REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MILIMANI LAW COURTS

ELC CASE NO. E064 OF 2020

LAKEVIEW DEVELOPMENT LIMITED.....PLAINTIFF

-VERSUS-

BELGO HOLDINGS LIMITED.....1ST DEFENDANT

THE LAND REGISTRAR.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Ruling herein relates to two Applications, namely, the Notice of Motion Application dated the 10th of August 2020, which was filed by and/or on behalf of the Plaintiff herein and the other Application is the one dated the 5th of July 2021, the latter filed by and/or on behalf of the 1st Defendant.

2. Vide the Application dated 10th August 2002, the Plaintiff has sought for the following Reliefs;

i. ……...(Spent)

ii. A temporary order of injunction be and is hereby issued, restraining the 1st Defendant whether by itself, agents, nominees or any person whosoever from selling, transferring, leasing, charging and/or in any manner howsoever disposing the properties known as L.R. NO. 28586, I.R. NO. 124735 (formerly L.R. NO. 3859) and L.R. NO. 28587, I.R. NO. 134736 (formerly L.R. NO. 3860), (hereinafter referred to as the suit properties) pending the hearing of this Application inter-partes.

iii. A temporary order of injunction be and is hereby issued, restraining the 1st Defendant whether by itself, agents, nominees or any person whosoever from selling, transferring, leasing, charging and/or in any manner howsoever disposing the properties known as L.R. NO. 28586, I.R. NO. 124735 (formerly L.R. NO. 3859) and L.R. NO. 28587, I.R. NO. 134736 (formerly L.R. NO. 3860), (hereinafter referred to as the suit properties) pending the hearing of this suit.

iv. Cost of this Application be borne by the Defendants.

3. The subject Application is premised and/or anchored on the various, albeit numerous grounds that are contained at the foot thereof and same is further supported by two Affidavits of, Gad Zeevi and Haim Bergestein, sworn on the 21st of July 2020, respectively, and to which the Deponent has annexed various annextures in support thereof.

4. Upon being served with the pleadings in respect of the subject suit and in particular the Notice of Motion Application under reference, the 1st Defendant filed Grounds of Opposition dated the 28th of September 2020, which has enumerated and/or otherwise itemized 27 grounds, in opposition to the Application.

5. On the other hand, the 1st Defendant/Respondent's Director, namely Akbar Esmail, also swore a Replying Affidavit in opposition to the said Application. For clarity, the Replying Affidavit herein adopted and highlighted the Grounds of Opposition which were similarly filed by and/or on behalf of the 1st Defendant.

6. As pertains to the Application dated the 5th of July 2021, the 1st Defendant/Respondent has sought for the following Reliefs;

i. The Honorable Court be pleased to grant an order of stay of all further proceedings in this suit be stayed pending the hearing and determination of Court of Appeal at Nairobi Civil Appeal E345 of 2021 between Belgo Holdings Limited versus Lakeview Development Limited and Chief Land Registrar.

ii. Cost of this Application be in the cause.

7. The Application herein is predicated on the grounds contained at the foot thereof, and same is further supported by the Affidavit of one James Ochieng Oduol, Counsel for the 1st Defendant herein.

8. On the 29th of July 2021, the subject matter came up before Hon. Lady Justice K. Bor, Judge, whereupon the attention of the Court was drawn to the two Applications, namely the application dated the 10th of August 2020 and the one dated the 5th of July 2020, respectively.

9. Pursuant to the foregoing, and after listening to the submissions by the respective Advocates, the Honorable Judge ordered and/or directed that the two Applications under reference be heard and/or disposed of together.

10. On the other hand, it was further directed that the two Applications be canvassed by way of written submissions, which were to be filed and exchanged within set timelines.

SUBMISSIONS BY THE PARTIES

11. Following the directions by the Honorable Court, the parties herein proceeded to and indeed filed their respective submissions in support and opposition of the respective Applications. For clarity, the submissions filed by the respective parties form part and parcel of the record of the Court and same have been duly considered and/or appraised.

12. I must point out that the submissions filed by the Plaintiff and the 1st Defendant respectively, are voluminous and have quoted extensive caselaw pertaining to the grant and/or refusal of an order of temporary injunction and grant and/or refusal of an order of stay of proceedings.

ISSUES FOR DETERMINATION

13. Having reviewed and/or evaluated the Notice of Motion Application dated the 10th of August 2020, as well as the two Affidavits in support thereof and the submissions filed by the Plaintiff on one hand, and having similarly considered the elaborate Grounds of Opposition dated the 28th of September 2020 and the Replying Affidavit of Akbar Esmail, as well as the submissions on behalf of the 1st Defendant, the following issues are germane for determination;

i. Whether the Plaintiff herein has established a prima facie case with overwhelming chances of success.

ii. Whether the Plaintiff is disposed to suffer irreparable loss.

iii. In whose favor does the Balance of Convenience tilt.

iv. Whether there is sufficient cause shown for purposes of stay of proceedings pending the hearing and determination of the Appeal to the Court of Appeal.

v. Whether the 1st Defendant's Appeal to the Court of Appeal would be rendered nugatory, if the order for stay of proceedings are not granted.

ANALYSIS AND DETERMINATION

Issue Number One

Whether the Plaintiff herein has established a prima facie case with overwhelming chances of success.

14. The subject dispute touches on and/or concerns the sale, alienation and transfer of the suit properties to and/or in favor of the 1st Defendant herein.

15. It is common ground that the suit properties herein, hitherto belonged to and/or were registered in the name of the Plaintiff, who was thus the lawful and registered proprietor thereof. For clarity, the fact that the suit properties were previously registered in the name of the Plaintiff is not in contest.

16. On the other hand, it is also common ground that on 29th of May 1995, the Plaintiff herein and the 1st Defendant entered into and executed an agreement for sale over and in respect of the suit properties, whereby the Plaintiff was represented by her Director, namely, Gad Zeevi, while the 1st Defendant was represented by her Director, Akbar Esmail.

17. Despite the entry into and execution of the sale agreement, the bone of contention is whether the agreed consideration of the sum of Kshs. 20 million, was ever paid to and/or in favor of the Plaintiff.

18. According to the Plaintiff, the sale agreement was executed by the parties, albeit on mutual trust that the purchase price would be paid by the 1st Defendant, as soon as the 1st Defendant procured and obtained funding from her bankers. In this regard, it was further stated that the execution of the sale agreement was meant to help the 1st Defendant to fast-track the issue of funding and thereafter to remit the requisite payment/consideration to the Plaintiff.

19. It is further contended by the Plaintiff that the sale agreement under reference was executed on trust, because the 1st Defendant's Director, namely, Akbar Esmail, was known to the Plaintiff company as well as the Plaintiff's Directors, and therefore the Plaintiff Company believed the representations made by the said Akbar Esmail.

20. On her part, the 1st Defendant has contended that as at the execution of the sale agreement, the entire purchase price and/or consideration over ad in respect of the suit property had been paid to and in favor of the Plaintiff, and in this regard, the 1st Defendant adverts to the fact that receipt of such payment was acknowledged by the execution of the sale agreement.

21. The 1st Defendant has further contended that as evidence of receipt and acknowledgement of the purchase price, the Plaintiff proceeded to and executed the indenture dated the 27th of July 1995. For clarity, the 1st Defendant contends, that it would not have been tenable for the Plaintiff to have executed the indenture, if same had not been paid the purchase price.

22. Suffice it to say, that the issues adverted herein before are issues of facts, which would require to be interrogated and/or investigated by the Court during the plenary hearing and thereafter the Court would ascertain the veracity or otherwise of the contradictory depositions by the parties.

23. Nevertheless, it is imperative to note that the existence of such serious evidential dispute, connotes and/or constitutes a basis to warrant the Court to make a finding of the existence of a prima facie case, which requires to be addressed at the opportune time.

24. Be that as it may, it is appropriate to state that if the purchase price and/or consideration in respect of the sale transaction was not paid for whatever reason, then the transfer and subsequent registration of the suit properties in favor of the 1st Defendant would be vitiated by such failure. But, I have pointed out, that this must be dealt with at the hearing.

25. It is also important to note, that the existence of a Title to and in favor of the proprietor, without more, may not confirm indefeasibility of the said Title. In this regard, the Court may at the opportune time be called upon to interrogate the process leading to the acquisition of the Title.

26. In support of the foregoing position, I rely on and restate the position as captured in the decision in the case of **Elizabeth Wanjiru Githinji & 29 others vs Kenya Urban Roads Authority** where Justice Odek observed as hereunder;

> "I am convinced and persuaded by the merits and reasoning in the local and comparative jurisprudence that a title under the Torrens system is defeasible on account of mistake, misrepresentation, fraud and illegality. For this reason, it is not sufficient for the appellants to wave an RLA or RTA title and assert indefeasibility. **If a mistake is proved or total failure of consideration or other vitiating constitutional or statutory factors, an RLA or RTA title is defeasible."**

27. On the other hand, there is also the issue as to whether the requisite Land Control Board Consent concerning the suit properties was procured or obtained, either within the statutory duration or at all.

28. As concerns the issue of the Land Control Board Consent, it is imperative to take cognizance of the provisions of Paragraph 51 of the 1st Defendant's Statement of Defence, which states as follows;

> "The 1st Defendant denies each and every allegation made in Paragraphs 25, 26 and 28 of the Plaint. **The agreement became void for all purposes and intent on the 30th of November 1995, as no Application for the Consent of the Land Board was made in accord with Sections 6 and 8 of the Land Control Act**."

29. If indeed the position as captured in the said paragraph of the 1st Defendant's Statement of Defence is correct, then a question thus arises pertaining the legality, validity and process leading to the transfer and registration of the suit properties in favor of the 1st Defendant.

30. Nevertheless, I must similarly point out that whereas the issue of the Consent is a legal one, whether or not it was applied for and if so obtained, is also a pertinent issue of fact that must be addressed by the Court during the formal hearing.

31. However, it is worthy to note, that parties are bound by their pleadings and at this moment, the contents of Paragraph 51 of the 1st Defendant's Statement of Defence, espouses yet another bonafide triable issue which establishes the threshold of a prima facie case.

32. In support of the foregoing position, I invoke and rely on the decision in the case of **Independent Electoral & Boundaries Commission & Another vs Stephen Mutinda Mule & Another [2013] eKLR** where the Court Of Appeal observed as hereunder;

> "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of

pleadings…**for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings.** Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

33. Other than the foregoing, there is also the plea that the circumstances leading to the registration of the suit properties in favor of the 1st Defendant, was such that the 1st Defendant holds the suit properties in trust for the Plaintiff. For clarity, the Plaintiff herein has impleaded an implied, resulting and constructive trust. *(See Paragraph 35 of the Plaint.)*

34. Yet again, there is a glimpse of another triable issue premised on trust, in its various aspects and/or perspectives. For clarity, this would also be interrogated during the plenary hearing.

35. As pertains to the legal import and tenure of a claim based on trust, it is sufficient to take cognizance of the decision in the case of **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR** where the Honorable Court of Appeal observed as hereunder;

"The transaction between the parties is to the effect that the respondent created a constructive trust in favor of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to the Land Control Act is enforceable. Our view on this aspect is guided by the Overriding Objectives of this Court and the need to dispense substantive and not technical justice. We are reminded and guided by the dicta of Madan, JA (as he then was) in **Chase International Investment Corporation and Another vs. Laxman Keshra and Others, [1978] KLR 143; [1976-80] 1 KLR 891** to the effect that:

"If the circumstances are such as to raise equity in favor of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed…."

36. It is also necessary to appreciate that the 1st Defendant herein had contended that the suit filed by and/or on behalf of the Plaintiff herein was *Res Judicata* and thus barred by the provisions of **Section 7 of the Civil Procedure Act.** In this regard, the 1st Defendant thus contended that no prima facie case would therefore arise and/or be established, where the suit is *Res Judicata.*

37. As pertains to the argument founded on the doctrine of Res Judicata, I am compelled to make two observations as hereunder;

38. First and foremost, the doctrine of Res Judicata would only arise and/or suffice where the previous proceedings, which must no doubt have been prosecuted before a Court of competent jurisdiction, were between the same parties and/or the parties' representatives and not otherwise. For clarity, the judgments that have been alluded to in respect of **HCC NO. 266 of 2005, HC. Constitutional Petition 21 of 2016 and ELC NO. 545 of 2012,** respectively, and which have been exhibited in the Affidavit of Akbar Esmail, did not relate to and/or concern a dispute between the Plaintiff and the 1st Defendant herein.

39. In my humble view, the doctrine of Res Judicata as captured and/or provided for under the provisions of **Section 7 of the Civil Procedure Act,** including *constructive Res Judicata,* may not be applicable, to vitiate the claim by the Plaintiff.

40. I must point out yet again, that the effective and effectual determination of the issue of *Res Judicata* can only be addressed in an appropriate, albeit substantive Application.

41. Secondly and most importantly, it is worthy to note that the 1st Defendant herein took out a Notice of Motion Application dated the 9th of October 2020 and in respect of which, same sought to strike out the subject suit on inter-alia the doctrine of *Res Judicata.* For clarity, the said Application was heard and disposed of by the Ruling rendered on the 10th of May 2021.

42. In my humble view, the issue of Res Judicata having been dealt with and adjudicated upon by a Court of concurrent jurisdiction,=[differently constituted], same is no longer available for consideration by this Honorable Court in determining whether the Plaintiff's case espouses a prima facie case.

43. On the other hand, the 1st Defendant had also addressed the issue of limitation under the Limitation of Actions Act and contended that the Plaintiff's suit, would similarly fall short of a prima facie case, by dint of the provisions of **Section 4 of the Limitation of Actions Act, Chapter 22, Laws of Kenya.**

44. Yet again, I must say that the issue herein is not available for this Court to address in assessing whether or not a prima facie case has been established by the Plaintiff, for the simple reason that same was decisively attended to and/or dealt with by the Ruling rendered on the 10th of May 2021.

45. Nevertheless, if I were to consider the import of Limitation of Actions, Act, in determining whether a prima facie case has been espoused, I would quickly refer to Paragraphs 24 and 25 of the Plaint which provides as follows;

> 24. The Plaintiff continued to wait for payment until 5th of September 2018, when the Plaintiff wrote to the 1st Defendant, seeking confirmation of payment, and asking the 1st Defendant to evidence any such payment, since the Plaintiff had not received**. <u>The Plaintiff discovered the fraud of the Defendant above in 2018, when it actively payment of the purchase price.</u>**
>
> 25. **<u>The Plaintiff avers that having now demanded for payment of the consideration, the cause of action for breach of contract begun to accrue on the 5th of September 2018, when the 1st Defendant was given formal notice to pay.</u>**

46. The import of the foregoing averments in the Plaint is that factual issues have been raised pertaining to and/or concerning when sic (the fraud was discovered). In this regard, evidence would need to be tendered and/or adduced by the Plaintiff and challenged by the 1st Defendant, to establish the veracity of when indeed the fraud, if any, was discovered.

47. In my humble view, the stage for rendition of such evidence and interrogation of the factual foundation or otherwise, is yet to come.

48. Be that as it may, I am alive to the provisions of Sections 27 and 28 of the Limitation of Actions Act, Chapter 22, Laws of Kenya, and particularly the provision of a window for commencement of a suit within specified timelines from the discovery of the occurrence of sic fraud.

49. Having made the foregoing observations, I am alive to the fact that while dealing with an interlocutory application, I am not disposed to make determinate findings on issues of fact. For clarity, determinate findings on issues of facts fall within the purview of the Trial Court, subject to evidence-in-chief, cross examination and re-examination where appropriate.

50. To highlight the foregoing observation, I am compelled to invoke and restate the position in the case of **<u>Mbuthia v Jimba Credit Finance Corporation & another[1988] eKLR</u>** where Justice H.G. Platt, (as he then was) observed as hereunder;

> **<u>"The correct approach in dealing with an application for the injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions.</u>** There is no doubt in my mind that the learned Judge went far beyond his proper duties, and has made final findings of fact on disputed affidavits. Supposing that the valuation of the plaintiff's Valuer were to be accepted as showing the true market value of the land in question, after evidence viva voce under cross-examination, how then could the Judge find that the sale at a price of Kshs. 200,000/- was not inconsiderably low? At roughly half the price, how could that be maintained as such an obvious situation, that the plaintiff's chances of success were found to have less than a possibility of success?"

51. Based on the foregoing observations, I come to the conclusion that the Plaintiff has established a prima facie case with overwhelming chances of success, which would require to be heard and/or addressed by the Court during a plenary hearing.

52. In support of the foregoing position, I adopt and rely on the decision in the case of **<u>Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125</u>** fashioned a definition for "prima facie case" in civil cases in the following words:

> **<u>"In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."</u>**

<u>Issue Number Two</u>

<u>Whether the Plaintiff is disposed to suffer irreparable loss.</u>

53. As pertains to irreparable loss, it is imperative to take cognizance of the definition provided by the Court of Appeal in the case of **<u>Nguruman v Jan Bonde Nielsen (2014) eKLR,</u>** where the Court of Appeal observed as hereunder;

> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. **<u>An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."</u>**

54. It is important to note that at this juncture, the 1st Defendant herein is the registered proprietor over and in respect of the suit properties and in this regard, the 1st Defendant is seized of the capacity to alienate, dispose of, charge and/ or otherwise deal with the suit properties, in any manner that same pleases.

55. For clarity, the scope and/or extent of the rights that inhere in the 1st Defendant, are well delineated vide the provisions of **Sections 24 and 25 of the Land Registration Act, 2012,** which provides as hereunder;

> "24. Interest conferred by registration Subject to this Act—
>
> (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
>
> (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
>
> 25. Rights of a proprietor
>
> (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
>
> (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
>
> (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register
>
> . (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee."

56. From the foregoing provisions, it is evident that the registered owner of a property, the 1st Defendant herein not excepted, can deal with the property in any manner envisaged and/or provided for under the law.

57. In view of the foregoing, there is no gainsaying that the 1st Defendant herein, could very well sell, alienate and/or charge the suit properties and any such action, would affect the substratum of the subject matter.

58. In the event that any such action does arise, I am of the humble view that the foundation of the subject suit, would be substantially destroyed and/or affected and the ensuing loss, would no doubt be irreparable.

59. In the premises, I find and hold that the Plaintiff/Applicant has proven the existence of irreparable loss as captured in Paragraph 35 of the Supporting Affidavit sworn by one Gad Zeevi, on the 21st of July 2021.

Issue Number Three

In whose favor does the Balance of Convenience tilt.

60. The suit properties, are being claimed by the Plaintiff and the 1st Defendant, respectively. On one hand, the Plaintiff avers that the suit properties lawfully belonged to herself and that though same intended to sell and/or dispose of the suit properties, the sale transaction did not materialize.

61. On the other hand, the 1st Defendant herein has posited that the suit properties were lawfully bought, purchased and thereafter transferred and registered in her name, premised on the sale agreement entered into on the 29th of July 1995. In this regard, the 1st Defendant claims to be the lawful owner, certainly premised on the existing Title documents.

62. Based on the foregoing rivalling claims, the preservation of the suit properties herein would be in the interest of both the parties, and in particular the Plaintiff and the 1st Defendant, respectively. For clarity, the ultimate winner of the subject dispute, would be able to take home the suit properties without the hassle of further and/or auxiliary proceedings.

63. In any event, during the pendency of litigation, the doctrine of *Lis-pendens,* leans towards the preservation and/or conservation of the substratum of the dispute before the Court and in this regard, the doctrine of *Lis-pendens* goes hand in hand with the Balance of Convenience.

64. In support of the foregoing position, I rely and adopt the decision in the case of **Co- operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR** where the Honorable Court observed as hereunder;

> **"**53. Presently, the ***LRA*** does not prohibit the application of the doctrine of *lis- pendens;* nor does any law for that matter. For this reason and in view of ***Section 107*** aforesaid, this Court has previously held that the doctrine of *lis- pendens* is still applicable to this

day, albeit under common law (see. **Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another [2015] eKLR)**

54. On whether the doctrine can be interpreted to mean that the filing of proceedings serves as an automatic stay of the sale; we are of the view that it cannot. As stated under the repealed ***Section 52*** of the ***ITPA***, an automatic prohibition of dealings or transfers of the property is only during the 'active prosecution' of the proceedings. **Consequently, while the parties are automatically duty bound to preserve the property during the pendency of active proceedings, the same cannot be said of fresh proceedings that have just been filed and whose prosecution is yet to begin.**

55. This conclusion is informed by the fact that lis pendens as applied in Kenya is heavily borrowed from the Indian system. However, unlike our system, the Indian one was amended to rid itself of the phrase 'active prosecution.' Consequently, in India, lis pendens kicks in from the moment proceedings are instituted, all the way through to the appellate stage. This has been the position adopted by the Supreme Court of India (see **Jagan Singh v. Dhanwanti [2012] 2 SCC 628)**. Clearly, the plaintiffs under that system enjoy a wide berth in so far as the doctrine is concerned. To ensure that this new found freedom is not abused by unscrupulous plaintiffs-who may file frivolous suits in a bid to frustrate a legitimate owner's right to deal in his land, several safeguards were put in place; from levies of compensatory costs in frivolous proceedings, to expedited proceedings and compensatory damages against vexatious plaintiffs (see **Vinod Seth v. Devinder Bajaj & Another SCC No. Civil Appeal No. 4891 of 2010).**

In Kenya, however, no such measures have been legislated regarding lis pendens**. As such, the practical approach remains that mere institution of suit does not trigger the doctrine. Rather, it is upon the active prosecution of that suit that the doctrine automatically sets in**. Consequently, the contention that mere filing of suit operates as an automatic stay of dealings, fails."

65. In my humble view, the Balance of Convenience also tilts to and in favor of the Plaintiff herein and effectively, by ensuring that the suit property, which is the subject of dispute, is preserved and conserved, so as to be ultimately available for the winner.

Issue Number Four

Whether there is sufficient cause shown for purposes of stay of proceedings pending the hearing and determination of the Appeal to the Court of Appeal.

66. As concerns the application for stay of proceedings, pending the hearing and determination of the pending Appeal before the Court of Appeal, namely Civil Appeal E345 of 2021, it is my humble view that sufficient cause has indeed been shown and/or established.

67. In any event, it is important to note that for purposes of proceedings before this Honorable Court, the filing of a Notice of Appeal would suffice, to constitute an Appeal.

68. In support of the foregoing observation, it is sufficient to invoke and refer to the provisions of **Order 42 Rule 6(4) of the Civil Procedure Rules, 2010,** which provide as hereunder;

"6. Stay in case of appeal [Order 42, rule 6.]

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given."

69. In a nutshell, I find and hold that sufficient cause and/or basis has been established and in this regard, I adopt and restate the decision in the case of **Re Global Tours & Travel Ltd HCWC No. 43 of 2000 (unreported),** where Ringera, J (as he then was) 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 matter, 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**."

Issue Number Five

Whether the 1st Defendant's Appeal to the Court of Appeal would be rendered nugatory if the order for stay of proceedings are not granted.

70. The Appeal by the 1st Defendant to the Honorable Court of Appeal is in respect of the Ruling of this Honorable Court, albeit differently constituted, which was delivered on the 10th of May 2021 and whereby this Honorable Court dismissed the Notice of Motion Application dated the 9th of October 2020.

71. For clarity, the said Application dated the 9th of October 2020, had sought to strike out the Plaintiff's suit based on numerous legal grounds, including the doctrine of *Res Judicata*, Limitation of Actions Act, the doctrine of Judgment in Rem, as well as non- disclosure of a reasonable cause of action.

72. In a nutshell, the 1st Defendant herein had raised jurisdictional issues, which if same had succeeded, the Plaintiff's suit, would no doubt have been struck out.

73. However, the Honorable Court herein found and held to the contrary, and essentially dismissed the Notice of Motion Application dated **the 9th of October 2020** and thereby provoking the Appeal before the Honorable Court of Appeal.

74. The point I am making is that the Appeal before the Court of Appeal may very well succeed and if it does, then the entire proceedings undertaken before this Honorable Court as well as the resultant orders, would have to align themselves with the decision of the Court of Appeal.

75. Be that as it may, the flipside of the coin, is what happens if the Appeal before the Court of Appeal does not succeed and yet an order of stay would have been granted. The corollary of such a situation, would be that the subject matter would be held in abeyance and thereby delay the expeditious hearing and determination of the suit.

76. In my humble view, such a situation would negate and/or defeat the import and tenor of the provisions of **Article 159(2)(b) of the Constitution of Kenya, 2010,** which underscores the necessity to hear and deal with legal disputes without undue delay.

77. In my humble view, the 1st Defendant's pending Appeal before the Court of Appeal, which no doubt may be having arguable points (*the determination of which does not belong to me),* will not be rendered nugatory if the orders of stay herein are granted.

78. Suffice it to say, that if the pending Appeal succeeds, the subject suit, will stand struck out with necessary orders, irrespective of the stage of the hearing, that shall have been reached and/or arrived at. Besides, appropriate orders for cost shall be made by the Honorable Court of Appeal.

79. In support of the foregoing observation and premised on the need to comply with the Constitutional provisions of **Article 159(2)(b) of the Constitution of Kenya 2010,** I beg to rely on and adopt the decision in the case of **David Morton Silverstein vs Atsango Chesoni [2002] eKLR** where the Court stated;

> **"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 succeeds , 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."**

80. In my humble view, the 1st Defendant herein has not established and/or espoused any prejudice that may be occasioned if the orders of stay of proceedings are not granted or at all.

81. On the other hand, I have on my own, not discerned any such prejudice. To the contrary, it shall be in the interest of justice that the subject matter does proceed for hearing in the appropriate manner.

FINAL DISPOSITION

82. Having considered the two Applications, namely the Notice of Motion Application dated the 10th of August 2020 and the 5th of July 2021, I come to the conclusion as hereunder;

> **i. The Notice of Motion Application dated the 10th of August 2020, is merited and same be and is hereby allowed.**
>
> **ii. The Notice of Motion Application dated the 5th of July 2021, is devoid of merit and same is hereby dismissed.**

83. As pertains to costs, I direct that the cost in respect of the Application dated the 10th of August 2020, shall abide the cause whereas, the cost of the Application dated the 5th of July 2021, shall abide the Appeal before the Honorable Court of Appeal.

84. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF DECEMBER, 2021

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

In the Presence of;

June Nafula Court Assistant

Mr. Mukuha Kamau h/b for Miller Bwire for the Plaintiff

Mr. James Ochieng' Oduol for the 1st Defendant

Mr. Allan Kamau for the 2nd Defendant