REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION NO. 318 OF 2016

MWANGANGI AND COMPANY ADVOCATES.....APPLICANT

=VERSUS=

MACHAKOS COUNTY.....RESPONDENT

RULING

1. By a Chamber Summons dated 28th March, 2018, expressed to be brought under Rule 11(3) of the ***Advocates (Remuneration) Order, 1962*** and all other enabling provisions of the law, the applicant in the instant application, **Machakos County**, seeks leave to appeal to the Court of Appeal against the ruling of this Court (**Nyamweya, J**) delivered on 14th March, 2018 and upon issuance of the said order, that there be a stay of any further proceedings in this case pending hearing and determination of the intended appeal.

2. According to the applicant, the Respondent herein, **Mwangangi and Company Advocates**, filed a Bill of Costs against the Applicant but instead served Machakos County Government through its legal office. Thereafter the said Bill was taxed by the Deputy Registrar. However being aggrieved by the said decision the Respondent herein filed a reference to this Court to which the applicant filed a preliminary objection that it was not a party sued in the proceedings. Both the preliminary objection and application were heard together and a ruling delivered on 14th March, 2018 which ruling the applicant is seeking to appeal against. It was however averred that being a ruling on a reference/objection to the decision of a Taxing master, an appeal only lies with leave of this court.

3. To the applicant, the decision in question affects the people of the Applicant County thus of great interest to the parties. It was the applicant's position that the Respondent will not suffer any prejudice if the application is allowed as it will get a chance to be heard on the appeal which in the applicant's view had high chances of success.

4. In its submissions, the applicant cited the ***Advocates Remuneration Order 2009*** in Rule 11 (2) & (3).

5. It was contended that therefore the trite practice that a party who has filed a reference to the judge emanating from a decision of a taxing officer and is aggrieved by the decision of the judge thereto may appeal to the Court of Appeal but only with the leave of the court. The applicant relied on **Kenya Shell Limited vs. Kobil Petroleum Limited [2006] eKLR** and **Machira T/A Machira & Company Advocates vs. Mwangi & Anor [2002] 2 KLR 391.**

6. The Court was urged to take judicial notice of the fact that the said ruling of 14th day of March 2018 will be enforced against the County Government of Machakos which is not a party to these proceedings and consequently affect the people of Machakos County immensely as the sum which sought to be reinforced against the said County Government of Machakos ought to have been used to better the welfare of the residents of the aforementioned county of Machakos. To the Applicant, a keen look at the ruling delivered on the 14th day of March 2018, it is clear that the judge therein made reference to a valuation report for purposes of considering the appropriate fees for instructions and establishing the value of the property. It is startling in that the Court therein would make reference to a valuation report which had not been filed as at the time of filing the suit. The court therefore could not have been in a position to determine the value of the suit property as at the time of filing the suit. Further to this, a valuation report was considered by the court in attempting to determine the value of the suit property and which report could only give the value of the suit property as at the time of the taxation and not the filing of the suit. It is therefore proper to have leave issued for the intended appellant to challenge the use and reliance of the valuation report in which the parties herein had not consented for its production and/or use in these proceedings. Clearly, there is no way then that the taxing officer and/or the judge could determine the fees to be paid to the respondent herein in view of the fact that they could effectively be used to determine the value of the suit property.

7. It was therefore submitted that this is a realistic ground of appeal as per the sentiments of the Honourable court in the aforementioned case of **Machira T/A Machira & Company Advocates vs. Mwangi & Ano** and the applicant therefore prayed this Court exercises its unfettered jurisdiction to allow the applicant herein in this application to proceed to grant leave to the applicant to appeal against the ruling delivered on the 14th day of March 2018.

8. To the applicant, a perusal of the memorandum of appeal shows that the intended appellant has raised several grounds which raise triable

issues with clear and high chances of success which is one of the grounds set out for grant of an order of leave to appeal out of time as enunciated in the case of **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** which was considered by the court in the case of **Aberdare Steel And Hardware Limited vs. Shreeji Enterprises Ltd [2018] eKLR**, in which the earlier court stated as follows:

> **"It is now settled that the decision whether to extend the time for appealing is essentially discretionally. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, third (possible) *the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted."***

9. It is the applicant's submissions that the intended appellant herein has met all the aforementioned grounds for grant of the order of leave to appeal out of time and therefore the Court do proceed to issue the said order.

10. On stay of proceedings, the applicant cited Order 42, Rule 6(1) of the ***Civil procedure Rules*** which provides as follows:

> **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 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.**

11. According to the applicant, if this Honourable court does allow the applicant to this application to file the intended appeal and thereafter refuse to grant the orders of stay of proceedings, the respondent herein may proceed to apply for judgement of the already taxed items and proceed with execution of the judgement sum thereto. The appeal will thereby be challenging the ruling of this Honourable court in failing to appreciate and wrongly applying and interpreting the Provisions of Rule 13A of the ***Advocates (Remuneration) Order 1962*** as subsequently amended in 1997 and which the respondent herein intends to use in the process of execution. Substantial loss would be occasioned on the applicant herein is the respondent were to apply for judgement and the court enter the said judgement thereby giving the respondent herein a clear path to apply and proceed with execution on a party which is not even a party to these proceedings.

12. In support of its submissions the applicant relied on **James Wangalwa & Ano vs. Agnes Naliaka Cheseto** as considered by the court in the case of **Masisi Mwita vs. Damaris Wanjiku Njeri [2016] eKLR.**

13. It was submitted that if this Court does not issue orders of stay of proceedings herein, the County Government of Machakos will suffer irreparable and/or substantial loss and the intended appeal rendered nugatory and a mere academic exercise. The applicant therefore prayed that this Court finds that the applicant has established grounds which would move this court to grant it leave to appeal against the ruling of the Honourable judge delivered on the 14th day of March 2018 and further proceed to issue the orders of stay of proceedings until the determination of the intended appeal thereto.

14. In opposing the application, the Respondent averred that the subject of this application is a ruling on a reference filed by the Respondent o challenge the decision of the Taxing Officer dated 14th November, 2016 in Misc. Appl. No. 197 of 2014 on an Advocates/Client Bill of Costs dated 15th December, 2014 and filed on 16th December, 2014 by the Respondent against the Applicant herein. In that Bill the Respondent sought taxation of costs against the applicant on account of legal services rendered by the Respondent in Machakos HCCC No. 255 of 2009 where the applicant's predecessor in title, the Municipal Council of Machakos, and later the Applicant itself, were one of the Defendants being represented by the Respondent.

15. It was averred that on 14th March, 2018, the Court delivered its ruling setting aside the decision of the Taxing Officer as regards item 1 on the instructions fees, directing that the Respondent's Advocates/Client Bill of Costs be placed before another Taxing Officer for re-taxation of that item only and that each party to bear own costs.

16. It was therefore surprising to the Respondent that the applicant would seek to appeal against the said ruling yet the Court did not tax the Bill. To the Respondent, the Applicant was properly named as a respondent n the said matter and that the court sufficiently addressed itself to the same. In the Respondent's view, the applicant does not have any reasonable and or substantial grounds to present to the Court of Appeal. It was further deposed that contrary to the applicant's contention, the applicant does not stand to suffer any prejudice. On the other hand the Respondent has been greatly prejudiced and continues to be prejudiced by the long delay in the determination of the Bill of Costs and the application if granted would result in an inefficient use of available judicial resources. The Court was therefore urged to dismiss the application with costs.

17. It was submitted on behalf of the Respondent that the application ought to be dismissed with costs as it is:

i. without any merits both in law and facts;

ii. grossly misconceived and or brought in mischief and or bad faith;

iii. merely intended to frustrate, obstruct or delay the course of justice in the matter herein of the costs due to the Respondent from the Applicant, and

iv. frivolous, vexatious and scandalous and an abuse of the process of the Court hence bad in law.

18. The Respondent further submitted that Applicant had not satisfied the requirements for a grant of stay of proceedings. Courts, it was contended, have now settled the principles upon which stay orders may be granted, that stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay, it should give effect to the overriding objective stipulated in sections 1A and 1B of the ***Civil Procedure Act*** which objective is premised on the provisions of Articles 47(1) and 159(2)(a) & (b) of the Constitution which emphasise on expeditious dispensation of justice to all. In this respect the Respondent relied on **Re Estate of Philip Nthenge Mukonyo (Deceased), Machakos Succession Cause No 193 of 2002, [2018] eKLR.**

19. Consequently, on the prayer for stay orders it was submitted that the instant application offends the provisions of Articles 47 (1) and 159 (2) (a) & (b) of the Constitution and Sections 1A, 1B of the ***Civil Procedure Act*** in that:

a. in the ruling in question the Court did not itself tax item 1 of the Bill of Costs (which it could have lawfully done) which was the main issue in dispute between the parties but directed that the item be re-taxed by a differently constituted taxing Court, nor did the Court condemn the Applicant to pay the costs of the Reference even when the costs ought to have followed the event of the success of the Reference;

b. no prejudice would be occasioned to the Applicant by the ruling on the Reference as it stands and staying the ruling and hence the proceedings and logical conclusion of the taxation would only result in further unnecessary and unreasonable delay and increase of costs in the taxation filed way back in 2014.

20. As regards the prayer for leave, it was submitted that it is a well settled principle of law that the grant of leave to appeal is a matter of the exercise of the discretion of the Court and that the discretion is to be exercised judicially. It was however submitted that *t*he Applicant has not established a basis upon which this Court can grant leave to appeal against the ruling in question, which ruling as demonstrated above, causes no prejudice to the Applicant. Based on **Shah Munge & Partners Ltd vs. National Social Security Fund Board of Trustees & 3 Others [2018, paragraph 18 eKLR** the Respondent submitted that the issue for consideration on the prayer for leave to appeal is whether the intended appeal is arguable and that the Applicant had not demonstrated that it has an arguable appeal and that the intended appeal is not frivolous for the reasons that:

a. the use of a valuation reports in Taxation proceedings which the Applicant has variously adduced as grounds of appeal in the draft Memorandum of Appeal is lawful hence proper and that is a well settled principle in law and the Applicant's objection on that regard lacks basis and cannot to be used as a ground to seek leave to appeal**.** In **Nairobi Misc. Civil Application No.373 of 2007 - Muriu Mungai & Co. Advocates versus New Kenya Co-Operative Creameries Ltd, at page 13**, the Court held that it was in order for the Taxing Officer to rely on a valuation report made after instructions were taken, pointing out that:

> **"…the Taxing Officer had the right to call for further information to assist him to assess the value of the subject matter for the purposes of calculating instructions fees including reports made subsequent to the instructions…"**

b. the parties had by Consent Orders submitted to the valuation of the subject matter in the said Machakos HCCC No. 255 of 2009 (formerly NAIROBI HCC NO. 2765 OF 1998) and the valuation was filed in the proceedings and no grounds whatsoever have been advanced to vacate that Consent Order todate;

c. in any event, ***Rule 13 A of the Advocates (Remuneration) Order, 2009,*** gives the Taxing Officer power and authority to direct and adopt such proceedings as may be necessary for the determination of any matter in dispute before him. Item 1 in the Bill of Costs was a matter in dispute before the Taxing Officer on account of which the provisions of the said Rule 13A of the ***Advocates (Remuneration) Order*** provided guidance to the Taxing Officer. The Court of Appeal expounded the application of the said provisions of the law with regard to valuation of the subject matter in a suit for purpose of taxation of an Advocates Bill of Costs in **Civil Appeal No. 34 of 2012, Otieno Ragot & Company Advocates vs. Kenya Airports Authority [2015] eKLR).**

d. Similarly, in **Nairobi Misc. Application No. 100 of 2013, Ufundi Co-operative Savings and Credit Society vs. Njeri Onyango & Company Advocates [2015] eKLR, (at page 4),** where the value of the subject property had not been stated in the pleadings, the Court held that it was in order for the Taxing Officer to rely on a valuation of the subject matter done after instructions were given to determine the fees, stating that:

> **"…The Court notes that the figure arose out of a valuation filed by the consent of among others, the Applicant's counsel…"**

21. As regards the issue of the parties in the taxation proceedings, it was submitted that in the application before the Court, the Applicant has raised an argument that it is not a party in the taxation proceedings and hence by implication, that both the ruling of the Taxing Officer which is the subject matter of the ruling on the Reference which ruling is in turn the subject of this application, should not apply to the Applicant. To the Respondent, that argument cannot be a good ground for granting the leave to appeal sought by the Applicant as it is both a non-issue and self-defeating since the Applicant had been properly named as "MACHAKOS COUNTY" in the said MACHAKOS H.C MISC. APPL. NO. 197 OF 2014 as well as in the Reference and that was indeed the Respondent's client in the main suit, the said MACHAKOS HCCC NO. 255 OF 2009 (formerly NAIROBI HCC NO. 2765 OF 1998). As a matter of fact, upon the filing of the Bill of Costs in the said MACHAKOS H. C. MISC. APPL. NO. 197 OF 2014, the Applicant never objected to the manner it was named and upon service it proceeded to file papers in the same name. It was only much later when, without any Orders for amendment, the Applicant irregularly "re-named" itself in papers it filed as "GOVERNMENT OF MACHAKOS COUNTY" and the Court in the ruling in issue properly addressed itself to that matter and as such it cannot be a basis for granting the leave sought herein. It is even interesting to note that the Applicant in its submissions herein (at page 3 par 3) has even re-named itself further as "COUNTY GOVERNMENT OF MACHAKOS". The Taxing Officer in her ruling also irregularly "re-named" the Applicant as "COUNTY GOVERNMENT OF MACHAKOS" and that was one of the basis for the Reference.

22. As regards prejudice, it was submitted that contrary to the allegations by the Applicant that it stands to suffer prejudice if the Orders

sought in the application herein are not granted, it is indeed the Respondent who would be grossly prejudiced by the issuance of the Orders. The mere fact that the Applicant is a public institution can never be a basis for denying the Respondent her rights with regard to the legal costs herein. The Constitution as well as statute law provide for and safeguards both the individual and public rights and emphasis are that justice must be done to all. In the circumstances herein the proprietary rights and interests of the Respondent in the Advocates costs herein can never be subjugated or secondary to the rights of the public in the name of the Applicant.

23. The Respondent concluded that the application herein is devoid of any merits and can only be as a result of gross misconception of the Constitution and the relevant law if not mere mischief and or bad faith and the authorities cited by the Applicant on the Applicants submissions do not in any manner aid the case advanced by the Applicant in the application. To the Respondent, she has been subjected to injustice, great prejudiced, hardship and loss and continues to suffer such by the long delay in the determination of the Bill of Costs and payment of the costs lawfully due from the Applicant and if the Orders sought herein are granted that would only aggravate the injustice, prejudice, hardship and loss to which the Respondent has been subjected. The Court was therefore urged to allow the legal process for determining the costs due to the Respondent proceed to conclusion without further delay and to dismiss the application with costs.

Determination

24. The matter before this Court is a two-pronged application for leave to appeal and for stay of proceedings pending the intended appeal to the Court of Appeal. Rule 11(2) and (3) of the ***Advocates Remuneration Order 2009*** in Rule 11 (2) & (3) provides as follows:

> **(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.**
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> **(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under sub-section (2) may with the leave of the judge but not otherwise, appeal to the Court of Appeal.**

25. It is therefore clear that there is no right of appeal to the Court of Appeal from a decision of a Judge arising from a reference. That the decision whether or not to grant leave to appeal is discretionary was stated by the Court of Appeal in **Kenya Shell Limited vs. Kobil Petroleum Limited [2006] eKLR** where it was held that:

> **"Whether or not the court would grant leave to appeal is a matter for the discretion of the court. As in all discretions exercisable by courts, however, it has to be judicially considered."**

26. The rationale for requiring leave to appeal in certain instances was stated in **Rene Dol vs. Official Receiver of Uganda [1954] 21(1) EACA 116** where it was held that:

> **"The general purpose of requiring leave to appeal from some orders is to restrict appeals from made in minor procedural or interlocutory matters which do not go to the root of the litigation or determine finally the substantive rights of the parties and which can themselves be brought into question in an appeal from the final decision.."**

27. According to the decision in **Sango Bay Estates Ltd and Others vs. Dresdner Bank AG [1971] EA 17:**

> **"Leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration but where, as in the present case, the order from which it is sought to appeal was made in the exercise of judicial discretion, a rather stronger case will have to be made out**."

28. In **Muhamed Yakub & Another vs. Mrs Badur Nasa Civil Application No. Nai. 285 of 1999**, the Court of Appeal held that leave to appeal is granted unless the appeal has no realistic prospects of success and also in exceptional circumstances though the case has no such prospects of success if the issue involved is of public interest. This was the position in **Machira T/A Machira & Company Advocates vs. Mwangi & Anor [2002] 2 KLR 391** where the court stated that:

> **"The court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. The use of the word "realistic" makes it clear that fanciful prospects or an unrealistic argument is not sufficient. When leave is refused, the court gives short reasons which are primarily intended to inform the applicant why leave is refused. The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has no prospects of success. For example, the issue maybe one which the Court considers should in the public interest be examined by this court or, to be more specific, this Court may take the view that the case raises a novel point or an issue where the law clarifying. There must however almost always be a ground of appeal which merits serious judicial consideration."**

29. In this case the applicant seems to be aggrieved by the decision of the Court to permit valuation to be undertaken after the filing of a suit for the purposes of determining the value of the subject matter of a suit. I appreciate the decision of the Court of Appeal in **Civil Appeal No. 34 of 2012, Otieno Ragot & Company Advocates vs. Kenya Airports Authority [2015] eKLR), (par. 26),** where it was held that:

> **"…To enable the taxing officer carry out the assessment or taxation of costs, he is empowered under Paragraph 13A to summon and examine witnesses, direct the production of documents and to "adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him. Those are powers that the taxing officer can call to his aid where for instance there is a dispute, as is the case here, regarding the value of the subject matter."**

30. I am not sure whether such power can be invoked even where the subject matter can be determined from the pleadings and I do not know whether that was the case in the instant matter. In other words I cannot state with certainty that the intended appeal has no realistic prospects of succeeding. In the premises I grant leave to the applicant to appeal to the Court of Appeal.

31. As regards stay, it is not automatic that where leave is granted the proceedings in question must be stayed. It is however not in doubt that this Court has powers to stay proceedings pending an intended appeal and this jurisdiction is derived from both Order 42 rule 6 of the ***Civil Procedure Rules*** as well the inherent jurisdiction reserved in section 3A of the ***Civil Procedure Act***. See **George Oraro vs. Kenya Television Network Nairobi HCCC No. 151 of 1992.**

32. This jurisdiction is meant to avoid a waste of valuable judicial time; prevent the court from duplication of efforts and prevent multiplicity of suits and applications being filed and where if the stay is not granted and defendant were to succeed it would have rendered the appeal nugatory. In such application the Court aims at ensuring that the object of the application is not rendered nugatory and that substantial loss and irreparable harm is not suffered by the applicant once the Plaintiff proceeds with the suit and the appeal succeeds. Obviously the decision whether or not to grant stay of proceedings being discretionary, the application must be made without unreasonable delay. Whereas I agree that delay is neither the sole factor nor the predominant factor to be considered, I am convinced that the delay is a factor that ought to be taken into account. In **Global Tours & Travel Ltd HCCC No. 43 of 2000 Ringera, J** (as he then was) clearly recognised that in deciding whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from the pros and cons of granting or not granting the order ought to be weighed and the factors that the Court must bear in mind include the need for expeditious disposal of cases, the scarcity and optimum utilisation of judicial time and ***whether the application has been brought expeditiously***. (Emphasis mine). In my view delay in making an application where the Court is expected to exercise discretion must always be a factor for consideration since it is an equitable principle that delay defeats equity as equity aids the vigilant, not the indolent.

33. Whereas the Court in such an application may be entitled to look at the intended appeal and see whether or not the intended appeal is not frivolous so as to satisfy itself that it is not being asked to suspend the proceedings so as to frustrate the hearing and delay the expeditious disposal of the matter, care must, however, be taken to ensure that the Court does not purport to preside over the intended appeal so as to avoid usurping the powers of the appellate Court.

34. The first issue for determination is therefore whether substantial loss is likely to be occasioned to the applicant unless the application is allowed. Dealing with a similar matter in **David Morton Silverstein vs. Atsango Chesoni Civil Application No. Nai. 189 of 2001 [2002] 1 KLR 867; [2002] 1 EA 296** the Court of Appeal citing **Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd & Another Civil Application No NAI 50 of 2001** held:

> **"... 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".**

35. In the present case, the reference before this Court was made by the Respondent. The Court allowed the reference and directed the parties to go back to the taxing officer in order for the contentious item to be re-taxed. At this stage no one can foretell what the outcome of that re-taxation is likely to be. The applicant's apprehension seems to stem from the fact that it is likely that the decision on re-taxation will go against them. Since the applicants were not the ones who made the reference, they cannot claim that judgement is likely to be entered against them in respect of the other items against which no reference was made by them. By apprehending that judgement is likely to be entered against them in respect of the item which is yet to be taxed and that the decision in question will gravely affect the people of the Applicant County, the applicant is with due respect putting the cart before the horse.

36. I agree with the decision in **Murithi M'Mbui & Another vs. Housing Finance Company (K) Limited Nairobi (Milimani) HCCC No. 247 of 2006** that in the circumstances of this case, the orders which were made by this Court in referring the matter back to the taxing officer for re-taxation of item 1 are not and were not intended to be conclusive and definitive as regards the amount due thereunder and the applicant may still prove at the taxation that the sum due is not as claimed by the Respondent.

37. Under the overriding objective in sections 1A(2) of the ***Civil Procedure Act***, the courts are now enjoined to give effect to the overriding objective as provided in section 1A in the exercise of its powers under the Act or in the interpretation of any of its provisions and under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. Since the enactment of the said provisions the Court of Appeal has made pronouncements on the same. In **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009, Nyamu, JA** on 20/11/09 held *inter alia* that:

> **"the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible".**

38. The same Judge in **Kenya Commercial Bank Limited vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of**

2010 held that:

> **"where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case".**

39. In **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010** the Court of Appeal held:

> **"the applicant cannot be allowed to invoke the "O2 principle" and at the same time abuse it at will...All provisions and rules in the relevant Acts must be "O2" compliant because they exists for no other purpose. The "O2 principle" poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court's view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day. If improperly invoked, the "O2 principle" could easily become an unruly horse and therefore while the enactment of the "double O" principle is a reflection of the central importance the court must attach to case management in the administration of justice, in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable factual foundation. The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained".**

40. One of the aims of the overriding objective is to ensure that all parties are placed on equal footing. Placing parties on equal footing necessarily means giving directions that ensure that justice is done to all parties to the suit. Placing the parties on equal footing mandates that the Court considers the position of all the parties before it and balance all their interests. This principle is intertwined with the principle of proportionality. In ensuring that the objective is attained, it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory that ultimate end of justice for the law has always kept growing to greater levels of refinement, as it expands, to cover new situations not exactly foreseen before. Even as the traditional considerations must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. As was stated by **Waki, JA** in **John Gakure & 148 Others vs. Dawa Pharmaceutical Co. Ltd & 7 Others Civil Application No. 299 of 2007** the aim of the overriding objective is to enhance the jurisdiction of the Court and expand its latitude in order for the court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective and its principal aims. Dealing with a case justly it was held includes *inter alia*, reducing delay, and costs, expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective calls for a new thinking and innovation and actively managing the cases before the court, including the granting of appropriate interim relief in deserving cases. The Court, in applying the principle of proportionality should consider all aspects of the matter in line with the provisions of Article 159(2) of the Constitution. Under that article:

> **In exercising judicial authority, the courts and tribunals shall be guided by the following principles—**
>
> **(a) justice shall be done to all, irrespective of status;**
>
> **(b) justice shall not be delayed;**
>
> **(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);**
>
> **(d) justice shall be administered without undue regard to procedural technicalities; and**
>
> **(e) the purpose and principles of this Constitution shall be protected and promoted.**

41. In this case, nowhere has the applicant contended that it has filed a Notice of Appeal yet rule 75(4) of the ***Court of Appeal Rules*** provides that:

> **When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.**

42. Whereas in its submissions the applicant alluded to a prayer for leave to appeal out of time, no such prayer appears in the body of the application. It is not therefore apparent whether the applicant is serious about its intention to appeal or just intends to forestall further proceedings in the matter.

43. Having considered the application, I am not satisfied that substantial loss will be occasioned to the applicant if the stay sought is not granted. Further, I am satisfied that in the circumstances of this case to halt the proceedings herein while the applicant has available options of attaining its objectives will occasion a higher risk of injustice to the respondent than injustice, if any, that the applicant is bound to suffer. I am also in agreement with the holding in **Francis Njakwe Githiari & Another vs. Hon. Daniel Toroitich Arap Moi T/A Moi Educational Centre HCCC No. 596 of 2004** that "if these proceedings were stayed pending the hearing and determination of the applicant's intended appeal, the Respondent will have to wait much longer before she can prosecute her case. Such delay is prejudicial to the Respondent".

44. In the result, I am not satisfied that this is a proper case in which to grant the stay of proceedings sought. Accordingly, the application

dated 28th March, 2018 in so far as it seeks stay of proceedings fails and is dismissed. The costs of this application are awarded to the Respondent.

Ruling read, signed and delivered in open court at Machakos this 19th day of November, 2018.

G V ODUNGA

JUDGE

In the presence of:

Miss Kamende for Mrs Mwangangi for the Applicant/Respondent

Mr Nthiwa for the Respondent/Applicant

CA Geoffrey