



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 282 OF 2018**

**KENYA PORTS AUTHORITY.....1<sup>ST</sup> PLAINTIFF**

**KENYA PORTS AUTHORITY PENSION SCHEME**

**(Suing through its registered trustees).....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**AKABA INVESTMENT LIMITED.....1<sup>ST</sup> DEFENDANT**

**KEMO CONTRACTORS LTD.....2<sup>ND</sup> DEFENDANT**

**HASSAN ABUBAKAR.....3<sup>RD</sup> DEFENDANT**

**SAMUEL KIPCHUMBA T/A PES INVESTMENT.....4<sup>TH</sup> DEFENDANT**

**HILLARY OSODO T/A HIRIRA ENTERPRISES.....5<sup>TH</sup> DEFENDANT**

**ABUBAKAR KISILO AND SHABAN**

**ISMAIL T/A SHABAN BLUE ENTERPRISES.....6<sup>TH</sup> DEFENDANT**

**THE NATIONAL LAND COMMISISON.....7<sup>TH</sup> DEFENDANT**

**THE LAND REGISTRAR.....8<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....9<sup>TH</sup> DEFENDANT**

**RULING**

1. There are two applications for consideration. The first application is the Notice of Motion dated 6<sup>th</sup> June, 2019 by the plaintiffs seeking to commit Abudulbasit Swaleh, the 1<sup>st</sup> defendant's director to civil jail for contempt of court for disobeying the orders of court dated 27<sup>th</sup> February, 2019 and issued on 14<sup>th</sup> March 2019. There is also the 1<sup>st</sup> defendant Notice of Motion dated 15<sup>th</sup> July 2019 seeking to stay the proceedings in this suit pending hearing and determination of the appeal pending before the court of appeal in respect of this court's ruling delivered on 27<sup>th</sup> February 2019. This court directed, with consent of both parties' advocates that the two applications be heard together. I first deal with the application dated 15<sup>th</sup> July, 2019 as its determination will in one way or the other affect the application dated 6<sup>th</sup> June, 2019.

2. The application dated 15<sup>th</sup> July 2019 is brought under Section 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rules 1, 2 and 3 of the Civil Procedure Rules and is seeking an order of stay of proceedings pending hearing and determination of the appeal pending before the court of appeal on this court's ruling delivered on 27<sup>th</sup> February 2019. The application is supported by the affidavit of the Abdulbasit Muhsin Saleh, a director of the 1<sup>st</sup> defendant sworn on 15<sup>th</sup> July 2019. He has deposed that the 1<sup>st</sup> defendant through its advocates on record filed a notice of appeal dated 6<sup>th</sup> March, 2018, and requested for certified copies of proceeding. He has annexed a copy of the letter requesting copies of the ruling and typed proceedings and the certificate of delay. He has deposed that the complete record of appeal was

filed in court on 25<sup>th</sup> May 2019 and served the same upon the respondents' advocates. He stated that they are awaiting a date from the Court of Appeal.

3. The 1<sup>st</sup> defendant argues that it has an arguable appeal that raises triable issues of law pertaining to fundamental doctrines of the law such as laches, locus standi and res judicata. It is the 1<sup>st</sup> defendant's contention that the appeal will be rendered nugatory if the proceedings in this court continue. The 1<sup>st</sup> defendant averred that the plaintiffs enjoy interim orders pending the hearing and determination of the suit and therefore will not suffer any prejudice should the application herein be allowed as the orders sought are only to preserve the subject matter.

4. In opposing the application, the plaintiffs filed a replying affidavit sworn by Augustus Wafula, the plaintiffs' advocate on 26<sup>th</sup> August 2019. It is deposed that the application is bad in law, an abuse of the court process and filed after an inordinate delay and is designed to frustrate the hearing and conclusion of this matter. It is contended that the orders issued by this court on 14<sup>th</sup> March 2019 was designed to preserve the status of the suit property from wastage or transfer pending the hearing of this matter. That the order having been issued on 27<sup>th</sup> February 2019, the case ought to be heard and concluded within twelve months in accordance with Order 40 Rule 6 of the Civil Procedure Rules thereby requiring that this matter be heard expeditiously. The plaintiffs further contend that there is no demonstration that the applicant will suffer any loss if stay of proceedings is not granted as sought. It is further contended that an order for stay of proceedings is in violation of Article 159 of the Constitution and Section 1A and 1B of the Civil Procedure Act. The plaintiffs urged the court to reject the application in totality.

5. The 1<sup>st</sup> defendant's counsel submitted that the plaintiffs continue to enjoy injunctive orders granted by the court on 27<sup>th</sup> February 2019. While relying on the case of **Kenya Power and Lighting CO. Ltd –v- Esther Wanjiru Wokebii (2014)eKLR** where the court cited Global Tours & Travels Limited; HC Winding UP Cause No.43 of 2000. The 1<sup>st</sup> defendant's counsel submitted that the 1<sup>st</sup> defendant has an arguable appeal that raises triable issues of law pertaining to fundamental doctrines of the law like laches, locus standi and res judicata. That as per the Global Tours Case (Supra), the applicant has an arguable appeal as they has been restrained from making development on its property. Counsel for the 1<sup>st</sup> defendant also relied on the case of **Christopher Ndolo Mutuku & Another –v- CFC Stanbic Bank Ltd (2015)eKLR** where the court observed that:

**“....What matters in an application for stay of proceedings pending appeal is the overall impression the court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice.... ”**

6. The 1<sup>st</sup> defendant's counsel also cited the case of **Ezekiel Mule Musembi –v- H. Young & Young (EA) Limited (2019)eKLR** where the court allowed stay of proceedings based on the decision in **Henry Bukomeko & 2 Others –v- Statewide Insurance Co Ltd Uganda Supreme Court Civil Appeal No. 13 of 1989** where it was stated:

**“Whereas on the authorities, if the delay is caused by the court registry, and the applicant has taken every step possible to prosecute the appeal, further time will be allowed to a blameless intended appellant, there is an overriding factor in this case, and that is that where an interlocutory appeal is taken great care must be exercised in getting the appeal on as quickly as possible, in order that the trial may proceed with the minimum delay. It is obvious that the longer an interlocutory appeal intervenes in the trial, the greater is the risk that the trial may be prejudiced. Therefore, rule 4 of the Court of Appeal rules would be read as requiring an intending appellant to show sufficient cause in the light of the fact that the appeal is an interlocutory appeal which must be brought forward as soon as possible. Indeed, the court itself has a duty to see that such appeals are disposed of with special urgency. ”**

7. It is the 1<sup>st</sup> defendant's submission that the appeal will be rendered nugatory if the proceedings in this court are to continue. That a stay of proceedings is necessary to enable the court to effectively adjudicate upon and settle all the questions involved in the suit. The 1<sup>st</sup> defendant beseeched the court to exercise its discretion in the interest of justice to grant the order of stay of proceedings prayed for. The 1<sup>st</sup> defendant submitted that it has filed the application within reasonable time and that it has certificate of titles over the suit property which should be deemed to be conclusive proof that they are the rightful owners of the suit properties. That in the event that the appeal is successful, then the entire suit shall be dispensed with.

8. On their part, counsel for the plaintiffs submitted that stay of proceedings is a grave judicial action which seriously interferes with the right to access to justice, right to be heard without delay and the right to a fair trial and therefore the criteria used by the courts for grants of such an order must be high and stringent. Counsel cited the case of **Grain Bulk Handlers Limited –v- Mistry Jadra Parbat & Company Limited (2016) eKLR** where Ogola J was of the following opinion:

**“....the discretion in granting an order of stay of proceedings lies with the court, and it is one to be exercised in the interest of justice taking into account the totality of the matter before court.”**

9. The plaintiffs' counsel also relied on the case of **Kenya Power & Lighting Co Ltd –v- Esther Wanjiru Wokabi (2014)eKLR** in which Githua J considered the criteria for an order of stay of proceedings to be granted and stated as follows:

**“To my mind, the court's discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles.**

**a) Whether the applicant has established that he/she has a prima facie arguable case;**

**b) Whether the application was filed expeditiously, and;**

**c) Whether the applicant has established sufficient cause to the court that it is in the interest of justice to grant the orders sought.”**

10. It was the plaintiffs’ submission that the 1<sup>st</sup> defendant does not have an arguable appeal as the grounds relied upon are aimed at frustrating the ends of justice in this matter, adding that the said grounds are baseless and lack merit. The plaintiffs’ further submitted that the 1<sup>st</sup> defendant lacks seriousness in pursuing the appeal and that the application herein has not been filed expeditiously. That the inordinate delay has not been explained. The plaintiffs’ counsel relied on the case of **Jaber Mohsen Ali & Another –v- Priscillah Boit & Another** cited with approval in **Selectisca Limited –v- Gold Rock Development Ltd (2015)eKLR** and **Christopher Ndolo Mutuku & Another –v- CFC Stanbic Bank Ltd (2015) eKLR** where the court observed that:

**“...what matters in an application for stay of proceedings pending appeal is the overall impression the court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice.....”**

The plaintiffs submitted that an order for stay of proceedings in this matter will be counterproductive and will delay the finalization of the main suit. They urged the court to dismiss the application with costs.

11. I have considered the application, the submission of parties and the authorities. It is not in dispute that the grant of an application to stay proceedings is within the discretion of the court. I am also aware that any exercise of such discretion has to be done in the interest of justice and must be judicious. Stay of proceedings pending appeal is purely a matter of judicial discretion that is exercised in the interest of justice depending on the justice of each case.

12. In the case of **Global Tours & Travels Limited (supra)** Ringera, J (as he then was) when confronted by a similar application had this to say:

**“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 so, 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.”**

13. The instant application was filed on 15<sup>th</sup> July 2019, while the ruling the subject of the appeal was delivered on 27<sup>th</sup> February 2019. The 1<sup>st</sup> defendant has stated that the notice of appeal was filed on 6<sup>th</sup> March 2019 while the record of appeal was filed on 25<sup>th</sup> May, 2019. In my view, the 1<sup>st</sup> defendant is guilty of inordinate delay in filing the application for stay of proceedings considering that the ruling appealed against was delivered on 27<sup>th</sup> February, 2019, while the instant application was only filed on 15<sup>th</sup> July 2019. Furthermore the applicant has not given a sound explanation for the delay in filing the current application. The court has also taken note that the current application was filed after the plaintiffs filed their application for contempt on 6<sup>th</sup> June, 2019. It is therefore apparent that the filing of this application was an afterthought and meant to preempt the hearing and determination of the plaintiffs’ application.

14. Additionally, the ruling appealed against was in respect of orders of temporary injunction whose effect was to preserve the status of the suit property pending hearing and determination of the suit. I am therefore not convinced that the appeal will be rendered nugatory if the proceedings in this matter are to continue. In the instant case, it is my considered opinion that it would not be in the interest of justice to exercise the court’s discretion and grant stay of proceedings as it will only serve the purpose of delaying the matter.

15. The upshot is that I find that the notice of motion dated 15<sup>th</sup> July 2019 is devoid of merit and is dismissed.

16. The Notice of Motion dated 6<sup>th</sup> June 2019 is stated to be brought under the provisions of Section 5(1) of the Judicature Act, Section 63 (c) and (e) of the Civil Procedure Act, part 81 of the Civil Procedure (Amendment NO.2) Rules 2012 of the Senior Courts of England and Wales County Courts, England and Wales, and Order 40 Rule 3 of the Civil Procedure Rules in which the plaintiffs are seeking for orders that the 1<sup>st</sup> defendant’s director, Abdulbasit Swaleh be committed to civil jail for a period not exceeding 6 months or impose such a penalty as the court may deem fit for contempt of court for disobeying the orders of this court dated 27<sup>th</sup> February 2019 and issued on 14<sup>th</sup> March 2019. In the alternative, the plaintiffs want the 1<sup>st</sup> and 2<sup>nd</sup> defendants’ property attached and sold. The application is supported by the affidavit of John Turasha Kinyanjui, the Head of Litigation and Disputes Department of the 1<sup>st</sup> Plaintiff. He has deposed that vide the ruling delivered on 27<sup>th</sup> February 2019, the court granted orders of injunction restraining the defendants from interfering in any manner with the public access road serving the plaintiffs’ created on the former MOMBASA/BLOCK XXIII/179 to serve PLOTS NO. MOMBASA/BLOCK XXIII/412-226 and 231-244 pending the hearing and determination of this suit. A copy of the said order has been annexed. It is deposed that the said order with a notice of penal consequences endorsed thereto was served on the 1<sup>st</sup> defendant’s accountant, one Ben Kazungu on 14<sup>th</sup> March 2019. That the order was also served on the 1<sup>st</sup> defendant’s advocates on 14<sup>th</sup> March 2019 and on 2<sup>nd</sup> defendant’s advocates on 15<sup>th</sup> March 2019. A copy of the affidavit of service has also been annexed.

17. It is the plaintiff’s case that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have willfully disobeyed the said orders of the court as they have continuously been operating a car washing business on the suit property thus interfering with the plaintiffs’ access to the public road created on the former MOMBASA/BLOCK XXIII/179 to serve PLOT NOS. MOMBASA/BLOCK XXIII/412-226 and 231-244. Copies of the photographs allegedly taken on 29.3.19 showing the car washing activities undertaken by the respondents have been annexed. The plaintiffs contend that the 1<sup>st</sup> and 2<sup>nd</sup> defendants continued to willfully disobey the said order and have exhibited a copy of a letter by the 1<sup>st</sup> plaintiff addressed to the defendants’ advocates. It is the plaintiffs contention that the 1<sup>st</sup> and 2<sup>nd</sup> defendants’ conduct defies the authority and dignity of this court

and has interfered with the administration of justice. That in order to prevent the ends of justice from being defeated, this application ought to be allowed. The plaintiffs' advocates did not file any submissions.

18. In opposing the application, the respondent filed a replying affidavit sworn by Abdulbasit Swaleh, a director of the 1<sup>st</sup> defendant on 15<sup>th</sup> July 2019. He has deposed that he was aware that this court issued interim orders against the 1<sup>st</sup> defendant company on 27<sup>th</sup> February, 2019. He further deposed that the 1<sup>st</sup> defendant is not directly involved in any car wash business and that the persons who wash cars in the suit properties are not controlled by the defendant, adding that they have merely permitted a few young adults to use its properties to wash cars. That the said order was communicated to the persons who wash cars with the permission of the defendants in the defendants' properties. He has deposed that the said persons ceased the car wash operations as soon as they were made aware of the court orders. That as it stands, any car wash activities/operations within the suit property have been stopped adding that any person washing cars in the suit property is not controlled by the respondent and they should be held personally culpable. It is further deposed that the suit properties are located adjacent to houses owned by Kenya Ports Authority and that he was informed that residents of the said homes request car wash services on a regular basis from persons unknown to the respondent. Further, that the suit properties are unfenced as such any person can access the properties and wash cars in the area. It is deposed that the 1<sup>st</sup> defendant had intended to fence the suit property, but stopped once the interim orders were served to its advocates. It is averred that the 1<sup>st</sup> defendant/respondent respects and obeys this court's orders and is wrongfully being cited for contempt. The respondent argues that the application lacks merit and urged the court to dismiss it.

19. Counsel for the 1<sup>st</sup> defendant submitted that the 1<sup>st</sup> defendant was aware of and had proper knowledge of the terms of the orders issued by the court on 27<sup>th</sup> February 2019. However, that the 1<sup>st</sup> defendant did not at any point in time in its capacity as company breached the terms of the said order. The 1<sup>st</sup> defendant's counsel submitted that contempt of court has not been proved against the 1<sup>st</sup> defendant as per the test set out in the case of **Katsuri Limited –v- Kapurchand Depar Shah (2016)eKLR**. The 1<sup>st</sup> defendant's counsel further submitted that the photographs annexed to the affidavit in support of the application cannot form the basis of finding the 1<sup>st</sup> defendant or its directors culpable of contempt of court as one is not able to find any nexus between the alleged offence and the evidence. Counsel cited Section 107 (1) of the Evidence Act which provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.”

20. The 1<sup>st</sup> defendant's counsel further submitted that the director of the 1<sup>st</sup> defendant is not the correct person to cite for the contempt proceedings, and that doing so offends the locus classical decision of **Salomon –v- A. Salomon Co. Ltd (1896) UKHL 1** in which the court held that a company is a separate and distinct legal entity and holding the 1<sup>st</sup> defendant personally liable for contempt of court is akin to lifting the company veil which can only be done in dire circumstances including fraud. It was submitted that plaintiffs have not discharged their burden of proof and therefore the 1<sup>st</sup> defendant nor its director cannot be held liable for contempt of court. The court was urged to dismiss the application dated 6<sup>th</sup> June 2019 with costs.

21. I have considered the application, the affidavits on record and the submissions filed. Contempt proceedings are quasi-criminal in nature and since the liberty of a person is at stake, the standard of proof is higher than in civil cases. In the case of **Gatharia Mutikika –v- Baharini Farm Ltd (1985) KLR 227**, it was held as follows:

**“The courts take the view that where the liberty of the subject is, or might be involved in breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal charge. A man may be sent to prison. It must be satisfactorily proved. ....it must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt.”**

22. The elements for civil contempt were also stated in the Katsuri case (supra) from the book “Contempt in Modern New Zealand” as:

- “ (a) The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;**
- (b) The defendant had knowledge of or proper notice of the terms of the order;**
- (c) the defendant has acted in breach of the terms of the order; and**
- (d) the defendant's conduct was deliberate.”**

23. From the above, it is clear that because contempt of court is criminal in nature, it must be proved that one actually disobeyed the court order before one is cited for contempt. The applicant in an application for contempt must prove beyond peradventure that the respondent is guilty of contempt. Therefore, the power to commit for contempt is one to be exercised with great care and an order committing a person to prison for contempt is to be adopted as a last resort.

24. In this case, the respondent does not deny the existence of the orders issued by the court on 27<sup>th</sup> February, 2019. It is however the respondent's contention that he obeyed the orders and even stopped fenceings the suit properties. The respondent avers that the car wash business undertaken in the suit premises is one by unknown person who are not under the control of the 1<sup>st</sup> defendant.

25. I have perused the copy of photographs annexed to the affidavit in support of the application herein. From the said photographs, it is difficult for the court to know what activities are being undertaken and by whom. I note also that the letter annexed and marked “KPA 4” is dated 1<sup>st</sup> February 2019. It is clear that the said letter was written before the issuance of the orders of 27<sup>th</sup> February 2019. The 1<sup>st</sup> defendant's director has stated on oath that it stopped any activity once the interim orders were served on its advocates and that the car wash business is by unknown persons. The plaintiffs have not challenged these averments which therefore remains uncontroverted.

26. From the evidence on record, I cannot safely hold that the 1<sup>st</sup> and 2<sup>nd</sup> defendants disobeyed the orders of the court issued on 27<sup>th</sup> February, 2019. I am not satisfied that the plaintiffs have proved contempt on the part of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Consequently, I do find that the notice of motion dated 6<sup>th</sup> June, 2019 lacks merit and hereby dismiss it.

27. Because both the application by the plaintiffs and the one by the 1<sup>st</sup> defendant have been dismissed, I order that parties bear their own costs.

28. Orders accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 16<sup>th</sup> day of September 2020**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Ms. Abwao Wafula for Plaintiff/Respondent

No appearance for Defendant/Applicants

Yumna Court Assistant

**C.K. YANO**

**JUDGE**