REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO 539 OF 2012

KENYA COMMERCIAL BANK LIMITED…....……………………………..PLAINTIFF

VERSUS

TAMARIND MEADOWS LIMITED…........……....…………......……1ST DEFENDANT

TAMARIND PROPERTIES LTD…..……………..………...………2ND DEFENDANT

KENNEDY OTIENO OGWARO…….…………….……..….………3RD DEFENDANT

JOSEPH MUNGAI……..........................………………...….……..4TH DEFENDANT

DAVID KITAWI NGODA…..………………..……………....………..5TH DEFENDANT

AND

WIBESO INVESTMENTS LTD…………....1ST PROPOSED INTERESTED PARTY

JOHN HARUN MWAU…………………..……2ND PROPOSED INTERESTED PARTY

ATTORNEY GENERAL……….…………....3RD PROPOSED INTERESTED PARTY

RULING

1. Before the Court are two (2) applications; the first application is dated **31st December 2015**, filed on **7th January 2016** and the second application dated **27th January 2016** and filed on even date. Both applications are expressed to have been by the Proposed Interested Parties pursuant to the provisions of **Sections 1A & 1B of the Civil Procedure Act, Order 41 of the Civil Procedure Rules** and all other enabling provisions of the law, and in which it sought similar orders, to wit, the stay of proceedings in the instant matter pending the hearing and determination of the instant application, and further, pending the hearing and determination of their intended appeal. It was the Applicants' contention that unless the proceedings in the instant matter were stayed, their intended appeal would be rendered nugatory. It was further contended that, if the proceedings herein were to be allowed to proceed, the Applicants' non-

derogable right to fair hearing would be severely impaired, as they would not be afforded an opportunity to defend themselves; which would be contrary to the provisions of **Articles 24, 25, 50, 159 and 165 of the Constitution.**

2. In the supporting affidavit of **Bedan Mbugua Gikebe** deposed to on **31st December 2015** in support of the 1st Interested Party's application**,** it was averred that the intended appeal has overwhelming chances of success and to demonstrate the expressed intention to file an appeal against the ruling delivered by this Court on **18th December 2015**, a Notice of Appeal was exhibited herein (marked **"BMG-2"**). They thus contend that whereas no prejudice would be occasioned to the Respondents, should the Court be inclined to issue the orders as prayed, they, on their part, stand to suffer untold loss, suffering and damage if the orders sought were not granted.

3. In support of the application dated **27th January 2016**, **John Harun Mwau** deposed in his supporting affidavit sworn on **18th January 2016,** that the proceedings herein are a mere ploy and a disguise for the parties to perpetuate their fraudulent activities; and that the proposed 1st Interested Party, **Wibeso Investments Limited,** is the registered proprietor of the suit property, known as **LR 18469** and not the Defendants; and therefore that it is in the interests of justice in this matter to allow the application, as none of the parties would suffer any prejudice; the converse of which would be that the Applicant's intended appeal would be rendered nugatory, and their right to a fair hearing extinguished. The 2nd Proposed Interested Party also relied on his Further Affidavit filed on **14th June 2016** in which the grounds adduced in support of the application were replicated and augmented.

4. The applications were opposed by the Plaintiff and the Defendants herein. The Plaintiff's Replying Affidavits were sworn by **Tom Ogola** on **18th January 2016** and **24th February 2016, r**espectively**,** in response to the two applications. The 1st Defendant, relied on its Replying Affidavits sworn and filed on **11th April 2016** and **14th April 2016,** respectively, while the 2nd and 4th Defendants relied on the affidavits of **Joseph Mungai** sworn on **14th March 2016** and **11th April 2016**. In their responses to the two applications, which are almost identical, it was the Respondent's case that the applications were filed against the wrong parties and in respect of the wrong property; that the Court lacks the requisite jurisdiction to deal with the issues raised by the Applicants, including allegations of fraud, trespass and forgery; and further, that the instant application is as frivolous as it is needless, and is intended merely to unnecessarily delay the prosecution of the suit indefinitely.

5. In the Replying Affidavits **Joseph Mungai**, it was further contended that, since the Court had found that enjoining the Applicants as parties to these proceedings would only serve to derail and delay the expeditious disposal of the instant suit, no substantial loss would be suffered by the Applicants if the applications were dismissed. Further, it was reiterated that it would work against the interests of all parties in the suit if the Court were to allow the stay of proceedings at the instance of the Applicants, who are themselves not parties to the proceedings.

6. The Application was canvassed by way of written submissions, to which end the 1st Proposed Interested Party filed its written submissions dated **13th June 2016.** Therein, it was submitted that the application had been filed without undue delay; that the Applicants stood to suffer substantial loss; and that they were ready and willing to abide by any directions that the Court would give with regards to the issue of security for the due performance of the decree, (presumably "any order" of the court, granted that no decree had been issued by the time the application was filed). The 1st Proposed Interested Party relied on **Re Global Tours & Travels Ltd: Winding Up Cause No. 43 of 2000; Civil Appeal No. 110 of 2011: Nicholas Njoru vs The Attorney General & Others**; and **Civil Application No. No. 115 of 2014: Permanent Secretary Ministry of Roads & Another,** among other authorities, in urging the court to allow the application to enable their appeal and quest to be enjoined in these proceedings to ventilate their case.

7. The 2nd proposed Interested Party relied on their written submissions filed herein on **14th June 2016**, in

which Counsel similarly endeavoured to demonstrate that the 2nd Proposed Interested Party had satisfied the threshold for the granting of stay orders, namely that the application had been filed without undue delay; that the applicant risks suffering substantial loss if the orders for stay are not granted, and that the Applicant is willing to provide security for due satisfaction of the decree. In support of his submissions, the 2nd proposed Interested Party relied on **Attorney General vs. Samuel Chege Gitau & 283 Others [2010] eKLR** and **Mohamed Koriow Nur vs The Attorney General & Others [2010] eKLR.**

8. In the submissions filed by the Plaintiff dated **10th June 2016**, it was posited that the Applicants had relied on the wrong statutory provisions, one of which was expressed simply as **Rule 41** of **the Civil Procedure Rules;** and that the relevant provision ought to have been expressed as **Order 42 Rule 6 of the Civil Procedure Rules;** and that therefore, the applications were fatally defective. For the proposition that stay of proceedings is a serious, grave and fundamental interruption of a party's right to expeditious case disposal, which ought to be exercised only in deserving cases, the Plaintiff relied on the case of **Machira T/A Machira Co. Advocates v East African Standard (No. 2) (2002) 2 KLR** in which **Kuloba, J** (as he then was) expressed the view that the Court could not proceed on the assumption that an appeal would succeed, and further, that granting such prayers to the applicants who were not parties to the suit would lead to the distortion of the solemn process of the Court.

9. Further, it was submitted that the instant application is an abuse of the process of the Court, and that the same would neither ensure justice nor the expeditious disposal of these proceedings. In support of this argument the Plaintiff relied on the cases of **John Kimani Njoroge v Joseph Muthiora Wainaina (2012) eKLR** and **HCCC No 363 of 2009: Stephen Somek Takwenyi & Another v David Mbuthia Githae & 2 Others,** and stressed the significance of preserving the integrity of the Court and its processes. The Court was thus urged to dismiss the applications for being pretentious, scandalous, vexations and *ipso facto,* an abuse of the process of the Court.

10. The 1st Defendant on its part filed its submissions dated **13th June 2016**, contending that the issues raised by the Applicants as their cause of action do not squarely fall within the jurisdiction of this Court as they are issues that would best be ventilated in the **Environment & Land Court**, from the standpoint of **Article 162(2)(b) of the Constitution**. It was submitted that the instant application was incompetent and fatally defective for having been brought under the wrong provisions of the law, and further, that the application had not met the threshold set out under **Order 42 Rule 6 of the Civil Procedure Rules**. For this proposition, reliance was placed on **Civil Application No 204 of 2004: UAP Provincial Insurance Company Ltd v Michael Backett** and **Safaricom Ltd v Ocean View Beach Hotel Ltd & 2 Others (2010) eKLR**. Counsel also cited the case of **Raymond M. Omboga v Austine Pyan Maranga Kisii HCCA No 15 of 2010** in which the Court held that save for costs, a negative order was incapable of execution or being stayed, and that the Applicants had failed to show what substantial loss they stood to suffer should the application for stay be denied by the Court, and that therefore, the applications should be accordingly dismissed.

11. On their part, the 2n and 4th Defendants in their submissions dated **13th June 2016** submitted that the threshold for the stay of proceedings as set out under **Order 42 rule 6 of the Civil Procedure Rules** had not been met, and that the application, if allowed, would lead to substantial loss on the Defendants' part as their loan obligations would continue to accrue. Further, it was submitted that there was no commonality of issues as raised herein between the Applicants and the parties to this suit.

12. The Court has considered the applications and the replies thereto made by the different parties, the contentions therein and the written submissions filed on behalf of the respective parties. The main issue arising for determination is the exercise of this Court's inherent jurisdiction in granting orders for stay of proceedings pending the intended appeal by the Applicants from this Court's Ruling delivered on **18th December 2015**. **Order 42 Rule 6(2)(a) & (b) of the Civil Procedure Rules** lays down the threshold for an application for stay of proceedings pending appeal thus:

> **(2) No order for stay of execution shall be made under sub-rule (1) unless-**

(a) ***__the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and__***

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.(Emphasis added).

13. The Court's attention was drawn to the case of **__Re Global Tours & Travels Ltd__** (supra) wherein **Ringera, J** expressed himself as follows;

*"**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 cases, 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 same viewpoint was expressed, albeit differently, in **__Machira t/a Machira & Co Advocates v East African Standard__** (supra), thus;

"…to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. __That is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way we handle applications for stay of further proceedings or execution, pending appeal...in the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court__." (Emphasis added).

15. Thus, with regard to the two applications herein, the Court needs to consider the **pros and cons** of whether or not to grant the orders sought, and in so doing, bear in mind the provisions of **Article 159 of the Constitution,** as read together with **Sections 1A and 1B of the Civil Procedure Act** regarding the need to uphold the overriding objective of the rules of civil procedure and the integrity of the court process. In its Ruling dated **18th December 2015**, the Court came to the conclusion, after careful consideration, that the issues that had been raised by the Applicants were patently dissimilar to those that the Court was considering and which were in dispute between the parties. Further, the Court took the view that the addition of the proposed Interested Parties to the suit would not only invariably distort the issues, but would amount to the proposed Interested Parties hijacking the case of the parties herein, to ventilate their own grievances over land ownership and defamation, and thereby cause unwarranted delay in the determination of the issues at hand. Accordingly, the Court dismissed the applications for joinder, fully aware that the land ownership issues could be pursued before the ELC, while the aspects of defamation could be dealt with in the Civil Division of the High Court. In a nutshell, the causes of action were found to be distinct and divisible. Hence the application for joinder was dismissed. Thus, there was no decree or order capable of being enforced that was issued for purposes of **Order 42 Rule 6 of the Civil Procedure Rules**. The order thus fell within the ambit of what may be deemed as **a negative order**.

16. In **__Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah [2008] eKLR__**, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

"The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the

application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C).”

17. The same reasoning was applied in the case of **Raymond M Omboga v Austine Pyan Maranga** (supra), that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise..."

18. In the premises, I would be of the same view and find that there are no orders flowing from that ruling in respect of which a stay order can validly be granted. As was expressed in **Raymond M Omboga v Austine Pyan Maranga** (supra), there is nothing that the Applicants have lost by virtue of the mere fact of dismissal of their application, the issue of substantial loss would not arise. Accordingly, I fully endorse the viewpoint expressed by **Kimaru, J**, in the case of **Stephen Somek Takwenyi & Another v David Mbuthia Githae** (supra) that

“The Court has the inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent the abuse of the process of the Court. In the civilized legal process it is the machinery used in the Court of law to vindicate a man’s right or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process. But the circumstances in which the abuse of the process can arise are varied an incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue…there is the inherent jurisdiction of every Court of justice to prevent an abuse of its process and its duty is to intervene and stop the proceedings, or put an end to it.”

19. In the result therefore, it is my finding that the applications by the two proposed Interested Parties dated **31st December 2015**, and **27th January 2016** are unmeritorious, and the same are hereby dismissed with costs to the Respondents.

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 7th DAY OF SEPTEMBER 2016.

OLGA SEWE

JUDGE