



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC SUIT NO. 81 OF 2019**

**JINAANI NZIOKI MBIUVA.....PLAINTIFF**

**-VERSUS-**

**THE CABINET SECRETARY,.**

**MINISTRY OF LANDS AND HOUSING.....1<sup>ST</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**DIRECTOR OF SURVEYS.....4<sup>TH</sup> DEFENDANT**

**JOSHUA WAMBUA MUTUNGA..... 5<sup>TH</sup> DEFENDANT**

**JAMES MUTHINI MWAU.....6<sup>TH</sup> DEFENDANT**

**JOHNSON NZUI MUKULA.....7<sup>TH</sup> DEFENDANT**

**RULING**

1. The application for determination is dated 26<sup>th</sup> November, 2019 filed by the Appellant/Applicant under certificate of urgency on 28<sup>th</sup> November, 2019. It is brought under Order 22 Rule 22, Order 42 Rule 6 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act and all other enabling provisions of the Law.

2. The Applicant seeks the following Orders: -

**i) Spent.**

**ii) Spent.**

**iii) That this Honourable Court be pleased to order stay of further proceedings herein pending the hearing of an intended Appeal against the order of court issued on the 28<sup>th</sup> September, 2020 and the ruling of court delivered on the 23<sup>rd</sup> November, 2020 herein.**

**iv) That this Honourable Court be pleased to stay its orders of 28<sup>th</sup> September, 2020 and those of 23<sup>rd</sup> November, 2020 and in its place reinstate its orders of 25<sup>th</sup> September, 2020 committing Joshua Wambua Mutunga and Johnson Nzui Mukula, the 5<sup>th</sup> and 7<sup>th</sup> Defendants/Respondents herein to imprisonment for 6 months for disobeying the orders given and issued on 10<sup>th</sup> December, 2019 and 24<sup>th</sup> December, 2019 respectively pending the hearing and determination of the intended Appeal herein.**

**v) That this Honourable Court be pleased to grant any other order that is fit and just to grant herein.**

**vi) That in any event, the costs hereof be awarded to the Plaintiff/Applicant.**

3. The application is supported by the affidavit of Jinaani Nzioki Mbiuva, the Plaintiff/Applicant, sworn on the same day and a further

affidavit sworn on 9<sup>th</sup> February 2021. The basis of the application is that the Applicant is dissatisfied with the Ruling delivered on 23<sup>rd</sup> November 2020 which dismissed the application to set aside the Order of this Court dated 28<sup>th</sup> September, 2020 releasing the 5<sup>th</sup> and 7<sup>th</sup> Respondents from civil jail on a personal bond of Kshs. 100,000/= each. That this Court is *functus officio* and has no jurisdiction to review its final Orders of 25<sup>th</sup> September, 2020 *ex-parte*. That this Court has no jurisdiction to review its Orders of 22<sup>nd</sup> January, 2020 denying the 5<sup>th</sup> and 7<sup>th</sup> Respondents audience. That contempt of court orders in their very nature are final and the only recourse available is the Court of Appeal. That the conduct of the 5<sup>th</sup> and 7<sup>th</sup> Respondents and the setting aside of the Court's orders of 25<sup>th</sup> September, 2020 *ex-parte* could bring the administration of justice and integrity of the judicial process into disrepute.

4. The application is opposed by Johnson Nzuki Mukula, the 7<sup>th</sup> Defendant/Respondent, vide the Replying affidavit sworn on 17<sup>th</sup> December, 2020. He deposed that in the Constitution of Kenya, all persons are to be accorded equal protection under the law without discrimination regardless of their status. That the above application is fatally defective because the prayers for stay of the Orders issued on 28<sup>th</sup> September, 2020 and 23<sup>rd</sup> November, 2020 were considered and declined by this Court. That the Applicant cannot appeal against the Order of 28<sup>th</sup> September, 2020 out of time without obtaining leave of court. That under Order 40 of the Civil Procedure Rules, this Court is vested with power to vary an order for committal of the 5<sup>th</sup> and 7<sup>th</sup> Respondents to civil jail for disobedience of court orders on application or *suo moto*. That on 29<sup>th</sup> September, 2020 both the Respondents herein complied with the Order issued on 10<sup>th</sup> December, 2019.

5. In the further affidavit sworn on 9<sup>th</sup> February, 2021 in rejoinder, the Applicant contends that the prayers being sought herein are in respect of the Ruling dated 23<sup>rd</sup> November, 2021. That the Order releasing the 5<sup>th</sup> and 7<sup>th</sup> Respondents was unconditional and did not direct them to comply with the Order of 10<sup>th</sup> December, 2019.

6. The parties duly filed their respective submissions as per the directions issued on 18<sup>th</sup> December, 2020. The Plaintiff/Applicant submitted as follows: - That this Court has jurisdiction to make an order of stay pending appeal pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules. That there have been no grounds established by the 5<sup>th</sup> and 7<sup>th</sup> Respondents why this Honourable Court should not allow the application as prayed. That the Applicant is aggrieved with the decision to reinstate audience to the 5<sup>th</sup> and 7<sup>th</sup> Respondents *suo moto*. That the said reinstatement of audience will render the intended Appeal nugatory and lastly that there was no delay in bringing this application before court.

7. The Applicant relied on several authorities namely: -

**Ezekiel Mule Musembi -Vs- H. Young & Company (E.A.) Limited [2019] eKLR; Richard Muthusi -Vs- Patrick Gituma Ngomo & Another [2017] eKLR; and MWK -Vs- JDK [2020] eKLR.**

8. The 5<sup>th</sup> and 7<sup>th</sup> Respondents submitted that the upshot of the Order dated 22<sup>nd</sup> January, 2020 was to deny them audience until that time when they would purge their contempt of the Order dated 10<sup>th</sup> December, 2019. That they have since purged the said contempt and invite the Court to hear them on the issue. That under Order 40 Rule 3(1) of the Civil Procedure Rules, 2010 this Court may direct the release of a person who has been committed to civil jail as a result of disobedience or breach of the terms of a court order. That the insistence by the Applicant that an *inter partes* hearing was mandatory before the lifting of the committal order is insupportable in law by virtue of Order 40 Rule 3(1) above. That in the circumstances, the intended Appeal is frivolous.

9. The 5<sup>th</sup> and 7<sup>th</sup> Respondents rely on the following authorities in defence to the application: -

**Woburn Estate Ltd -Vs- Margaret Bathforth [2016] eKLR; Carol Construction Engineers Ltd -Vs- Naomi Chepkorir Langat [2016] eKLR; James Njuguna Chui -Vs- John Njogu Kimani [2017] eKLR;**

**Masisi Mwita -Vs- Damaris Wanjiku Njeri [2016] eKLR; and Mukunya Mugo 'A' & another -Vs- Elizabeth Mugure Mukunya [2019] EkLr.**

10. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents submitted that the jurisdiction to grant an order for stay pending appeal is anchored to Order 42 Rule 6 of the Civil Procedure Rules, 2010. That discretion must be exercised judiciously and only in exceptional circumstances. That stay of proceedings is a serious judicial action which seriously interferes with the conduct of litigation. They rely on two authorities namely: -

**Kenya Wildlife Service -Vs- James Mutembei [2019]; and Gichuhi Macharia & another -Vs- Kiai Mbaki & 2 others [2016] eKLR.**

11. I have perused the parties' submissions and the annexed authorities. It is common ground that an order for stay of proceedings is at the discretion of the trial court. Order 42 Rule 6 (1) of the Civil Procedure Rules (2010) outlines as follows: -

**6.(1) 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 be 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.**

12. The only apparent issue for determination is whether this Court ought to stay these proceedings pending hearing and determination of the intended Appeal by the Applicant. In answering this question, it must be borne in mind that the onus lies with the Applicant to convince this

Court why discretion should be exercised in his favour and not vice versa as has been suggested at paragraph 4.4 of the Applicant's submissions.

13. I fully agree with the findings of Ringera, J. (as he then was) in **Re Global Tours & Travel Ltd HCWC No. 43 of 2000** wherein the learned judge held that;

*“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 case, 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.”*

14. The above considerations by Ringera, J. are not exhaustive. Nonetheless, they provide a sufficient starting point to what may inform the Court's discretion in such an application. To further buttress the above position, an excerpt from **Halsbury's Laws of England, 4<sup>th</sup> Edition Vol. 37 page 330 and 332**, is quite relevant. It states that;

*“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”*

*“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”*

*It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The application for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”*

15. Turning to the application herein, the Applicant is obviously dissatisfied that this Court temporarily lifted the order for committal to civil jail of the 5<sup>th</sup> and 7<sup>th</sup> Respondents while at the same time granting them audience. In the Applicant's view, this Court ought not to have varied the committal order nor heard that application without first setting aside the Order dated 22<sup>nd</sup> January, 2020 which denied the 5<sup>th</sup> and 7<sup>th</sup> Respondents audience until they had purged their contempt of the Order dated 10<sup>th</sup> December, 2019. One unavoidable question springs into mind; in what special circumstance has the temporary lifting of the committal order caused prejudice or substantial loss to the Applicant?

16. In my view, the real facts of the case are whether the contempt is continuing unabated or whether the 5<sup>th</sup> and 7<sup>th</sup> Respondents have purged it. If the Applicant herein should demonstrate that contempt of the Order dated 10<sup>th</sup> December, 2019 is being repeated, then stiffer penalties await the 5<sup>th</sup> and 7<sup>th</sup> Respondents. There is absolutely no shred of evidence to suggest that the course I took on 28<sup>th</sup> September, 2020 was by any stretch of imagination lenient towards 5<sup>th</sup> and 7<sup>th</sup> Respondents. To reiterate my words in the previous ruling of 23<sup>rd</sup> November, 2020;

*“Lastly, we should not lose focus of the fact that the order of 25<sup>th</sup> September, 2020 committing the 5<sup>th</sup> and the 7<sup>th</sup> Defendants to civil jail for six (6) months has not been set aside or summarily reversed. It still hangs over their heads like a sword of Damocles since the two contemnors (defendants) are out on bond which can be cancelled at the stroke of a pen if it is shown that they did not purge the contempt...”*

17. Being mindful not to encroach into the merits of the intended Appeal, but also being aware that the arguability thereof is a factor that may inform the decision to grant the stay orders sought herein, I will make reference to one authority by the Court of Appeal; **National Hospital Insurance Fund Board of Management v Boya Rural Nursing Home Ltd [2007] eKLR** where the learned Judges aptly held as follows;

*“It is apparent from the ruling of the learned Judge that he understood the law to be that a contemnor who has made an application to set aside the order alleged to have been disobeyed cannot be heard on such application unless and until he has obeyed the order first and then question it later. If that is so, then the learned Judge with respect misapprehended the law for a court has an absolute discretion whether or not to hear a contemnor who has not purged the contempt. In Hadkinson v Hadkinson [1952] 2 All ER 567 Denning L.J. said at page 575:*

*“I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues it impedes the cause of justice by making it more difficult for the court to ascertain the truth or to enforce orders which it may make, then, the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed”.*

18. From the above excerpt, it is easy to surmise that the Order finding the 5<sup>th</sup> and 7<sup>th</sup> Respondents was not final since contempt could be purged at any moment. Neither was the order refusing to give them audience final as this too, could be lifted at any moment when it was shown that contempt had been purged. I am therefore unable to agree with the Applicant's submission that an Order for contempt is final and/or this Court became *functus officio* after issuing the Order for contempt.

19. On the Applicant's submission that proceeding further with this matter will render the intended Appeal nugatory, I find guidance in the ruling by the Court of Appeal in **David Morton Silverstein v Atsango Chesoni [2002] eKLR** where the learned Judges aptly held as follows;

*“On the second limb regarding whether the applicant's intended appeal would be rendered nugatory if it succeeded and we refused to grant a stay, we must point out that the appeal whose success would be rendered nugatory if we do not grant a stay is the appeal already filed in this Court, not the appeal pending in the High Court. On this aspect of the matter we think we must follow the decision of this Court in the case of **KENYA COMMERCIAL BANK LTD VS BENJOH AMALGAMATED LTD & ANOTHER**, Civil Application No. NAI 50 of 2001 (29/2001 UR), (Unreported). That was also an application to stay the proceedings in the High Court pending the hearing and determination of an intended appeal to this Court. In its ruling regarding whether the intended appeal's success would be rendered nugatory if a stay was not granted, the Court stated as follows:*

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

*These remarks aptly apply to the application before us. What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and, if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory.”*

20. Needless to add and in conclusion, I find no merit in the contention by the Applicant that proceeding with this matter further will render the intended appeal nugatory. I also find no prejudice likely to be suffered by the Applicant from the continuance of these proceedings.

21. Conversely, staying these proceedings will put further strain on the scarce judicial time available and most importantly, it will offend and delay the realization of the overriding objective of this Court which is to facilitate the just, proportionate and expeditious determination of civil disputes.

22. The upshot of the above is that the Applicant does not demonstrate sufficient cause to warrant stay of proceedings herein. The application is hereby dismissed with costs to the 5<sup>th</sup> and 7<sup>th</sup> Respondents.

**SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 19TH DAY OF APRIL, 2021.**

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**HON. MBOGO C.G.**

**JUDGE**

**Court Assistant: Mr. Kwemboi**