Ngatho & another v Moki Savings Co-operative Society Ltd & 21 others (Environment & Land Case 745 of 2001) [2023] KEELC 901 (KLR) (6 February 2023) (Ruling)

Neutral citation: [2023] KEELC 901 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 745 OF 2001

JO MBOYA, J

FEBRUARY 6, 2023

BETWEEN

LILIAN WAIRIMU NGATHO ..... 1ST PLAINTIFF

ELIZABETH MURUNGARI NJOROGE ..... 2ND PLAINTIFF

AND

MOKI SAVINGS CO-OPERATIVE SOCIETY LTD ..... 1ST DEFENDANT

LUCY WANJIRU KIRUHI ..... 2ND DEFENDANT

BEATRICE NJERI GACHUKIA ..... 3RD DEFENDANT

JOYCE WARINGA NJUGUNA ..... 4TH DEFENDANT

SUSAN MUGURE NJUGUNA ..... 5TH DEFENDANT

JAMES NJOROGE MWANGI ..... 6TH DEFENDANT

SAMUEL KARIMI KARIGI ..... 7TH DEFENDANT

VENANSIO MBATARU KARIUKI ..... 8TH DEFENDANT

MICHAEL MBIRA NGINGI ..... 9TH DEFENDANT

FRANCIS KARIUKI MACHARIA ..... 10TH DEFENDANT

GEORGE MURIGU GITHUKU ..... 11TH DEFENDANT

SAMMY THUMBI NYAMBARE ..... 12TH DEFENDANT

SIMON GATHII MACHARIA ..... 13TH DEFENDANT

JAMES NDUATI KURIA ..... 14TH DEFENDANT

JAMES MARAGWA WERU ..... 15TH DEFENDANT

JUSTINE WILLY KARIUKI ..... 16TH DEFENDANT

JAMES MATHO WAKABA ..... 17TH DEFENDANT

DAVID MWANGI G. GUCEEA ..... 18TH DEFENDANT

JAMES NJOROGE NJAU ..... 19TH DEFENDANT

CICILIA NDURUKA ..... 20TH DEFENDANT

RICHARD GICHINI NJOROGE ..... 21ST DEFENDANT

BETH WAIRIMU KAHIU ..... 22ND DEFENDANT

RULING

1. Vide Notice of Motion Application dated the 30th January 2023, the 2nd Defendant/Applicant has approached the Honourable court seeking for the following reliefs;

    i. This Application be certified urgent and orders be given Ex Parte in the First Instance.

    ii. Pending the hearing Inter Partes of prayer no3 below this application, this Honorable Court be pleased to stop, postpone or suspend or adjourn the hearing of this Suit which is scheduled for 7th and 8th Days of February 2023 effective for 14 days only or until further orders of this Honorable Court.

    iii. This Honorable Court be pleased to stay proceedings in this suit pending the hearing of this Application Inter Partes or as the court may determine.

    iv. This Honorable Court be pleased to order a stay of proceedings in this suit altogether till application for stay of proceedings filed by the second Defendant/Applicant in the Court of Appeal, Civil Appeal No E 847 of 2022, dated 13th January 2023, is heard and determined.

    v. Costs of this Application be provided for.

2. The instant application is premised and anchored on the various grounds which have been alluded to and/or enumerated at the foot of the application. Besides, the application is supported by the affidavit of Lucy Wanjiru Kiruhi, namely, the 2nd Defendant/Applicant, sworn on even date.

3. Upon being served with the instant application, the 3rd to 7th Defendants/Respondents responded thereto by filing Grounds of opposition dated the 3rd February 2023 and in respect of which, same have contended, inter-alia, that the instant application constitutes and amounts to an abuse of the due process of the court.

4. In addition, the 3rd to 7th Defendants/Respondents have also contended that by dint of the provisions of Order 46 Rule 6(1) of the *Civil Procedure Rules*, this court is divested of the requisite jurisdiction to entertain and adjudicate upon the instant application, insofar as the Applicant herein has since filed a similar application before the Honourable Court of Appeal.

5. Other than the foregoing, it is imperative to state and underscore that the rest of the parties, including the Plaintiff and the rest of the Defendants, neither filed any Replying affidavit nor Grounds of opposition.

6. For coherence, it is worthy to state that it is only the 3rd to the 7th Defendants/Respondents, who have opposed and contested the instant application.

7. Additionally, it is appropriate to underscore that the instant application came up for hearing on the 6th February 2023 and given the nature of the issues that were raised thereunder, it became imperative that same be heard and disposed of without further delay. Consequently and with the concurrence of the Advocates for the Parties, the application was heard vide oral submissions.

Submissions by the Parties

Applicant's Submissions

8. Learned counsel for the Applicant raised, highlighted and amplified four pertinent issues for consideration by the court.

9. Firstly, learned counsel for the Applicant submitted that following the delivery and rendition of the ruling of the 13th October 2022, the 2nd Defendant/Applicant felt aggrieved and dissatisfied. In this regard, counsel pointed out that the Applicant thereafter proceeded to and filed a Notice of Appeal to the court of appeal.

10. Additionally, learned counsel for the Applicant has also submitted that the Applicant has also procured and obtained the typed proceedings of the court and thereafter filed and lodged the substantive appeal to the court of appeal. For clarity, counsel stated that the appeal before the Court of Appeal was assigned and serialized as Civil Appeal No E847 of 2022.

11. In the premises, counsel has therefore contended that the Applicant has a subsisting appeal before the Court of Appeal, which seeks to impeach and challenge the ruling rendered on the 13th October 2022.

12. Secondly, learned counsel for the Applicant has also submitted that other than filing the appeal before the court of appeal, the Applicant has also filed an application for stay of proceedings before the Court of Appeal pursuant to and in line with the provisions of Rule 5(2) (b) of the *Court of Appeal Rules* 2010.

13. Nevertheless, counsel has added that despite the filing of the said application before the Honourable Court of Appeal, the said application has not been heard and disposed of. In any event, counsel contended that the said application was pending certification before the Court of Appeal.

14. Thirdly, learned counsel submitted that to the extent that there is a pending application for stay of proceedings before the court of appeal, whose purposes is to stay the current proceedings, it would not be appropriate and in the interest of justice, for this Court to proceed with and continue hearing the matter, before the Court of Appeal pronounces itself on the pending application.

15. Fourthly, learned counsel for the Applicant has submitted that even though there is a pending application for stay of proceedings before the court of appeal, this Honourable court is still vested with the requisite jurisdiction to entertain and adjudicate upon the current application.

16. Furthermore, learned counsel for the Applicant added that the grant of the current application will not affect the proceedings which are currently pending before the Honourable court of appeal. In this regard, counsel invoked and relied on the provisions of Order 42 Rule 6(1) of the *Civil Procedure Rules*, 2010.

17. Fifthly, learned counsel submitted that the current application is not prohibited by dint of the provisions of Section 6 of the *Civil Procedure Act*, or otherwise. For clarity, counsel contended that the provisions of Section 6 of the *Civil Procedure Act* (*supra*) are inapplicable to the subject matter.

18. Additionally, learned counsel for the Applicant submitted that where a party has gone to a higher court and appealed against the judgment/ruling of a particular judge, it is imperative that the Judge whose decision has been appealed against, does afford the aggrieved Party (read, the Applicant) an opportunity to challenge the impugned decision.

19. In the premises, learned counsel for the Applicant therefore contended that it would be inappropriate and unjust for this court to continue with the scheduled hearing of the matter, despite the pendency of an Appeal before the court of appeal.

20. In a nutshell, learned counsel for the Applicant has therefore impressed upon the court that it was/ is necessary that the current application be granted to enable the Applicant to pursue the appeal before the court of appeal, in the manner established and provided for under the *Constitution*.

Submissions By The 3rd To The 7th Defendants/respondents

21. Learned counsel Mr. Masore Ny'ang'au on behalf of the 3rd to the 7th Defendants/Respondent relied on the Grounds of opposition dated the 3rd February 2023 and highlighted four pertinent issues for consideration and determination by the court.

22. First and foremost, learned counsel for the named Respondents submitted that the current application, which has been filed by and on behalf of the Applicant, constitutes and amounts to an abuse of the due process of the Honourable court.

23. To this extent, learned counsel contended that it was not open for the Applicant to approach the court of appeal seeking an order of stay of proceedings and upon failing to procure an appropriate order therefrom, to revert to the court of first instance and to seek similar orders.

24. Furthermore, learned counsel added that for as long the application for stay of proceedings was pending and alive before the Honourable Court of Appeal, it is not open to the Applicant herein to come before this court and seek to be granted similar kind of orders.

25. In a nutshell, learned counsel contended that the filing of two separate and distinct application, before the various court and which applications seek similar or near similar reliefs, by itself amounts to and constitutes an abuse of the due process of the court.

26. Secondly, learned counsel for the named Respondents has also submitted that having approached the Court of Appeal with a view to procuring and obtaining an order of stay of proceedings, over and in respect of the instant matter, the Applicant cannot now revert to the court of first instance (court whose decision is appealed against) and seek to obtain similar orders.

27. In this respect, learned counsel has submitted that this Honourable court is divested of the requisite jurisdiction to entertain and adjudicate upon the current application, insofar as the Jurisdiction has since vested in the Court of Appeal by dint of the provisions of Rule 5(2) (b) of the *Court of Appeal Rules*, 2010.

28. In addition, learned counsel submitted that by dint of Order 42 Rule 6(1) of the *Civil Procedure Rules*, 2010, it was incumbent upon the Applicant to elect whether to start before the court appealed from before venturing to mount the application for stay before the court appealed to.

29. However, counsel has contended that the moment the Applicant approached the court appealed to, (read, the Court of Appeal) for purposes of obtaining an order of stay of proceedings, same is divested of the right to revert back to the court appealed from. In this regard, counsel underscored that this court is devoid of jurisdiction.

30. Thirdly, learned counsel also submitted that the current application is also barred by the doctrine of Sub-judice. In this respect, learned counsel invited the court to invoke and apply the provisions of Section 6 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

31. Fourthly, counsel for the named Respondents submitted that the instant application has also been made and mounted with unreasonable and inordinate delay, which delay has neither been explained nor accounted for.

32. Consequently and in this regard, it was contended that the instant application is defeated by the doctrine of Latches.

33. Finally, learned counsel for the named Respondents submitted that the instant matter was filed and lodged before the Honourable court in the year 2001. In this regard, counsel reminded the Honourable court that the suit herein has spent 22 years in the corridors of Justice and hence the necessity to remove any hurdles and to facilitate expeditious hearing and disposal of same.

34. In any event, learned counsel contended that the 3rd to 7th Respondents shall continue to suffer extreme prejudice and inconvenience, for as long as the subject suit is delayed. For clarity, counsel pointed out that the titles which are currently registered in the names of the 3rd to the 7th Respondents, have been restricted and encumbered as a result of orders that were issued by this Honourable court.

35. Arising from the foregoing, learned counsel for the named Respondents has therefore contended that the totality of the circumstances surrounding the instant matter and coupled with the conduct of the Applicant, militates against the grant of the orders sought at the foot of the current application.

36. In this regard, counsel therefore implored the Honourable court to dismiss the application and pave way for the scheduled hearing of the matter on the 7th and 8th days of February 2023.

Issues for Determination

37. Having reviewed the Notice of Motion application dated the 30th January 2023, together with the supporting affidavit thereto and having taken into account the grounds of opposition filed on behalf of the 3rd to 7th Respondents; and upon considering the oral submissions ventilated on behalf of the Parties, the following issues do arise and are thus worthy of determination;

    i. Whether the Honourable court is seized and possessed of the requisite Jurisdiction to entertain the subject application.

    ii. Whether the Current Application is barred and prohibited by the Doctrine of Res-sub-judice.

    iii. Whether the instant application constitutes and amount to an abuse of the Due process of the Honourable court.

    iv. Whether the Application herein has met the requisite threshold to warrant the grant of the orders of stay of proceedings, either in the manner sought or at all.

Analysis and Determination

Whether the Honourable court is seized and possessed of the requisite Jurisdiction to entertain the subject Application.

38. The Learned counsel for the Applicant conceded and admitted that prior to and before the filing of the current application, same had hitherto filed and lodged an application seeking for stay of proceedings before the Honourable court of appeal. In this regard, counsel contended that same had exercised his right pursuant to and in line with Rule 5(2) (b) of the *Court of Appeal Rules*, 2010.

39. There is no gainsaying that the Applicant herein was at liberty to pursue her rights and in particular, to mount an application for stay of Proceedings before the Honourable Court of Appeal.

40. However, the question to be addressed herein relates to and concerns whether a party who has since approached the court appealed to for purposes of obtaining an order of stay of proceedings can subsequently revert to the court of first instant (read court whose decree is appealed from) and seek to obtain an order of stay of proceedings.

41. I must point out that an applicant is at liberty to seek for an order of stay of proceedings or execution before the court appealed from, being the court of first instance and thereafter, if same is dissatisfied, to apply to the court appealed to for similar orders of stay of proceedings or Execution. For clarity, this bespeaks and underlines the rules of ascendancy.

42. However, where the Applicant has exercised his/her right to approach the higher court for purposes of procuring and obtaining an order of stay of proceedings or stay of execution, (whichever is appropriate), such a Party cannot by side-wind now seek to revert to the court of first instance, in the event the Appellate court has for one reason or another, declined to grant the orders of stay.

43. Clearly, where the court of appeal has declined to grant stay, or for some reasons, not been persuaded to certify the Application as Urgent, it would be inappropriate for the court of first instance to purport to grant an order of stay and thereby defeat the orders of the Court of Appeal.

44. I beg to point out that by approaching the Honourable Court of Appeal for an order of stay of proceedings, the Applicant herein is equated with one who has approached the Father and once the Father declines to accede to his/her request, then same reverts to the son and says; now that the Father has declined, please agree and give me what the Father has refused. Surely, such an approach is inimical to human nature and by extension the Rule of law.

45. Furthermore, the scheme of approaching the various cadres of court when an applicant is seeking for stay of proceedings or stay of execution (whichever is appropriate) has been well delineated/ demarcated vide the provisions of Order 42 Rule 6(1) of the *Civil Procedure Rules* 2010. Simply put, the hierarchical order is well documented.

46. Given the significance of Order 42 Rule 6(1) of the *Civil Procedure Rules*, 2010, it is appropriate and imperative to reproduce same. In this regard, same are reproduced as hereunder;

> 6. Stay in case of appeal [Order 42, rule 6.]
>
> No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made,

to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

47. My understanding of the foregoing provisions is to the effect that an Applicant has a right to elect to start and file the application for stay of proceedings or stay of execution (whichever is appropriate) before the court of first instance and thereafter, subject to the nature of the orders issued by the court of first instance, same is at liberty to escalate a similar application to the court appealed to.

48. However, the moment the Applicant elects to start with the Court appealed to (read the Court of Appeal), it is deemed that the Applicant has forsaken and abdicated his rights to approach the court of first instance.

49. In respect of the instant matter, the Applicant herein elected to start from the top and having exercised such right, (subject to the freedom of choice) the Applicant must contend herself with the consequences attendant to that choice. For coherence, it is appropriate to underscore that choices have consequences.

50. In short, it is incumbent upon the Applicant herein to await the hearing and determination of her application for stay of proceedings by the Honourable court of appeal, without trotting back to the court of first instance and seeking to cause anarchy.

51. Be that as it may, it is my humble albeit considered view that the obtaining circumstances pertaining to and in respect of this particular matter denies and deprives this Honourable court of the requisite jurisdiction to entertain the current application.

52. In any event, the entertainment and adjudication of the current application, by this Honourable Court would be tantamount to belittling the Court of Appeal who did not find any merits in the urgency that was placed before them by the Applicant.

53. Furthermore, where a Court is divested of the requisite jurisdiction to entertain and adjudicate upon the subject matter, then it behooves the concerned the Court to down his/her tools. In this regard, I feel obligated to comply and essentially to down my tools as far as the application for stay of proceedings is concerned.

54. Without belaboring the importance and significance of Jurisdiction, it is appropriate to recall, restate and reiterate the holding in the case of *Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd* 1989 KLR 1, where the Court of Appeal observed as hereunder;

> "Jurisdiction is everything. Without it, a court has no power to take one more step. In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the *Constitution*, Constitutional Application No 2 of 2011; the Supreme Court noted that The *Lillian 'S' case* [1989] KLR 1] establishes that "jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein.
>
> Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity..."

55. In addition, it is also worthy to adopt the holding of the Supreme Court of Kenya in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, where the Supreme Court stated at paragraph 68 as hereunder;

> A Court's jurisdiction flows from either *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.

56. In a nutshell, it is my finding and holding that the provisions of Order 42 Rule 6(1) of the *Civil Procedure Rules* 2010 divest and deprives this Honourable court of the requisite Jurisdiction to entertain an application for stay of proceedings, the moment an Applicant approaches an appellate court for similar orders.

Whether the current Application is barred and prohibited by the Doctrine of Res-sub-judice.

57. There is no gainsaying that the Applicant herein approached the Honourable Court of Appeal vide Rule 5(2) (b) of the Rules of the said court and sought to procure and obtain an order of stay of proceedings, pending the hearing and determination of Civil Appeal No E847 of 2022.

58. On the other hand, it is also common knowledge that despite having approached the Honourable Court of Appeal, a single judge of the said court reviewed the application filed by and at the instance of the Applicant and failed to discern any urgency in respect of the said application.

59. Be that as it may, upon being informed that the single judge of the court of appeal had declined to certify the application for stay of proceedings as urgent, the Applicant herein moved back to the same Court of Appeal and sought to be heard on the question of urgency. In this regard, the court of appeal proceeded to and listed the matter for hearing on the question for urgency and not otherwise.

60. It is not lost on this Honourable court that by the time the said application was being canvassed, the Honourable Court of Appeal had not pronounced itself on the question of urgency or at all.

61. Confronted with (sic) her inability to persuade the Honourable court of appeal to certify her application as urgent and to grant interim stay of proceedings, the Applicant herein engaged reverse gear and chose to return to the Court of first instance, believing that the court of first instance would (sic) be lenient unto her and to grant the impugned orders.

62. By returning and reverting to the court of first instance, the Applicant creates a scenario/situation where same has two sets of applications, both seeking stay of proceedings, albeit before different courts. Simply put, the Applicant herein is prosecuting the Application for stay of proceedings before two separate fora.

63. To my mind, the Applicant having filed the previous application for stay of proceedings before the Court of Appeal, which is the earlier application, same was disentitled of the liberty to revert to and file a similar application before this honourable court.

64. However, having proceeded to and filed the latter application, what now obtains is a scenario where there is a former application and a latter application, both seeking similar orders.

65. Clearly, this is a classic case which is frowned upon by the provisions of Section 6 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

66. For ease of reference, the provision of Section 6 (supra) provides as hereunder;

> 6. Stay of suit:
>
> No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
>
> Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

67. Other than the foregoing, I wish to add that the implication, meaning and tenor of the provisions of Section 6 of the *Civil Procedure Act*, (*supra*), which denotes the doctrine of Res-sub-judice, was broken down and elaborated upon by the Supreme Court of Kenya in the case of *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)*.

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

> (67) The term 'sub-judice' is defined in *Black's Law Dictionary* 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

69. Nourished and guided by the elaborate explication and espousal of the law vide the decision (*supra*), I have no hesitation in coming to the conclusion that the current application, which was filed subsequent to the one before the Court of Appeal, is barred by the Doctrine of Res-sub-judice.

Whether the instant Application constitutes and amount to an abuse of the Due process of the court.

70. Despite the fact that the filing of the current application during the lifetime of the previous application before the court of appeal, contravenes the rule of Res-sub-judice, there is yet another aspect to the duplicitous filing of the subsequent application.

71. For coherence, it is appropriate and worthy to state that the due process of the court envisages a situation where a particular litigant/Applicant files a single pleading/application at a time and thereafter pursues the named application to its logical conclusion, before venturing to file another, subject to the permission of the Law.

72. Additionally, where the named application has been pursued to its logical conclusion, irrespective of the outcome thereof, then the claimant or damnified litigant is provided with various avenues to impugn the resultant outcome.

73. For the avoidance of doubt, a damnified or aggrieved Applicant, is at liberty to either file an application for review or better still, to file an appeal, subject to the provisions of the *Constitution* and the applicable laws.

74. In any event, where the law allows, like in the provisions of Order 42 Rule 6(1) of the *Civil Procedure Rules*, the aggrieved Applicant, may escalate the application to the Higher/appellate court.

75. However, the law does not envisage a situation, or allow an Applicant or damnified litigant to commence and file two (2) parallel proceedings, either before the same court or two separate courts, even where the two courts are(sic) deemed to be seized of Jurisdiction.

76. As pertains to the instant matter, the Applicant herein is aware of and alive to the fact that her previous application for stay of proceedings was still pending before the Court of Appeal. Infact, the Applicant herself is vigorously pursuing the Judges of the court of appeal to certify her application as urgent.

77. Despite the foregoing, the same Applicant still had the courage and brevity to approach this court and file yet a similar application seeking for stay of proceedings. Simply put, what the Applicant was saying is; because the Court of Appeal is still reluctant to hear and grant my application, you can go ahead and give it to me.

78. Without belaboring the point, the fact of filing multiple proceedings or plethora of applications, before two separate fora, albeit seeking similar reliefs, amounts to and constitutes an abuse of the Due process of the court.

79. It must be stated and underscore that litigant must not be allowed to take the various cadres of courts in circles and turn the justice system into a circus. Such kind of scenario is clearly antithetical to the rule of law and the general administration of justice.

80. In my humble view, this kind of behavior must not only be frowned upon, but must be stopped at all costs. For clarity, an Applicant must not have a window or ventilation, that fosters forum- shopping.

81. Suffice it to point out that the conduct of the Applicant herein, which has ably been alluded to in the preceding paragraphs, was clearly an abuse of the court process and same fits very well within the known descriptions of what constitutes an abuse of the court process.

82. In this respect, I am inspired by the holding of the court in the case of *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR, where the court stated and held as hereunder;

> 22. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[12]
>
> 23. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party.

However, abuse of court process in addition to the above arises in the following situations:-

(a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.

(d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

(e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[13]

(f)) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

(g)) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

(h)) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[14]

83. Furthermore, the question of abuse of the due process of the court and what constitutes same, was also spoken to and elaborated upon by the Court of Appeal in the case of *Muchanga Investments Ltd v Safaris Unlimited (africa) Ltd & 2 others* [2012] eKLR, where the Court of Appeal discussed the Concept of abuse of judicial process in the following case;

> " In the Nigerian Case of *Karibu-whytie* J Sc in *Sarak V Kotoy*e (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-
>
> "The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ..."
>
> The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-
>
> (a) "Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
>
> (b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.

(d) (sic) meaning not clear))

(e) Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness."

84. Having reviewed the various aspects pertaining to the filing of the two separate applications, one before the Court of Appeal and the other before this Honoutable court, I come to the inescapable conclusion that the Applicant was indulging in activities that constitutes abuse of the court process.

Whether the Application herein has met the requisite threshold to warrant the grant of the orders of Stay of Proceedings, either in the manner sought or at all.

85. Before venturing to address and resolve the issue herein, it is necessary and appropriate to recall and restate that the subject matter was filed before this honourable court in the year 2001. Consequently, it is evident and apparent that the instant suit has since celebrated its 22nd anniversary in the corridors of Justice.

86. Despite the suit celebrating its 22nd anniversary in the corridors of Justice, the Applicant herein is still keen and desirous that the file must continue to accumulate more years and perhaps, gather more dust in the Registry.

87. Nevertheless, as the Applicant desires that the file continues to celebrate more anniversaries in the corridors of justice, the rest of the Respondents, whose titles are restricted and encumbered vide orders issued herein, will remain exposed to prejudice and inconvenience.

88. I beg to point out that the foregoing background constitutes and provides, the foundation and basis upon which the current issues must be looked at and determined.

89. Furthermore, there is no gainsaying that an order of stay of proceedings has the implication of further postponing and suspending the proceedings, to await the determination of some other named events.

90. Consequently and in this regard, an order of stay of proceedings, if granted, will no doubt, postpone the hearing, finalization and determination of the subject dispute.

91. In the premises, it is therefore important to underscore that before a court of law can venture to and grant an order of stay of proceedings, the court must first and foremost discern whether such an order would occasion undue prejudice and adverse effects on the other Parties and thereafter, weigh the the conflicting Rights/ Interests of the Parties concerned.

92. To my mind, the subject matter has been pending before this Honourable court for quite too long. Indeed, the file herein is an eyesore, taking into account the number of years same has taken in the corridors of (sic) Justice.

93. Owing to the foregoing, I am afraid that an order of stay of proceedings, either in the manner sought by the Applicant or otherwise, shall neither be in the Interests of Justice nor accord with the Provisions of Article 159 (2) (b) of the *Constitution*, 2010.

94. In any event, prior to and before granting an order of stay of Proceedings, the court is called upon to exercise and undertake delicate balancing act, of ensuring that justice is not delayed, even as the Applicant pursues his/her undoubted right of appeal.

95. In the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR, the Court of Appeal stated and observed as hereunder:

> " Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent."

96. Other than the legal implication and consequences attendant to an order of stay of proceedings, it also behooves an Applicant seeking such an order of stay of Proceedings, to approach the Honourable court without undue and inordinate delay.

97. However, in respect of the instant matter, it is not lost on the Honourable court that the ruling which aggrieved and dissatisfied the Applicant herein, was rendered on the 13th October 2022 and yet the current application was not filed, until the 30th January 2023.

98. In addition, it is also important to underscore that despite the lapse of time, amounting to more than 87 days, the Applicant herein did not deem it fit and expedient, to account for or better still, explain the named delay.

99. To my mind, the extent of delay (which has not been accounted for) militates against the exercise of Equitable discretion in favor of the Applicant herein. Simply put, the application is defeated by the Doctrine of Latches.

100. Finally, it is also worthy to recall that the current application though dated the 30th January 2023, was not filed until the 2nd February 2023, yet the Applicant was aware that the instant matter had been scheduled for hearing on the 7th and 8th days of February 2023. Clearly, the intention of the Applicant was to scuttle the scheduled hearing.

101. In my humble view, the current application was inspired by an ulterior motives and same, is therefore replete and wrought with mala fides.

102. In a nutshell, the said application was not calculated to achieve the overriding objectives of the court as espoused vide Section 1A and 1B of the *Civil Procedure Act*. Consequently, the current application is contrary and antithetical to the Interests of Justice.

103. In view of the foregoing observation, it is evident that even if the application was to be determined on the basis of merits, same would still fail the requisite test, envisaged under the law and particularly, vide the provisions of Article 159 (2) (b) of the *Constitution*, 2010.

104. Finally and before departing from the issue herein, it may be appropriate and expedient to invite the attention of the Applicant and her counsel to the holding of the Court of Appeal in the case of *Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others* [2015] eKLR, where the Court stated as hereunder;

> "Justice shall not be delayed" is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the *Civil Procedure Act* are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot

therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure.

105. From the foregoing analysis, I am not persuaded that the Applicant herein has come close to satisfying and/or meeting the threshold required before an application for stay of proceedings can be granted or allowed.

Final Disposition

106. Having considered and addressed all the thematic issues that were captured, enumerated and reflected in the body of the Ruling herein, it is now evident and crystal clear that the current application is not only premature and misconceived, but, same is otherwise an abuse of the Due process of the Honourable Court.

107. In a nutshell, the Application dated the 30th January 2023 is not meritorious. Consequently, same be and is hereby Dismissed with costs to the 3rd to the 7th Defendants/Respondents only.

108. For completeness, it is hereby ordered and directed that the instant matter shall proceed for hearing on the 7th and 8th days of February 2023, both days inclusive, as hitherto scheduled.

109. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF FEBRUARY 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant.

Mr. Kuria for the Plaintiff/Respondent.

Mr. Boniface Njiru for the 2nd Defendant/Applicant and for the 13th to 22nd Defendants.

Mr. Masore Ny'ang'au for the 3rd to the 7th Defendants/Respondents.

Mr. Karuga Maina for the 8th to the 12th Defendants/Respondents.