



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO. 6054 OF 1991

HAITHAR HAJI ABDI.....1ST PLAINTIFF

ABDI RAHIMAITHAR HAJI.....2ND PLAINTIFF

VERSUS

KENYA NATIONAL CAPITAL CORPORATION LIMITED.....DEFENDANT

CONSOLIDATED WITH

CIVIL SUIT NO. 1181 OF 1992

SOUTHDOWN DEVELOPERS LIMITED.....PLAINTIFF

VERSUS

KENYA NATIONAL CAPITAL CORPORATION LIMITED.....DEFENDANT

AND

HAITHAR HAJI ABDI.....1ST APPLICANT/AGGRIEVED PARTY

ABDI RAHIMAITHAR HAJI.....2ND APPLICANT/AGGRIEVED PARTY

OCEANIA INVESTMENT LIMITED.....1ST INTERESTED PARTY

AVIC INTERNATIONAL PROJECT (K)

LIMITED.....2ND INTERESTED PARTY

RULING

1. Haithar Haji Abdi and Abdi Rahimaitar Haji, the 1st and 2nd Applicant/aggrieved party took out the motion dated 20/11/2020 whereof they sought for the following orders:

i. This application be certified urgent and be heard on priority basis.

ii. Pending the interparties hearing of the application, there be a stay of execution of the judgment and decree in this case and the related cases arising from the said judgement being:

a) Nairobi ELC No. 1389 of 2004.

b) Nairobi HCCC No. 1181 of 1992

c) Nairobi HCCC no. 2310 of 1993

d) Nairobi HC Misc No. 546 of 2004

e) Milimani HCCC No. 447 of 2004

iii. Pending interpartes hearing of the application, there be stay of further proceedings in this case and the related cases arising from the judgment delivered in this case being:

a) Nairobi ELC No. 1389 of 2004.

b) Nairobi HCCC No. 1181 of 1992

c) Nairobi HCCC no. 2310 of 1993

d) Nairobi HC Misc No. 546 of 2004

e) Milimani HCCC No. 447 of 2004

iv) Pending the hearing and determination of the appeal against the ruling and order made on 13th November 2020, there be stay of execution of the judgment and decree in this case and the related cases arising from the said judgment being:

a) Nairobi ELC No. 1389 of 2004.

b) Nairobi HCCC No. 1181 of 1992

c) Nairobi HCCC no. 2310 of 1993

d) Nairobi HC Misc No. 546 of 2004

e) Milimani HCCC No. 447 of 2004

v) Pending the hearing and determination of the appeal against the ruling and order made on 13th November 2020, there be stay of further proceedings in this case pursuant to, or to enforce any legal rights arising from the judgment and decree passed in the case, and/or the related cases arising from the said judgment or decree being:

a) Nairobi ELC No. 1389 of 2004.

b) Nairobi HCCC No. 1181 of 1992

c) Nairobi HCCC no. 2310 of 1993

d) Nairobi HC Misc No. 546 of 2004

e) Milimani HCCC No. 447 of 2004

vi) The costs of this application be provided for.

2. The motion is supported by the supporting and the further affidavit of Abdi Rahimaithar Haji. Kenya National Capital Corporation Ltd, the defendant herein, filed grounds of opposition to oppose the application. Avic International Project, the 2nd Interested Party filed the replying affidavit sworn by Wang Wenhao to resist the motion.

3. When the motion came up for interpartes hearing, this court directed the motion to be disposed of by written submissions vide its ruling delivered on 1st December 2020.

4. I have considered the grounds stated on the face of the motion dated 20/11/2020 and the facts deponed in the affidavits filed in support and against the motion. I have also considered the grounds of opposition filed by the defendant. I have further considered the rival written submissions.

5. It is clear on the face of the applicants' motion that the motion is based on the provisions of Section 3A Civil Procedure Act and Order 42 rule 5 of the Civil Procedure Rules. The applicants are basically invoking the court's inherent jurisdiction.

6. It is the submission of the applicants that unlike the relief sought under Order 42 rule 5 of the Civil Procedure Rules, the relief sought under Section 3A is a serious or grave one and is dependent on a breach committed against the administration of justice.

7. The applicants aver that the judgment and the subsequent decree were the outcome of court proceedings where the plaintiff, a limited liability company was an abstract entity which could only sue and prosecute the case through resolutions made by its directors or

shareholders.

8. The applicant pointed out that the purported directors and shareholders who were alleged to have made the resolution or decision to institute the suit have denied any knowledge of the suit. It was argued that this court gave judgment and a decree to a purported decree holder who was not aware of the suit hence not a proper person before the court.

9. It is further argued that the witness who appeared to give evidence as the agent of the plaintiff misled the court and committed perjury.

10. It is the applicant’s submission that the above facts were not rebutted after the plaintiff or defendant failed to file a replying affidavit.

11. The applicant also pointed out that the judgment and decree in this case was obtained by fraud practised upon the court. The court was urged to grant the order sought in exercise of its inherent power under Section 3A of the Civil Procedure Act to prevent injustice and to remedy an injustice where it exists.

12. It is argued that in the circumstances of this case the doctrine of resjudicata does not apply.

13. In response, the defendant and the plaintiff opposed the application stating that the allegations and facts deponed in the affidavits of Abdi Rahimaithar Haji being a repetition had already been answered in previous affidavits. This court was urged to consider the averments made in the affidavit of Morris Tema sworn on 20th November 2019.

14. It is stated that the facts set out in the aforesaid affidavit respond to the factual issues raised in the stay application dated 20.11.2020. It is the submission of the respondents that this court lacks jurisdiction to grant the orders sought since the application was filed after unreasonable delay of over 16 years from the date of delivery of the judgment sought to be reviewed.

15. It is also pointed out that since no appeal has been preferred against the judgment delivered on 15.10.2003, no order for stay pending appeal can issue.

16. It is also argued that the application dated 20.11.2020 is an abuse of the court process as there is nothing to stay in these proceedings because the Interested Parties have failed to meet the test for the grant of the order for stay.

17. This court was also urged to find that the court has no jurisdiction to stay execution or proceedings pending before the Environment and Land Court pursuant to Article 162(2) of the Constitution.

18. Having considered the rival submissions and the authorities cited, I have come to the following conclusions in this matter: **First**, I am satisfied that the Interested Parties having previously filed a similar application for review, are not permitted in law to institute a new application based on similar grounds and facts.

19. This court is bound to consider the affidavits filed in support and against the previous application, therefore it cannot lie in the mouth of the applicants to state that the respondents have not filed any response to the current motion.

20. **Secondly**, it is not in dispute that the applicants have not appealed against the judgment delivered on 15th October 2003, therefore an application for stay pending appeal has no foundation hence cannot issue.

21. **Thirdly**, an application for review and for stay should be filed without unreasonable delay. In this case the judgment sought to be impugned was delivered on 15.10.2003. The application for review and stay was filed after the lapse of 16 years from the date of judgment. The delay is unexplained and unreasonable. Such applications cannot be entertained by this court since the applicants are guilty of laches.

22. **Fourthly**, it is also apparent that judgment sought to be reviewed has already been fully complied with hence the application is overtaken by events. This court’s ruling delivered on 13.11.2020 cannot be stayed because no positive orders were granted capable of execution.

23. In the end, I find the motion dated 20.11.2020 to be without merit. The same is ordered dismissed with costs being awarded to the plaintiff and defendant.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 5th day of March, 2021.

.....
J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

..... For Interested Party