 where there was no mention of an intention to appeal. In fact, the Amended Plaintiff was deemed as duly filed in time and the 1st and 2nd Defendants/Applicants put in their amended Defence.
15. The Counsel submitted that the delay of over a month had not been explained and was indeed inordinate. She averred that this was the conclusion in the case of:- "[Nathaniel Ngure v Housing Finance](#) [2018] eKLR as quoted by the 1st and 2nd Defendants/Applicants where the Court found that the Application had not been brought timeously. The 1st and 2nd Defendants/Applicants were also seeking to stay the proceedings in this suit until the intended appeal was heard and determined. The Counsel made an observation that the 1st and 2nd Defendants had however not submitted on this limb of their application. The Counsel argued that in any case this was a discretionary power of the Court. However, the onus placed on an Applicant seeking to stay proceedings was higher as the Court has to balance against the right of the Plaintiff to access justice and the right to be heard. This was the finding in the case of:- "[Global Tours & Travels Limited](#); Nairobi HC Winding up Cause No 43 of 2000" quoted with approval in "[Kenya Wildlife Service v James Mutembei](#) [2019] eKLR;

“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 for 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.”



16. The Court further stated;

“Stay of proceeding should not be confused with stay of execution pending appeal. 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.”

17. The Counsel submitted that the Court would take notice that the Plaintiff had been in Court since the year 2007 in search for justice and had never been heard to date. This being a matter of the years 2007 and 2014, that had never ventured past preliminaries in itself raised questions. Notably, the 1st and 2nd Defendants/Applicants continued to enjoy possession of the suit property and collection of the rent to the detriment of the Plaintiff/Respondent. It would then follow that it was in the Applicant’s interest that a status quo be maintained in perpetuity. Further, the Counsel opined that the 1st and 2nd Defendants/Applicants had not attached a draft Memorandum of Appeal from which they could deduce whether the intended appeal was arguable or not. The Counsel argued that any appeal from a ruling of this court of May 10, 2022 was not arguable and had absolutely no chance of success and for which purpose would be to prolong the hearing and determination of the suit and the Plaintiff from having its day in court and being heard on merit.
18. The Counsel submitted that the impugned ruling related to the right of the Plaintiff to amend its pleadings. As a rule of the thumb, amendments to pleadings were allowed as of right particularly before the hearing of the suit to give parties an opportunity to fully ventilate their claim. Additionally, the Plaintiff/Respondent stood to suffer great prejudice should this court exercise its discretion in favour of the 1st and 2nd Defendants/Applicants. Justice will have been delayed and therefore denied.
19. The Counsel further submitted that from the foregoing, that would be prejudicial and unjust to allow the Application. It would not be in the interest of justice to exercise court’s discretion and grant stay of proceedings as the same would only serve the purpose of delaying the suit to the detriment of the Plaintiff/Respondent, the Applicants having failed to demonstrate that they ought to be granted equitable remedies sought and lacking an arguable appeal to warrant issuance of the orders being sought. The Counsel relied on the conditions and principles laid out in the case of:- *”Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission and 7 Others* [2014] eKLR” as quoted by the 1st and 2nd Defendants/Applicants and submitted that the Applicants had not met them. In the final analysis, the Counsel prayed that the application by the 1st and 2nd Defendants/Applicants be disallowed with costs and that this matter be fixed for hearing.

V. Analysis and Determination

20. The court has considered the said Notice of Motion application dated July 7, 2022 by the 1st and 2nd Defendants/Applicants herein, the attached annexures thereof and the elaborate written Submissions, the cited authorities and the relevant provisions of the *Constitution of Kenya, 2010* and statutes in support and opposition of the Application. The following issues three (3) issues fell within the domain of the subject matter and shall be the guide of Court in arriving at an informed, just and fair determination. These are:-
- a. Whether the Notice of Motion application dated July 7, 2022 by the 1st and 2nd Defendants/Applicants has merit.
 - b. Whether the parties herein are entitled to the reliefs sought.



- c. Who will bear the costs of the application?

Issue No a). Whether the notice of motion application dated July 7, 2022 by the 1st and 2nd defendants/applicants has merit.

21. Prior to proceeding further on the analysis of the issue under this sub – heading, the Court wishes to trace some brief background to this matter. The Plaintiff/Respondent filed an application dated November 22, 2021 seeking for leave of Court to cause some amendment to its pleadings. They attached a copy of the Drafted amended Plaint. On February 1, 2021 parties appeared in court and directions were taken to canvass this application by way of written submissions. It was set down for delivery of ruling on March 31, 2022. Unfortunately, the Honorable was not sitting and a further date was given by the Registry. For some reason or other it appears inadvertently a notice was never issued and on May 10, 2022 taking that this ruling had taken awhile was delivered in the absence of the parties. The Applicants claim to that it was on May 24, 2022 that they became aware of the ruling upon being served with an Amended Plaint by the Plaintiff. Indeed, they come across the said ruling on May 24, 2022 while it was already past the statutory 14 days for preferring any appeal. They were aggrieved by that decision and wished to institute an Appeal. Nonetheless, on abundance of caution, the 1st and 2nd Defendants/Applicants proceeded and managed to file an Amended Defence, which the Court finds highly commendable step taken by them. It is for these reason that they filed this application fundamentally seeking for the orders of extension of time and stay of proceedings of this Court pending the hearing of the intended appeal. With these orders in place, they argued it would enable them file the said appeal and be heard appropriately at the Court of Appeal. Certainly, this is within their right.
22. Thus, I now wish to deliberate on the legal rationale on the extension of time. The Court of Appeal in the case of ”*Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, [1999] 2 EA 231, laid down the parameters in extending time for filing an appeal and stated thus:-
- “It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the Respondent if the application is granted”.
- Further, in the case of ”*Hannah Muthii Kibindu v Stephen Njine Kibindu & Another* [2020] eKLR”, it is the Court of Appeal that extended time to lodge a Notice of Appeal out of time.”
23. Applying this legal principles to the this instant case, I discern and its and it is not in any dispute that indeed this Honorable Court delivered its impugned ruling in the absence of the parties and without giving notice of the intended delivery after the ruling was not delivered on its due date. The matter was set down for delivery of ruling on March 31, 2022. On March 31, 2022, the court never sat having been engaged on other official duties and no directions were given to that effect. Resultantly, all the parties including the Applicants were of the belief that the ruling would be delivered on notice as the Court being the ordinary convention. The ruling was delivered on May 10, 2022 in the absence of the parties. For all this miscommunication and inadvertent error has to be fully shouldered by Court and it sincerely begs the pardon from the parties for the inconveniences caused whatsoever. I dare say that the mistake was never intentional at all. It is on May 24, 2022, the Applicants were as served with an Amended Plaint by the Plaintiff/Respondent and The ruling was delivered in the absence of the parties. Hence, its on this day they now got to know that indeed the Court had already delivered the



ruling. They obtained their copy of the said ruling and read through it. The Appellants were dissatisfied with it and intended to file an appeal to the Court of Appeal. However, this would not be possible as the time for lodging a notice of appeal lapsed on May 24, 2022 from the date of the delivery of the ruling. They reiterated that they became aware of the ruling after the statutory 14 days had lapsed. While I have a different view with the Counsel for the Plaintiff/Respondent that the time starts running upon getting the knowledge of the ruling, I fully concurs with the Learned Counsel for the 1st and 2nd Defendants/Applicants that the 14 days duration is computed from the date of the delivery of the ruling. The Court further agrees with the Counsel for the Applicants and in conformity with the provisions of Rule 75 (1) and(2) of the Court of Appeal Rules to the effect that there was no fault whatsoever on the part of the Appellant in failing to file the notice of appeal within time and thus they should not be prejudiced because of a failure that was not of their own making. Already has taken full responsibility of the current situation. Additionally, the delay, in any event, is not inordinate, is explained and granting the orders sought is not prejudicial to the Plaintiff/Respondent in any way. The 1st and 2nd Applicants were only able to access a copy of the full ruling by this Court on May 26, 2022 and was advised to appeal. In the real sense, they would have done nothing else within their control. For these reason, the Court fully exonerate them of any blame whatsoever and proceeds to allow the prayer for the extension of time to file the appeal. At all times, the balance of scale of Justice must be fair, equitable, just and reasonable to all parties equally.

24. As to whether there should be a stay of proceedings of this suit pending lodging and determination of the intended appeal, the Plaintiff/Respondent has vehemently opposed the said application and prayer. The 3rd, 4th, 5th 6th and 7th Defendants never opposed nor file any replies to the application. While tendering the opposition, the Counsel for the Plaintiff/Respondent strongly submitted that the 1st and 2nd Defendants/Applicants' got the knowledge that a ruling which was delivered by this Court on May 10, 2022 on the May 24, 2022 when they were served with the Amended Plaint and further actually got access and read it on the June 2, 2022. As indicated above, the contention by the Counsel was having filed this application and conceived the idea to prefer an appeal July 8, 2022 was inordinate delay. According to them, they ought to have lodged the appeal on June 7, 2022 when the 14th Day was lapsing from the May 24, 2022 when they got to know of the existence of the Ruling. The Court begs to totally differ with that interpretation of the law.
25. The second question is whether this court has jurisdiction to enlarge the time for lodging a fresh notice of appeal when an already lodged notice of appeal is deemed defective, though subsisting. The framework on this court's jurisdiction to enlarge time for lodging a notice of appeal is contained in the provision of Section 7 of the Appellate Jurisdiction Act which provides as follows:-
 - “7. The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired: Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”
26. The above legal framework has been the subject of interpretation by the Court of Appeal and the third-tier Superior courts. The Court of Appeal in the case of:-”Trimborn Agricultural Engineering Limited



v David Njoroge Kabaiko & Another [2000] eKLR” rendered itself on this issue exhaustively. Shah JA stated “*inter alia*”:

“Section 7, above was not in my view intended to cover Appellants whose appeals have been struck out for incompetence and who desire to file competent appeals. Once a litigant files a valid notice of appeal and had obtained the necessary leave to appeal, where necessary, the matter respecting which an appeal is intended, is thereby removed from the jurisdiction of the superior court, except for limited matters in which specific jurisdiction has been conferred on it to deal with. Section 7, above presupposes that an intending appellant has not taken any other steps in pursuance of that appeal. Besides, from a careful reading of the provisions of Rules 74 and 81 of the Rules of this Court, it is clear that they are intended to deal with the filing of appeals for the first time. The jurisdiction to restart the appellate procedures is not donated by Section 7, above, but by Rule 4 of the Rules. The rule, in effect empowers the court to reinstate the struck - out appeal, while Section 7 above empowers the High Court to, in effect, assist a litigant in distress who otherwise would not seek help of either court for any interim relief before he lodges his appeal for the first time.”

27. Shah JA rendered himself further:

“The question that arises here is: what happens when a record of appeal is not yet lodged and the time to lodge the notice of appeal is extended by the High Court and whilst the first defective notice of appeal has not been struck out.

The answer to the question posed by me is that the first notice of appeal, until struck out by this court, on an application made to it, remains and the High Court has therefore no jurisdiction to extend the time to lodge a fresh notice of appeal.”

28. On his part, Gicheru JA rendered himself on this issue as follows:

“Although that notice of appeal was defective and could not be amended, it was a legitimate notice of appeal in regard to the appellant’s appeal and as long as it subsisted, any subsequent extension of time to lodge another notice of appeal and the lodging of such notice of appeal in the superior court in respect of the said appeal was null and void.”

29. It is therefore clear from the prevailing jurisprudence on the jurisdiction of this court under Section 7 of the Appellate Jurisdiction Act that once a notice of appeal has been lodged, served and subsists, this court is divested of the jurisdiction donated to it under Section 7 of the Appellate Jurisdiction Act. That is my finding on the second issue.

30. The next issue would be whether this Court has the legal mandate to stay the proceedings pending the hearing of an appeal. The law on stay of proceedings pending appeal is provided for in Section 6 of the Civil Procedure Act, Cap 21 to the effect that where an issue is directly and substantially in issue in proceedings between the same parties, another court ought to stay its proceedings in respect of such suit.

31. In the case of “Global Tours & Travels Limited; Nairobi HC Winding Up Cause No 43 of 2000, the court held 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.”

The Court then distilled the following three main principles to guide a Court in such applications:

- a. Whether the Applicant has established that he/she has a prima facie arguable case.
- b. Whether the application was filed expeditiously and
- c. Whether the Applicant has established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought.

In the case of ”*Christopher Ndolo Mutuku & Another v CFC Stanbic Bank Limited* [2015] eKLR, the Court observed that;

“...what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”

Similarly, in the case of ”*Christopher Ndolo Mutuku & Another v CFC Stanbic Bank Limited* [2015] eKLR”, the court held as follows;

“What matters in an application for stay of proceedings pending appeal is the overall impression the court makes out of the total sum of the circumstances of each which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice.”

Similarly, in the case of “*Pius Kawinzi Kithoka v Jacinter Kavindu Makau*, the Court made the following observation:

“The Applicant has given no explanation at all for this delay. In my view, it shows lack of seriousness in pursuing the appeal at worst, and at best a vexing tardiness which disentitles him from the Court’s discretion. Equity does not aid the indolent”

32. The *Halsbury’s Law of England* 4th Edition Vol 37 pages 330 and 332 states that;

“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.”

33. It is therefore clear that in determining whether or not to grant an order for stay of proceedings, the Court must bear in mind the general rule that once a suit is filed, proceedings ought to continue without interruption until the suit is determined. This is premised on the right of every person to a fair trial which includes the right to have the trial begin and conclude without unreasonable delay as enshrined in Article 50 (2) (e) of the *Constitution* as well as the principle that justice delayed is justice denied, being a cardinal principle that guides Courts in the exercise of judicial authority. It is against this background that orders for stay of proceedings ought to be sparingly granted and only in exceptional circumstances that demonstrate that there are compelling reasons and it would go against all that is deemed just and fair to proceed with the suit. The threshold for such proof is beyond reasonable doubt.

Issue No b). Whether the parties herein are entitled to the reliefs sought from the filed application

34. Upon providing the legal principles on this subject above, the Court now wishes to embark on the analysis under this sub heading. In the instant application, the 1st and 2nd Defendants/Applicants have argued that the justification for grant of stay of proceedings is that it is to avoid having parallel decisions on the same matter, which may be the case in the event he succeeds in the appeal. From the very onset, I great cognizance that the Intended appeal is one against a ruling and not a Judgement of this Court whatsoever. It is instructive to note that the matter has not even been set down for hearing. Be that as it may, as the Counsel for the 1st and 2nd Defendants/Applicants put it this was a suit filed in the year 2007, close to 14 years before this Court without ever having been heard is absurd. Actually in such instance that the legal maxim:- “Justice delayed, is Justice denied” enshrined under Article 159 (2) (b) of the *Constitution of Kenya, 2010* comes into play. It will be against public policy and the transformative trajectory of the Judiciary and provision of Section 3 of the *Environment & Land Act*, No 19 of 2011 that to continue failing to hear this matter.
35. While in the case of “Bungoma HC Misc Application No 42 of 2011 *Wangalwa & Another v Agnes Maliaka Cheseto* the Court of Appeal held that: -
- “an Applicant must establish factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as a successful party.’
- Further, Rule 5 (b) of the Appellate Jurisdiction Act provides that’ in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”
36. Furthermore, in the current scenario, the 1st and 2nd Defendants/Applicants are yet to lodge the Notice of Appeal. There are two important pleadings in place – both Amended Plaintiff and Defence. All parties have complied with the pre - trial requirements enshrined under Order 11 of the Civil Procedure Rules, 2010. Thus, the suit is ripe and almost being set down for hearing. To my mind, they have not fully demonstrated what prejudice they will all suffer substantially if the stay of proceedings sought is not granted and the case in question fails to be heard or determined. Based on the facts as presented while relying on Rule 5 (b) of the *Appellate Jurisdiction Act* cited above and associating myself with the quoted decisions.



37. The provision of Section 3A of the Civil Procedure Act, Cap 21 provides as follows;

“Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court”

38. It is trite law that Section 3A is applicable by the Courts where there is a vacuum but not where there are provisions to cater for such as in this instance case. Section 3A of the Civil Procedure Act relates to the wide powers of the Court to exercise its discretion to the end of justice between the parties. This court had already expressed itself in the ruling delivered on May 10, 2022. This court takes the view that the application being one that will stall the hearing of this suit being that this is a very old matter may not stand.

39. For all these reasons, the Court declines to grant the orders of stay of proceedings of this case as the same lack any merit nor persuasive strength in both facts and law. Pursuant to that, I direct that as a matter of urgency this matter must be heard and be disposed off expeditiously.

Issue No c). Who will bear the costs of the application

40. It is trite law that the issue of Costs is at the discretion of the Court. Costs means any award granted to a party at the conclusion of any legal action, process or proceedings in a litigation. The provision of Section 27 (1) of the Civil Procedure Act, Cap 21 holds that costs follow the events. By events, it means the results or outcome of any legal action, process or proceedings in any litigation.

41. In the instant case, the Honorable Court finds that the 1st and 2nd Defendants/Applicants have been successful in prosecuting their Notice of Motion application dated July 7, 2022. Nonetheless, since the matter has not yet commenced, heard and finally determined I direct that the Costs to be in the cause accordingly.

VI. Conclusion & Disposition

42. Having conduct an indepth analysis of all the framed issues herein, on preponderance of probability, this Honorable Court finds that the 1st and 2nd Defendants/Applicants herein have established some sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought. Specifically, the Court proceeds to grant the following orders:-

- a) That the Notice of Motion application dated July 7, 2022 by the 1st & 2nd Defendants/Applicants be and is hereby partially allowed strictly to the extent only upon fulfilment of the following terms and conditions:-
 - i. The Honorable Court grants the 1st and 2nd Defendants/Applicants thirty (30) days leave from the date of its delivery of this ruling as the enlargement and/or extension of time to give a notice of intention to appeal against its ruling dated May 10, 2022.
 - ii. In default to fulfil this condition the application shall automatically stand dismissed with costs to the Plaintiff/Respondent.
- b) That in the meantime and for expeditious sake, this matter be heard and determined within the next One Hundred and eighty (180) days from this date being on May 17, 2023. There be a mention on March 2, 2023 to ascertain that all the pre – requisites of the Pre Trials session under Order 11 of the Civil procedure Rules, 2010 have been fully accomplished and/or complied with accordingly. Notices to issue by the Plaintiff.



c) That the Costs of the application to be in the cause.

It is so ordered Accordingly.

RULING DELIEVERED, SIGNED AND DATED AT MOMBASA THIS 9TH DAY OF DECEMBER, 2022.

HON. MR. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT

MOMBASA

In the presence of:

a. M/s. Yumna, the Court Assistant.

b. M/s. Rimunya Advocate for the Plaintiff/Respondents.

c. Mr. Khamisi Salim Advocate holding brief for Mr. Jengo Advocate for the 1st & 2nd Defendants/Applicants.

d. No appearance for the 3rd, 4th, 5th, 6th and 7th Defendants despite notices having been duly dispatched.

