



**Mayfair Establishments Limited v Taib (Sued as the Legal Representative of the Estate of Sheikh Ali Taib Bajaber - Deceased) & 3 others (Environment & Land Case 99 of 2022) [2024] KEELC 1717 (KLR) (9 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 1717 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 99 OF 2022**

**LL NAIKUNI, J**

**APRIL 9, 2024**

**BETWEEN**

**MAYFAIR ESTABLISHMENTS LIMITED ..... PLAINTIFF**

**AND**

**ABDULLA ALI TAIB (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SHEIKH ALI TAIB BAJABER - DECEASED) ..... 1<sup>ST</sup> DEFENDANT**

**KENNEDY ELLAM WEKESA (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GEORGE ELLAM WEKESA - DECEASED) ... 2<sup>ND</sup> DEFENDANT**

**SELINA WEKESA ..... 3<sup>RD</sup> DEFENDANT**

**CATHERINE NEMALI WEKESA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. This Honorable Court is tasked to determine two pleadings in form a Notice of Motion application dated 29<sup>th</sup> September, 2023 by Abdulla Ali Taib (Sued as the Legal representative of the estate of Sheikh Ali Taib Bajaber (Deceased)), the 1<sup>st</sup> Defendant/Applicant herein and a Preliminary Objection raised by the Defendant herein. The application was brought under the provision of Order 42 Rule 6 (1) (2) (6), Order 22 Rule 22 and Order 51 of the *Civil Procedure Rules*, 2010. Additionally, before the Honourable Court for its determination is the Notice of Preliminary objection dated 10<sup>th</sup> January, 2024 raised by Mayfair Establishments Limited, the Plaintiff herein.
2. Upon service of the Notice of Motion application, the Plaintiff responded through raising of the afore stated Notice of Preliminary objection. The 2<sup>nd</sup> and 4<sup>th</sup> Defendant never opposed the filed application.



From this Ruling, the Court will deal with both these motions simultaneously though separately for ease of flow accordingly.

## II. The 1<sup>st</sup> Defendant/Applicant's case.

3. The 1<sup>st</sup> Defendant/Applicant sought for the following orders:-
  - a. Spent.
  - b. Spent.
  - c. That this court be pleased to issue a stay of proceedings in this suit pending the hearing and determination of the Court of Appeal Case No.E.118 of 2023 between *Abdalla Ali Taib v Mayfair Establishments Limited & Others*, being an Appeal challenging the Ruling delivered by this Honorable Court on 30<sup>th</sup> May 2023.
  - d. That the costs of this application be provided for.
4. The application was premised on the grounds, testimonial facts and the averments made out under the twenty five (25) Paragraphed Supporting Affidavit of Abdulla Ali Taib sworn and dated on 29<sup>th</sup> September, 2023 and the six (6) annextures marked as "AAT 1 – AAT 6" annexed thereto. He averred as follows:-
  - a. He was the legal representative of Sheikh Ali Taib Bajaber who is and remains the legal owner of all that parcel of land Mombasa/Block X/97 measuring approximately 0.397 acres or thereabouts (Herein after referred to as the "Suit Property").
  - b. He swore the Affidavit in Support of his Motion seeking to stay any further proceedings in this matter pending the hearing and determination of the Appeal at the Court of Appeal being "Civil Appeal Case No. E. 118 of 2023 between *Abdalla Ali Taib v Mayfair Establishments Limited & Others*, being an Appeal challenging the Ruling delivered by this Honorable Court on 30<sup>th</sup> May 2023.
  - c. Through his advocates on record, Messrs. Khalid Salim, he filed a Preliminary Objection-dated 7<sup>th</sup> October 2022 seeking to have the entire suit struck out on the grounds that the suit was statute barred having been filed outside the prescribed time provided for by the law. (He annexed in the affidavit and produced as exhibit a true copy of the said Notice of Preliminary Objection dated 7<sup>th</sup> October 2022 marked as "AAT – 1").
  - d. This Honorable court delivered a Ruling on 30<sup>th</sup> May 2023 whereby it dismissed the said Preliminary Objection dated 7<sup>th</sup> October 2022.
  - e. Although the said Objection was dismissed by the Court, the Court agreed with the 1<sup>st</sup> Defendant that the suit was actually filed outside the prescribed time frames as provided for by the law. (Annexed in the affidavit and produce as exhibit a true cop of the said Ruling of 30<sup>th</sup> May 2023 marked as "AAT – 2").
  - f. Being dissatisfied with the above decision, he filed an Appeal against the said Decision to the Court of Appeal seeking that the said Ruling be set aside, Preliminary Objection allowed and this suit struck out with costs to be paid to him.
  - g. Consequently his advocates on record filed a notice of appeal on 12<sup>th</sup> June 2023 and wrote a letter also dated 12<sup>th</sup> June 2023 addressed to the Deputy Registrar requesting for typed and certified copies of the proceedings of the trial Court and the Ruling. (Annexed in the affidavit



and produce as exhibit a true copy of the said notice of appeal and letter marked as “AAT – 3” and “AAT – 4” respectively).

- h. This matter was set down for hearing of the main suit on the 5<sup>th</sup> October 2023 before this Honorable Court.
- i. The said Appeal had already been filed before the Court of Appeal, the same having been filed on 9<sup>th</sup> August 2023, and are now pending directions by the Deputy Registrar of the Court of Appeal for directions on the hearing. ( Annexed in the affidavit and produce as exhibit a Stamp Received copy of the Record of Appeal having already been filed marked as “AAT – 5”).
- j. There may be likelihood that the Appeal will be allowed, the effect being that the Court of Appeal will order that the suit herein be struck out for having been filed outside the prescribed time frames as provided for by the law.
- k. Should proceedings in the said suit not be stayed, all parties, the Court included, were likely to suffer substantial and irreparable loss due to the following reasons:
  - i. In the likely event that his appeal succeeded and the suit at the trial court was not stayed, all the proceedings of the trial Court would be a mere academic exercise and a waste of the precious time of the Court and resources of the parties.
  - ii. That, therefore, it was prudent that the proceedings herein be stayed pending the outcome of the Appeal to avoid rendering the proceedings an academic exercise, to avoid the proceedings being rendered nugatory and to save the precious time of both the judiciary as well as that of the parties.
  - iii. That if the orders sought herein were not granted, there is likelihood that the hearing would proceed prior to the Court of Appeal pronouncing itself on the issue of whether this suit ought to be struck out for having been filed out of time, which pronouncement if in the affirmative, the entire proceedings of this Court would be struck out as well.
  - iv. In the event that the suit at the trial court proceeds for hearing and consequently a Judgment is delivered in favor of the Plaintiff and evictions where orders were granted pending the determination of his appeal, there was real likelihood that execution would take place prior to the court of appeal pronouncing itself on his Appeal.
  - v. That should his appeal succeed after the development on (iv) above, he would suffer great prejudice and substantial loss as an award of damages would not be sufficient to compensate him for the losses and damage that would have been occasioned to us the premises being their property which they had had for decades.
- l. In any event he had a good appeal with high chance of success and stood to suffer irreparable damage if the orders sought herein were not granted.
- m. The Appeal had very good grounds and high chance of success for the following reasons among others:-
  - i. That the Honourable Judge erred in law and in fact in disallowing the Appellant’s Preliminary Objection dated 7<sup>th</sup> October 2022.



- ii. That despite having rightfully found that the Preliminary Objection satisfied the legal requirements as espoused in the case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributors*, failed to allow the said Objection.
- iii. That despite having rightfully held that the plea of limitation is a pure point of law that goes to the jurisdiction of the Court, the Learned Judge erred in law and in fact in converting it into a factual issue.
- iv. That despite having rightfully held that 1<sup>st</sup> Respondent's cause of action was filed outside the prescribed time limits as provided for under the Limitation of Statutes Act, the Learned Judge erred in law and in fact in failing to allow the Preliminary Objection by striking out the entire suit.
- v. That despite having rightfully determined, from the Plaintiff, when the 1<sup>st</sup> Respondents cause of action arose (being 11<sup>th</sup> May 2010), the Learned Judge erred in law and in fact in failing to strike out the 1<sup>st</sup> Respondents suit.
- vi. That the Learned Judge erred in law and in fact in failing to strike out the 1<sup>st</sup> Respondents suit despite having rightfully determined that the 1<sup>st</sup> Respondents suit was filed after 12 years 3 months and 27 days after the cause of action arose.
- vii. That despite having easily ascertained time from the Plaintiff, the Learned Judge erred in law and in fact in holding that the issue of timelines ought to be determined at the hearing of the suit.
- viii. That despite having rightfully held that the suit was filed outside the time limits as prescribed by Section 7 of the *Limitation of Actions Act*, the Learned Judge erred in law and in fact in holding that the Appellant would be required to produce evidence to demonstrate that the suit is time barred.
- ix. That the Learned Judge erred in law and in fact in extending the scope of the objection by dealing with extraneous factual factors not raised by the Appellant.
- x. That despite finding that the 1<sup>st</sup> Respondent got the locus standi to institute the suit on 11<sup>th</sup> May 2010 when it claimed to have become the registered owner of the suit property being, Land Reference Number Mombasa/Block X/97 the Learned Judge erred in law and in fact in finding that these are matters of pure conjecture and may not be adequately determined through a Preliminary Objection but from a full trial.
- xi. That notwithstanding having confirmed that the 1<sup>st</sup> Respondents claim was time barred at the time of filing the suit on 7<sup>th</sup> September 2022 as per the requirements of Section 7 of the Limitation of Actions Act, the Learned Judge erred in law and in fact in holding that these are matters of facts and there is need of production of empirical documentary evidence.
- xii. That despite having determined the timelines demonstrating that the suit is statute barred, the Learned Judge erred in law and in fact in holding that the 1<sup>st</sup> Respondents claim was capable of being heard despite having been brought after the 12 years contrary to the provisions of Section 7 of the *Limitation of Actions Act*.
- xiii. That consequently the Honourable Judge failed to appreciate that the provisions of Section 7 of the *Limitation of Actions Act* provide that an action to recover land may



not be brought after the end of twelve years from the date of which the right of action accrued to them or through the person they claim from.

- xiv. That despite having held that the 4<sup>th</sup> Respondent's suit was time barred, the Learned Judge erred in law and in fact in further holding that evidence need be produced by the Appellants by virtue of Section 7 of the *Limitation of Actions Act*.
- xv. That the Honourable Judge thus erred in law and in fact in placing too much reliance on the statements by the 1<sup>st</sup> Respondent instead of placing reliance on the law, substance and weight of the adduced by the Appellant. (Annexed in the affidavit and produce as exhibit a true copy of the memorandum of appeal marked as "AAT – 6").
- n. The Respondents were not likely to suffer any prejudice or loss should the orders sought herein be granted.
- o. The Respondents would have a chance before the Court of Appeal to ventilate their case as against that of the Appellant.
- p. It was therefore prudent to allow the process of the Court to be followed to avoid any likely breach of the process and or embarrassment.
- q. The question to be determined before the Appellate Court would have a great impact on the proceedings herein with the likely effect of this suit being dismissed and thus it was important to allow for the said question and or issue to be determined before proceeding any further with the case.
- r. There was no need to subject the parties to hearings and proceeding with the case when there was a probability and chances that the said proceedings may likely be rendered an academic exercise should the Appeal succeed.
- s. The balance of convenience tilted in favor of allowing the due process of the court to be followed by giving a chance to the Appellate Court to address the issue of whether the suit is time barred or not.
- t. In the unlikely event that the Appeal was dismissed, parties would resume back to the Trial Court in order to proceed with the matter.
- u. Therefore, it was in the best interest of justice and fairness that the Orders herein are granted.

## **II. The Notice of Preliminary objection by the Plaintiff.**

- 5. As indicated above, the Plaintiff herein instead for filing a reply, opted to raise an objection. This was done through filing of a Notice of Preliminary objection dated 10<sup>th</sup> February, 2024. It objected to the Notice of Motion application dated 29<sup>th</sup> September, 2023 and urged the Honourable Court to strike out and/or dismiss the motion based upon the following grounds, namely:-
  - a. The Notice of Motion was in its entirety misconceived, defective and incompetent.
  - b. The Motion was filed after the 1<sup>st</sup> Defendant voluntarily participated in the trial and proceedings and was at the tail end of cross examination. The motion was an attempt to scutter adverse evidence already tendered against the Defendants and to render the trial a mockery.
  - c. The motion was a plain abuse of the Court process. It was instituted to defeat justice and shut out the Plaintiff from being heard. The motion sought to re-open and re-litigate the 1<sup>st</sup> Defendant's Preliminary Objection that was dismissed by the Court on 30<sup>th</sup> May 2023.



- d. The motion was a disguised appeal against the Ruling and Order made by the Honourable Court on 30<sup>th</sup> May 2023. The Honourable Court could not sit in appeal against its own Ruling and Order.
- e. The Appeal filed by the 1<sup>st</sup> Defendant Applicant on 16<sup>th</sup> July, 2023 never sought for stay of proceedings in the Superior Court. The Appeal was filed without the leave of this Court and was doomed to fail. The appeal was a mischief and delay tactic to have the hearing and determination of this suit delayed and derailed.
- f. It was frivolous and scandalous to file an appeal, then proceed to participate fully in the hearing, then obtain leave to file Statement, Witnesses Statements and List of Documents and thereafter sought to obtain a stay of proceedings in the same Court. The motion was vexatious and vexatious and ingenuous and violated the right to a fair trial protected under the Constitution.
- g. The single ground upon which this motion was based was that the Appeal filed shall succeed. The motion never addressed and acknowledged that the Appeal filed may fail. The motion was predicting both the outcome the Appeal as well as playing lottery with the proceedings in this Court.

## II. Submissions

6. On 5<sup>th</sup> October, 2023 while all the parties were in Curt directions were granted to have the Notice of Motion application dated 29<sup>th</sup> September, 2023 be disposed of by way of written submissions. Pursuant to that on 14<sup>th</sup> February, 2024 after receiving the Notice of Preliminary objection dated 10<sup>th</sup> February, 2024, the Honourable Court reserved 9<sup>th</sup> April, 2024 as the date to deliver its Ruling thereof.

### A. The Written Submission by the 1<sup>st</sup> Defendant/ Applicant

7. The 1<sup>st</sup> Defendant/ Applicant through the Law firm of Messrs. Khalid Salim & Company Advocates their written Submissions dated 20<sup>th</sup> February, 2024. Mr. Khalid Salim Advocate commenced the submission by stating that for determination before this Honourable Court is the 1<sup>st</sup> Defendant's notice of motion application dated 29<sup>th</sup> September 2023 and the Plaintiffs Preliminary Objection dated 10<sup>th</sup> February 2024. This Honourable court delivered its ruling on the preliminary objection filed by the 1<sup>st</sup> Defendant challenging the jurisdiction of this Honourable court 30<sup>th</sup> May 2023.
8. The Learned Counsel submitted that the 1<sup>st</sup> Defendant had preferred an appeal being Court of Appeal Case Number E118 of 2023: *Abdalla Ali Taib v Mayfair Establishments Limited & Others*. Further, on the day the ruling was delivered on 30<sup>th</sup> May 2023, the matter was issued with a hearing date for 5<sup>th</sup> October 2023. The 1<sup>st</sup> Defendant therefore filed its application dated 29<sup>th</sup> September, 2023 on the same date. In response to the said application, the Plaintiff, through its advocate filed a Preliminary objection on the basis that inter alia, the 1<sup>st</sup> Defendant has participated in the in the trial, voluntarily and was at the tail end of cross examination, as such the motion is an attempt to scutter adverse evidence already tendered against the Defendants and to render the trial a mockery.
9. As it stands, the factual issues raised in the application dated 29<sup>th</sup> September, 2023, were unopposed, simply because the Preliminary objections where raised were on pure points of law. Even at the time of preparing these submissions, no reply had been filed disputing the factual issues raised therein. To put matters into perspective, when parties appeared in court on 5<sup>th</sup> October 2023 when the matter was slated for hearing, the advocate for the 1<sup>st</sup> Defendant informed this Honourable court on the application which had been filed seeking stay of proceedings and as such sought for an adjournment.



10. The Learned Counsel submitted that the advocate for the Plaintiff opposed the adjournment sought and this Honourable Court granted leave to the all the Defendants to file their Pre - Trial documents within 7 days, which the 1<sup>st</sup> Defendant did. In addition to the above, the Honourable court directed that in the interest of justice that the hearing of the matter was to proceed and if there was need to recall the Plaintiff's witness, the same could be done.
11. The Learned Counsel relied on the following two (2) issues for determination:-
12. Firstly, on whether the 1<sup>st</sup> Defendant's Application for stay of proceedings pending appeal dated 29<sup>th</sup> September 2023 was merited. The Learned Counsel submitted that the Defendant's application dated 29<sup>th</sup> September 2023 was purely to stay the proceedings by this Honourable Court pending the determination and outcome of the Appeal filed by the Applicant at the Court of Appeal of Kenya against the Ruling delivered on 30<sup>th</sup> May 2023 dismissing the 1<sup>st</sup> Defendants/Applicant's Preliminary Objection objecting to the Jurisdiction of this Honourable Court by virtue of the entire suit being time barred. The Learned Counsel cited the case of:- *Kenya Wildlife Service v James Mutembei* [2019] eKLR the court quoted the case of "*Global Tours & Thavels Limited*; Nairobi HC Winding Up Cause No.43 of 2000" where the court laid out the threshold to be met when granting a stay of proceedings pending appeal by stating:

“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 incised 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)”.
13. This same position was adopted in the case of "*Kenya Power & Lighting Co. Ltd v Esther Wanjiru Wokabi* Civil Appeal No. 326 of 2013 (2014) eKLR". From the above, they can derive that the grounds to be met in seeking a stay of proceedings pending appeal are:
  - a. the prima facie merits of the intended appeal.
  - b. whether the court was satisfied that it was in the interest of justice to grant the orders sought.
  - c. whether the application had been brought expeditiously
14. On the issue of prima facie merits of the intended appeal and whether that it is in the interest of justice to grant the orders sought, the Learned Counsel submitted that the ruling of delivered on 30<sup>th</sup> May 2023 erroneously dismissed the Defendant's preliminary objection despite having rightfully found that the Preliminary Objection satisfied the legal requirements as espoused in the case of "*Mukisa Biscuit Manufacturing Company Limited v West End Distributors*" and that the plea of limitation of time being a pure point of law that goes to the jurisdiction of the Court as the cause of action arose on 11<sup>th</sup> May 2010. In fact, it was the 1<sup>st</sup> Defendant's position that the Honourable Judge erred in law and fact in holding that the Plaintiff has a cause of action despite the same being time barred thereby a blatant abuse of this Court's process and eventually occasioning the 1<sup>st</sup> Defendant a great deal of prejudice.



15. According to the Learned Counsel for the 1<sup>st</sup> Defendant, the gist of the Defendant's Appeal as evident in the Memorandum of Appeal annexed and marked as "AAT – 6" in the 1<sup>st</sup> Defendant's Application dated 29<sup>th</sup> September 2023, disputed the Court's arrival of the dismissal of the Defendant's Preliminary Objection despite the Plaintiffs suit being time barred by virtue of the Provisions of Section 7 of the *Limitation of Action's Act*.
16. It was the Learned Counsel's submissions that this was a pertinent and weighty issue that had to be decided in the appeal as ultimately it would conclude as to whether or not the Plaintiff had a claim against the 1<sup>st</sup> Defendant.
17. On whether the court was satisfied that it was in the interest of justice to grant the orders sought, the Learned Counsel submitted that the 1<sup>st</sup> Defendant is and remained to be the legal representative of Sheikh Ali Taib Bajaber, who is the legal owner of all that parcel of land known as Mombasa/block X/97 measuring approximately 0.397 acres, the suit property, which he purchased from the late George Ellam Wekesa sometime on 11<sup>th</sup> May 2002 for a valuable consideration of Kenya Shillings Six Million Eight Hundred Thousand (Kshs. 6,800,000/=) and subsequently a Certificate of Lease was issued to the deceased on 25<sup>th</sup> November, 2002. On the other hand, the Plaintiff alleges to have acquired the same property on 11<sup>th</sup> May 2010, by this time the 1<sup>st</sup> Defendant had already been in possession for a period of 8 years.
18. According to the Learned Counsel, the Plaintiff alleged that there existed a lease against the suit property for a term of 99 years in favour of one George Ellam Wekesa, the 2<sup>nd</sup> Defendant herein and that the subsequent sublease to the 1<sup>st</sup> Defendant was done contrary to the terms of the lease. Prior to the Plaintiffs alleged purchase in the year 2010, the Plaintiff was indeed aware of the existence of a lease over the property. This was admitted under the averments of Paragraphs 6 and 7 of the Plaintiff. However, despite being aware of the supposed breach, in fact even prior to its purchase, the Plaintiff chose not to bring any action against the 1<sup>st</sup> Defendant. By virtue of the above, there existed a high likelihood for a meritorious appeal which would only render the processes of this Court a mere academic exercise if the proceedings herein were not stayed.
19. Further it was the Learned Counsel's submission that the grant of stay of proceedings was paramount and in the interest of justice for the following reasons:
  - a. The 1<sup>st</sup> Defendant took possession of the suit property from the time of acquisition in year 2002 up till now, for over a period of 22 years and continue to be in possession of the said property.
  - b. The Plaintiff in their prayers sought to inter alia re - enter and repossess the property forthwith, as well as to cancel and revoke the said lease issued on 25<sup>th</sup> November 2002 in favour of the 1<sup>st</sup> Defendant and his predecessor in title currently registered against the title known as Mombasa/Block X/97 based on an alleged breach and violations of the lease and the covenants thereto based on non-payment of rent, and seek therein, to evict the Defendant from the premises.
  - c. Therefore, there existed a highly likelihood that if the matter was not stayed and proceeded for hearing, and the Court granted the Plaintiff the irreversible eviction Orders sought, pending the hearing and determination of the 1<sup>st</sup> Defendant's appeal, execution was likely to commence thereby rendering the Defendant and his family destitute.
  - d. In the event that the 1<sup>st</sup> Defendant's meritorious appeal was to succeed and where the proceedings of this Honourable Court were not stayed, the 1<sup>st</sup> Defendant was to suffer a great



prejudice and loss, one which not even an award for damages would be sufficient to compensate the Defendant.

- e. The essence of the 1<sup>st</sup> Defendant's Application dated 29<sup>th</sup> September 2023 seeking for stay of proceedings therefore was to stop in every way possible, this irreversible position in order to ensure that ends of justice are not defeated and more particularly to ensure that substantial loss does not occur.
  - f. The Learned Counsel was guided by the case of "*Sichuan Huashi Development Company Limited v Remax Realtor Limited* [2020] eKLR", where the Court held that:

“If the order for stay of proceedings is not granted and the lower court matter proceeds then the Applicant argues its appeal to a successful end, the Appeal will have been rendered nugatory.”
  - g. According to the Learned Counsel from the above, it was evident that the 1<sup>st</sup> Defendant/Applicant had sufficiently established that where the stay was not granted it would irreparably affect its rights and interests, which would in turn defeat the purpose of the Appeal and rules of natural justice.
20. On whether the application had been brought expeditiously, the Learned Counsel submitted that the Ruling sought to be appealed from was delivered on 30<sup>th</sup> May 2023. The 1<sup>st</sup> Defendant herein through a letter dated 12<sup>th</sup> June 2023 addressed to this Honourable Court requested for typed and certified copy of proceedings. A copy of the same was sent to the Plaintiff/Respondent's Advocate. On 12<sup>th</sup> June 2023 the Applicant filed his Notice of Appeal and also filed the Memorandum of Appeal on 9<sup>th</sup> August 2023. The 1<sup>st</sup> Defendant consequently filed the present Application on 29<sup>th</sup> September 2023.
  21. Thus, it was the Learned Counsel's submission that the Application had been filed without any delay and we urge this Honourable Court to so hold. Additionally, it would be an academic exercise and a waste of precious judicial time for the court to proceed with the trial only for the court of appeal to render its decision negating the decision of this court.
  22. Secondly, on whether the Preliminary objection dated 10<sup>th</sup> February 2024 is properly raised before the Court. The Learned Counsel submitted that the often quoted case of "*Mukbisa Biscuit (supra)*" defined what amounts to a Preliminary Objection. The effect of the afore cited case law is that, for one to succeed in putting up a Preliminary Objection, it must meet the following criteria,
    - a. It must be pleaded by one party and admitted by the other.
    - b. It must be a matter of law which is capable of disposing off the suit in its entirety.
    - c. It must not be blurred by factual details calling for evidence, must not call upon the Court to exercise discretion.
  23. It was thus submitted that the present objection never specified which section or part of the law it offends, and as such was not on a pure point of law easily satisfying the criteria above and thus improperly raised before this Court.
  24. In conclusion, the Learned Counsel submitted that the main concern of the Court was to do justice to the parties, and the Court would not impose conditions on itself to fetter the wide discretion given by the *Civil Procedure Rules*, 2010. The Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome so as not render nugatory the ultimate end of justice.



25. Therefore, it was the Learned Counsel's submission that there was likely to accrue an absurd outcome of rendering not just the 1<sup>st</sup> Defendant but also his family destitute, an outcome that is irreversible and one that would render the ends of justice nugatory, in the event that the proceedings herein are not stayed. It was thus paramount that the Court took into consideration the likely effect of not granting the stay on the proceedings in question. To this end, the Learned Counsel asked the Court to be guided by the decision in "*Lucy Njoki Waitbaka v Tribunal Appointed to Investigate the Conduct of the Honourable Lady Justice Lucy Njoki Waitbaka & Judicial Service Commission; Kenya Magistrates & Judges Association(Interested Party)* [2020] eKLR". They thus humbly invited this Court to find that the 1<sup>st</sup> Defendant/Applicant's application dated 29<sup>th</sup> September 2023 is merited and it be allowed as prayed.

## V. Analysis and Determination

26. As indicated above, I have keenly considered the pleadings filed by all the parties, the elaborate and robust written and oral submissions by the Learned Counsel, the relevant provisions of the law and the cited authorities. I have also perused all the orders that have been mentioned in this application.
27. This Honourable Court has framed three (3) broad salient issues for its determination. These are:-
- a. Whether the Notice of Preliminary objection dated 10<sup>th</sup> February, 2024 raised by the Plaintiff has merit based on Law and precedents.
  - b. Whether the Notice of Motion application dated 29<sup>th</sup> September, 2023 by the 1<sup>st</sup> Defendant/Applicant has any merit whatsoever and if the Honourable Court should issue a stay of the proceedings in this matter pending the hearing and determination of the Court of Appeal Case No. E.118 of 2023 between *Abdalla Ali Taib v Mayfair Establishments Limited & Others*, being an Appeal challenging the Ruling delivered by this Honorable Court on 30<sup>th</sup> May 2023.
  - c. Who bears the costs of the Notice of Motion application dated 29<sup>th</sup> September, 2023 and the Notice of Preliminary objection dated 10<sup>th</sup> February, 2024?

### **ISSUE No. a). Whether the Notice of Preliminary objection dated 10<sup>th</sup> February, 2024 has merit in Law and Precedent**

28. Under this sub title the Court shall evaluate the merits of the Preliminary objection. A Preliminary Objection was described in the "*Mukisa Biscuits (supra)*" to mean:-

"So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration".

29. Further Sir Charles Nebbold, JA stated that: -

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop".



30. Arising from the above, it is not in doubt that a preliminary objection ought to raise a pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. Further, in the case of “*Quick Enterprises Limited v Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999”, the Court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

31. It is this court’s opinion that in determining a preliminary objection, the court will also take into account that the preliminary objection must stem from the pleadings and raise pure point of law. See the case of “*Avtar Singh Bhamra & Another v Oriental Commercial Bank*, Kisumu HCCC No.53 of 2004”, where the court held that: -

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

32. Before the court embarks on determining the merit of the notice of preliminary objection, it has to first determine whether what has been raised herein satisfy the ingredients of a preliminary objection. As the Court determines whether what the 1<sup>st</sup> Defendant pleads in his application is an abuse of court. According to the Plaintiff, the Motion was filed after the 1<sup>st</sup> Defendant voluntarily participated in the trial and proceedings and was at the tail end of cross examination. The motion is an attempt to scutter adverse evidence already tendered against the Defendants and to render the trial a mockery.

33. According to the Plaintiff, the motion is a plain abuse of the Court process and is instituted to defeat justice and shut out the Plaintiff from being heard. The motion sought to re-open and re-litigate the 1<sup>st</sup> Defendant’s Preliminary Objection that was dismissed by the Court on 30<sup>th</sup> May 2023. The motion is disguised appeal against the Ruling and Order made by the Honourable Court on 30<sup>th</sup> May 2023. The Honourable Court cannot sit in appeal against its own Ruling and Order.

34. The Appeal filed by the 1<sup>st</sup> Defendant Applicant on 16<sup>th</sup> July, 2023 did not seek for stay of proceedings in the Superior Court. The Appeal was filed without the leave of this Court and is doomed to fall. The appeal is a mischief and delay tactic to have the hearing and determination of this suit delayed and derailed.

35. To advance the proper legal position on this aspect, I am compelled to rely on the case of “*Oraro v Mbaja* (2005) 1KLR 141”, where the Court held that: -

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

36. As rightfully stated out by the Learned Counsel for the 1<sup>st</sup> Defendant, for a preliminary objection to be successful it must meet the following ingredients:

- a. It must be pleaded by one party and admitted by the other.
- b. It must be a matter of law which is capable of disposing off the suit in its entirety.
- c. It must not be blurred by factual details calling for evidence, must not call upon the Court to exercise discretion.



37. Further, the Honourable Court take cognizance and fully concurs with the submissions of Learned Counsel for the 1<sup>st</sup> Defendant to the effect that, the present objection raised by the Plaintiff herein does not specify which section or part of the law it offends. From its own dressings as such it is not on a pure point of law easily satisfying the criteria above and thus improperly raised before this Court.
38. I hold that the 1<sup>st</sup> Defendant have a right to appeal and the Court does not have the power nor discretion to interfere with the same. The Preliminary objection by the Plaintiff seeks to have the Court interfere with that right and therefore the declines to per take in that injustice. For these reasons, I therefore discern that the Notice of Preliminary objection dated 10<sup>th</sup> February, 2024 is unmeritorious and unfounded and hence should not succeed.

**ISSUE No. b). Whether the Notice of Motion application dated 29<sup>th</sup> September, 2023 by the 1<sup>st</sup> Defendant/Applicant has any merit whatsoever and if the Honourable Court should issue a stay of the proceedings in this matter pending the hearing and determination of the Court of Appeal Case No. E.118 of 2023 between *Abdalla Ali Taib v Mayfair Establishments Limited & Others*, being an Appeal challenging the Ruling delivered by this Honorable Court on 30<sup>th</sup> May 2023.**

39. Under this sub title, the main substratum is on granting stay of proceedings pending the hearing and final determination of the pending appeal. From the very onset, there will be need to point out the major difference between the orders of Stay of execution with the orders of Stay of proceedings. While the former connotes legal powers to effect the decision of Court at the conclusion of any litigation or legal action, the former tends to curtail the right of a hearing of a case in its midst stage. They each bear severe and distinct consequences. It is now well established that this orders are at the discretion of the Court save to say that the unfettered powers should be exercised judicially and not capriciously at the whim of the Court. Legally speaking, first and foremost, the basic principle is set of clearly in the case of:- "*Kenya Wildlife Service v James Mutembei* [*supra*]" the Honourable Judge espoused stay of proceedings as opposed to stay of execution when held as follows:-

“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....”

40. Ringera J in the case of "*Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No. 43 of 2000" persuasively stated thus;

“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”.



41. The legal principles for granting a stay of execution and stay of proceedings are fairly well settled in Kenya. The statutory basis is the provision of Order 42 of the [Civil Procedure Rules](#), 2010. Rule 6(2) of the said order provides as follows:

“No order for stay of execution shall be made under subrule (1) unless –

- a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

42. In the case of “[National Oil Corporation of Kenya v Real Energy Ltd](#) [2017] eKLR”, the court considered the principles for stay of proceedings in paragraph 9 as hereunder:

“9. In the case of *Global Tours & Travels Ltd*; Nairobi High Court Winding up Cause No. 43 of 2000 which was cited with approval in *Gichuki Macharia & Another v Kiai Mbaki & 2 Others (supra)*, Ringera J as he then was stated as already stated above.”

43. There is another important consideration to be taken into account which was considered in the case of “[Butt v Rent Restriction Tribunal](#) [1979] eKLR”. It was put thus by the Court of Appeal:-

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett LJ in *Wilson v Church* (No 2) 12 Ch. D ([1879] 454 at P 459. In the same case, Cotton LJ said at P 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

44. According to the 1<sup>st</sup> Defendant/Applicant he filed a Preliminary Objection-dated 7<sup>th</sup> October 2022 seeking to have the entire suit struck out on the grounds that the suit is statute barred having been filed outside the prescribed time provided for by the law. (He annexed in the affidavit and produced as exhibit a true copy of the said Notice of Preliminary Objection dated 7<sup>th</sup> October 2022 marked as “AAT -1”). This Honorable court delivered a Ruling on 30<sup>th</sup> May 2023 whereby it dismissed the said Preliminary Objection dated 7<sup>th</sup> October 2022. The Court noted that in as much as any party was entitled at raising an objection at any stage, the Court wondered on its timings. It queried, why the same was brought while the matter was almost at the tail – end of the hearing by all parties. The Court got the impression it was an after thought and only tailored to cause delay and interfere with the rights to fair hearing of the case by the parties as enshrined under Article 25 ( c ) and 50 of the [Constitution of Kenya](#), 2010.

45. Although the said Objection was dismissed by the Court, the Court agreed with the 1<sup>st</sup> Defendant/ Applicant that the suit was actually filed outside the prescribed time frames as provided for by the law. (Annexed in the affidavit and produce as exhibit a true copy of the said Ruling of 30<sup>th</sup> May 2023 marked as “AAT – 2”). Being dissatisfied with the above decision, he filed an Appeal against the said decision



- to the Court of Appeal seeking that the said Ruling be set aside, Preliminary Objection allowed and this suit struck out with costs to be paid to him.
46. Consequently, his advocates on record filed a Notice of Appeal on 12<sup>th</sup> June 2023 and wrote a letter also dated 12<sup>th</sup> June 2023 addressed to the Deputy Registrar requesting for typed and certified copies of the proceedings of the trial Court and the Ruling. (Annexed in the affidavit and produce as exhibit a true copy of the said notice of appeal and letter marked as “AAT – 3” and “AAT – 4” respectively). This matter was set down for hearing of the main suit on the 5<sup>th</sup> October 2023 before this Honorable Court.
47. The said Appeal has already been filed before the Court of Appeal, the same having been filed on 9<sup>th</sup> August 2023, and is now pending directions by the Deputy Registrar of the Court of Appeal for directions on the hearing. (Annexed in the affidavit and produce as exhibit a Stamp Received copy of the Record of Appeal having already been filed marked as “AAT – 5”). So has the Applicant demonstrated the grounds of granting a stay of proceedings in the instant proceedings? There is no doubt that the Applicant has a right of appeal from the said decision of this Court. The court is also satisfied that the appeal may be arguable and certainly not frivolous as required by law. The court is also satisfied that the application for stay was filed with reasonable expedition. However, be that as it may, the only principle which requires interrogation is the one on whether or not the pending appeal will be rendered nugatory if stay of proceedings is not granted. The court also takes the view that if an applicant can demonstrate that his appeal would be rendered nugatory unless stay is granted then that would constitute demonstration of substantial loss.
48. I reiterate here that the granting of a stay of proceedings is purely a matter of judicial discretion. The court in the case of “*in Re Estate of Leah Nyawira Njega (Deceased)* [2021] eKLR” listed the following as the three (3) main principles for consideration in determining an application seeking a stay of proceedings:
- 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.”
49. On the *prima facie* merits of the intended appeal and whether that it is in the interest of justice to grant the orders sought, the Learned Counsel submitted that the ruling of delivered on 30<sup>th</sup> May 2023 erroneously dismissed the Defendant’s preliminary objection despite having rightfully found that the Preliminary Objection satisfied the legal requirements as espoused in the case of “*Mukisa Biscuit Manufacturing Company Limited (supra)*” and that the plea of limitation of time being a pure point of law that goes to the jurisdiction of the Court as the cause of action arose on 11<sup>th</sup> May 2010. In fact, it is the 1<sup>st</sup> Defendant/Applicant’s position that the Honourable Judge erred in law and fact in holding that the Plaintiff has a cause of action despite the same being time barred thereby a blatant abuse of this Court’s process and eventually occasioning the 1<sup>st</sup> Defendant a great deal of prejudice.
50. A reading of the Memorandum of Appeal relating to the appeal shows that the appeal is essentially and squarely challenging the decision of the trial court in dismissing the 1<sup>st</sup> Defendant’s preliminary objection challenging the jurisdiction of this Honourable Court. By any means, what does the 1<sup>st</sup> Defendant/Applicant expect this Court to decide after it has already robustly and loudly pronounced itself on the issue of Jurisdiction, perhaps to say it downs its tools through a stay of proceedings awaiting the outcome of the appeal? Certainly, not. That is not being realistic and fair to Court at all. In my view



I strongly feel that the 1<sup>st</sup> Defendant/Applicant is calling upon this Court to sit on appeal on its own decision. Clearly, this should not be the proper Court on making that determination as to whether the appeal in question raises prima facie arguable points of law and fact or not but the Court of Appeal under the provision of Rules, 5 ( 2) (b) of the [Court of Appeal Appellate Rules](#). This Court lacks the proper jurisdiction to make such a determination.

51. Turning to the third principle on the interest of justice vis-à-vis the subject of prejudice, the 1<sup>st</sup> Defendant/Applicant on the one hand is of the view that unless an order for a stay of proceedings is granted, it stands to be greatly prejudiced. Upon weighing the rival positions above and the foregoing circumstances, I once more and for the reasons granted above I am not satisfied that the 1<sup>st</sup> Defendant/Applicant has reasonably shown that unless there is a stay of proceedings during the pendency of the appeal, there is a likelihood that prejudice and hardship will be visited upon it.
52. I will also consider the fourth principle touching on the expeditious disposal of cases vis-à-vis proper use of judicial time. I borrow from the case of “[Ezekiel Mule Musembi v H Young & Company \(EA\) Limited](#) [2019] eKLR” where the court held that the expeditious disposal of cases ought to be a factor for consideration in determining applications seeking an order for a stay of proceedings. In the present suit it is apparent that the suit which was instituted in the year 2022 seeking the right of the Plaintiff to repossess the suit property from the Defendants. It is also apparent that the outcome of the appeal at the Court of Appeal will determine the course that the present suit will take especially in respect to whether or not this Court has jurisdiction to entertain the claim as per the Plaint dated 7<sup>th</sup> September, 2022. I have taken judicial cognizance that this matter is part heard where the Plaintiff Witness – 1 already testified and was stood down awaiting cross - examination on 24<sup>th</sup> April, 2024. In the circumstances, it would only be a practical and proper use of judicial time for the Court to allow expeditious disposal off this matter. In any case, any party if aggrieved still bears a chance to challenge the decision of this trial Court at the Court of Appeal under the appropriate provisions of the Law. Therefore, the upshot of it all is that the Notice of Motion application dated 29<sup>th</sup> September, 2023 fails to succeed for having been filed in the wrong forum.

**Issue No. c). Who bears the costs of the Notice of Motion application dated 29<sup>th</sup> September, 2023 and the Notice of Preliminary objection dated 10<sup>th</sup> February, 2024**

53. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the [Civil Procedure Act](#), Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “[Jasbir Rai Singh v Tarchalan Singh](#)” eKLR (2014) and [Cecilia Karuru Ngayo v Barclays Bank of Kenya Limited](#), eKLR (2014).
54. In this case, taking that both the application dated 29<sup>th</sup> September, 2023 by the 1<sup>st</sup> Defendant/Applicant and the Notice of Preliminary objection dated 10<sup>th</sup> February, 2024 have not been successful, it is in the interest of Justice and reasonable ground that each party bears their own costs.

**VII. Conclusion & Disposition**

55. The Upshot of this is that the has made put a case to have partially and thus, for avoidance of doubt, I therefore proceed to make the following findings:-
  - a. That the Notice of Motion Application dated the 29<sup>th</sup> September, 2023 be and is hereby found to lack merit and hence is disallowed entirely.



- b. That Notice of Preliminary objection dated 10<sup>th</sup> February, 2024 be and is hereby found to lack merit and the same is dismissed.
- c. That for expeditious sake this matter to be heard on 24<sup>th</sup> April, 2024.
- d. That each party to bear their own costs.

It is ordered accordingly.

**RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 9<sup>TH</sup> DAY OF APRIL 2024.**

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**HON. JUSTICE L.L. NAIKUNI,  
ENVIRONMENT & LAND COURT AT  
MOMBASA**

**Ruling delivered in the presence of:**

- a) M/s. Firdaus Mbula, the Court Assistant.
- b) Mr. Asige Advocate for the Plaintiff
- c) Mr. Khalid Salim Advocate for the 1<sup>st</sup> Defendant.
- d) No appearance for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant.

