Thika Coffee Mills Limited v Gakuyu Farmers Co-orperative Society & 2 others (Civil Appeal 281 of 2019) [2022] KECA 160 (KLR) (18 February 2022) (Judgment)

Neutral citation: [2022] KECA 160 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 281 OF 2019

DK MUSINGA, HM OKWENGU & MSA MAKHANDIA, JJA

FEBRUARY 18, 2022

BETWEEN

THIKA COFFEE MILLS LIMITED ..... APPELLANT

AND

GAKUYU FARMERS CO-ORPERATIVE SOCIETY ..... 1ST RESPONDENT

COFFEE BOARD OF KENYA LIMITED ..... 2ND RESPONDENT

CO-OPERATIVE BANK LIMITED ..... 3RD RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Nairobi (Kasango, J.) dated 30th May, 2019. in Civil Suit No. 109 of 2001)

JUDGMENT

1. This appeal arises from the ruling and order of Kasango, J. dated 30th May 2019 in which she allowed the 1st Respondent's Notice of Motion dated 27th April 2018.The said motion was brought under Section 3A of the *Civil Procedure Act* and Order 17 Rule 2(1) of the *Civil Procedure Rules*, in which the 1st Respondent sought orders that: The appellant's' suit be dismissed for want of prosecution and subsequent thereto, directions be issued on the hearing of the 1st respondent's counter-claim in the trial court.

2. The application was premised on the grounds that the suit had been last in open court on 27th February 2017 when it had come-up for a ruling on similar applications filed by the 1st and 2nd Respondents dated 17th March 2016 and 8th April 2016 respectively. That the said applications upon *inter partes* hearing were dismissed with costs on 27th February 2017. That from then on there had been no steps taken by the appellant to prosecute the suit. That due to the delay many witnesses of the 1st respondent were now of old age, and some had even died making it difficult for the 1st respondent to defend the suit. Lastly, that the delay was inordinate, inexcusable and prejudicial to the 1st respondent.

3. The said grounds were reiterated in the supporting affidavit of Simon Mania, the Chairman of the 1st Respondent and who further deposed that they had filed a statement of defence and counter-claim to the appellant's suit which they wished to prosecute once the application was allowed.

4. In reply, the appellant through one of its directors, Pius Mutual Ngugi, swore a detailed replying affidavit dated 11th December 2018. He deposed that the application contained half-truths, obvious distortions of facts and gross exaggerations which were meant to mislead the court. That the application did not in any event meet the threshold under Order 17 Rule 2 of the Civil Procedure Rules. That the suit had been instituted in 2001 by the appellant against the respondents claiming amongst other prayers USD 839, 093.56, plus accruing interest at the rate of 16% from the date when it was due for payment. The demand arose from contracts and agreements entered into between the appellant and the 1st respondent on 19th December 1997 and 1st September 1999 respectively where the appellant would provide the 1st respondent with milling services for coffee, commission agency services and financial services. That pursuant to the above, the appellant between July 1997 and 31st December 2000 advanced the 1st respondent sums totaling USD 1,542,123.71 with repayment schedules agreed but the 1st respondent failed to abide by the terms, hence the suit. The 1st respondent denied the claim as presented by the appellant and proceeded to file a defence and counterclaim to the suit.

5. That by a consent dated 26th June 2002 parties, agreed to deposit the sum held by the 2nd Respondent on account of the 1st Respondent in a joint interest earning account to be operated by the advocates of the parties which as at 22nd January 2004 had credit balance of USD 326,250.92. Thereafter the matter was set down for hearing and a total of 4 witnesses were heard. Later, due to one thing or the other, the matter could not proceed until on 5th May 2006 when the same was placed for further hearing before Hatari Waweru, J. That on 4th and 5th February 2014 the appellant filed further witness statements. In response, the 1st and 3rd respondents also filed witness statements on 10th March 2014 and on 25th July 2014 respectively, thereby compromising the further hearing of the suit. That on 8th December 2014, the appellant was further granted leave to file additional documents. That on 17th March 2016 and 12th April 2016, the 1st and 2nd Respondents respectively filed two separate applications seeking to have the suit dismissed for want of prosecution.

6. That the two applications were dismissed by Ochieng, J. on 27th February 2017. The appellant further highlighted various instances where it had taken steps to fix the suit for hearing since the ruling of 27th February 2017, by inviting the parties' advocates to fix hearing dates but the court file could not be traced. That the 2nd respondent too had attempted to fix a hearing date for the suit but ended up in vain on account of unavailability of the court file. That there were email communications and letters from the appellant to the Deputy Registrar of the court to avail the court file but to no avail. That the 1st respondent's advocates equally had a duty to fix the suit for hearing given that it had a counterclaim and kept on stating that the file was available in the registry.

7. The application was further opposed by the affidavit of Peris Gakii, the Legal Officer of the appellant which merely reiterated and expounded on the depositions in the affidavit of Pius Mbugua Ngugi (aforesaid), and we therefore need not rehash the same.

8. After considering the application, the trial court (Kasango, J.) made a finding that this was a case where justice had been delayed; the appellant having instituted the suit in 2001, and the last time the matter had been in court for substantive hearing was in May 2006. Thus, the gap between 2006 and 2016 when the application was made, the appellant had taken no steps to prosecute the suit.

9. The trial court proceeded to observe; -

> I am aware that this period was considered in the ruling of 27th February 2017, but I think justice demands that as I consider the fresh application, that I consider all the period this case has been on record collectively".

10. The trial court then found that the 1st Respondent had made a case for the dismissal of the suit for want of prosecution and proceeded to do so with costs.

11. Aggrieved by the decision, the appellant filed this appeal citing seven grounds to wit, that the trial court erred in law and fact in: adjudicating over issues that were not before it and acting outside the scope and basis of the application; sitting as an appellate court over the decision made by a court of concurrent jurisdiction being the decision of Fred Ochieng, J. delivered on 27th February 2017; failing to consider the merits of the material placed before it by the appellant in the replying affidavits; failing to accord the appellant an opportunity to be heard contrary to the dictates of rules of natural justice when it unilaterally amended the application *suo motu* for cause to be shown from the period 2006 to 2018 whilst the application sought for cause to be shown for the period 27th February 2017 to 27th April 2018; misinterpreting the Deputy Registrar's email dated 2nd November 2017 and failing to consider any subsequent or antecedent evidence that had been presented by the appellant, and by misapplying the well-known principles for dismissing a suit for want of prosecution

12. The appeal was canvassed by way of written submissions. Mr. Githogori, Mr. Kariuki and Mr. Maweu, learned counsel, appeared for the appellant, and the 1st and 2nd Respondents respectively.

13. Mr. Githogori submitted on four thematic areas, whether: the trial court could validly set aside a ruling of another judge of concurrent jurisdiction; the legal jurisprudence for dismissing suits for want of prosecution, and the trial court's had jurisdiction to adjudicate over the period of delay prior to 27th of February 2017.

14. On the first issue, the appellant submitted that by the applications dated 4th March 2016 and 12th April 2016 respectively, the Respondents sought for the dismissal of the suit for want of prosecution for inaction from 8th December 2014. The application was opposed and, in a ruling, delivered on 27th February 2017, Ochieng, J. dismissed the application and ordered that the suit be fixed for hearing. However, in her ruling in a similar subsequent application giving rise to this appeal, Kasango, J. while allowing application considered the gap between 2006 and 2016 which period had been considered in the ruling by Ochieng, J. As such, the judge dealt with an issue that had already been handled by another judge of concurrent jurisdiction. The appellant relied on the cases of *Bellevue Development Company Ltd. Vs. Francis Gikonyo & 7 Others* , Civil Appeal No. 239 of 2017 and *Peter Ng'ang'a Muiruri Vs. Credit Bank Ltd & 2 Others*, Civil Appeal No. 203 of 2006 (both unreported) to support the submission that a judge cannot determine an issue which had already been determined by another judge of concurrent jurisdiction.

15. On the second issue, the appellant submitted that the threshold set by order 17 Rule 2 of the *Civil Procedure Rules* and decided authorities on dismissal of a suit for want of prosecution did not favour the 1st respondent's application, as the 1st respondent did not establish that one year had gone by without the appellant prosecuting the suit as required, that there was inordinate and inexcusable delay in the circumstances of the case, such that the respondents will be prejudiced by the delay if the suit was to proceed to trial, and lastly that owing to the delay, a fair trial cannot be achieved.

16. The appellant further submitted that twelve months had not lapsed without the appellant taking any steps towards the prosecution of the suit by the time the 1st respondent filed the application as deposed

to in the replying affidavits. Indeed, there had been several steps undertaken by the appellant to set the suit down for hearing which constituted steps in the prosecution of the suit. That the appellant had demonstrated to the trial court that it had taken steps from 27th February 2017 to 27th April 2018 towards the prosecution of the suit, thus it could not be said that the one-year threshold had been met. Further, the appellant submitted that even after getting a letter from the Deputy Registrar of the availability of the court file on 2nd November, 2017, it followed it up by inviting parties to fix a hearing date on 8th November 2017. That was an act showing that the appellant had interest in having the suit prosecuted contrary to the view taken by the 1st respondent. As such, the threshold under the order 17 rule 2 had not been met. On the third issue, the appellant submitted that parties are bound by their pleadings and what had not been pleaded by them the court cannot adjudicate upon. That the matter before the trial court was the application by the 1st respondent which sought dismissal of the appellant's suit for inaction on the part of the appellant from 27th February 2017 to 27th April 2018. However, the trial court erred when it decided to delve into the period 2006 to 2016, when the court had not invited the appellant to show cause for the said period. Further, the court ought to have appreciated that the ruling by Ochieng, J. dealt with that period. It was further submitted that there was no single year that the matter had not been placed before a judge for some action. The appellant relied on the case of *Ivita Vs. Kyumbu* [1984] KLR 441 for the proposition that the test to be applied by courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can still be achieved despite delay.

17. Globally, the respondents' submissions in response reiterated the genesis of the matter as stated by the appellant and framed the issues for determination as whether, the trial Court erred in dismissing the suit for want of prosecution; and whether the trial Court adjudicated over issues that were not before it.

18. On the first issue, it was submitted that the appellant had failed to help the court achieve the duty bestowed on it pursuant to Section 1B of the *Civil Procedure Act*, Section 3A and 3B of the *Appellate Jurisdiction Act*. The appellant was under a duty to assist the court in effecting the Overriding Objectives but negligently and blatantly failed to observe this duty when it failed to set the suit down for hearing since 27th February, 2017, following the ruling by Ochieng, J. It relied on the principles regarding overriding objective as expounded in the cases of *Mradula Suresh Kantaria & Surech Nanillal Kantaria*, Civil Appeal No 277 of 2005, (unreported)*Caltex Oil Limited Vs. Evanson Wanjihia* [2009] eKLR.

19. They also relied on the case of *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium Vs. M.D. Popat & Others & Another* [2016] eKLR for the proposition that the delay in setting down a suit for hearing no doubt prejudices a party as justice delayed is justice denied. That the appellant had not given any excuse for its inaction. That the court was aware that the act of dismissing a suit is a draconian measure which should be exercised cautiously as it drives a party away from the seat of justice. Nonetheless, the court is bound to do justice to both parties without undue delay. Accordingly, the trial court cannot be faulted for the decision it arrived at.

20. We were further urged to be guided by the decision in *Mbogo & Another Vs. Shah* [1968] EA 93, and *Matiba Vs. Moi & 2 Others* [2008] 1 KLR 670, for the proposition that the trial court was exercising discretion when it allowed the application, and this Court is not entitled to substitute the trial court's discretion with its own by allowing the appeal. It had to be shown that the trial court's decision was plainly wrong because it misdirected itself, acted on matters on which it should not have acted on or because it failed to take into consideration matters which it should have taken into consideration and in doing so, arrived at a wrong decision. The respondents maintained that none of the above had been demonstrated in this appeal.

21. On the second issue, the respondents submitted that the trial court did not adjudicate over issues that were not before it and did not act outside the scope and basis of the 1st respondent's application as alleged by the appellant. That application was based on the grounds that the suit was last in court on 27th February, 2017; that the appellant had taken no steps to set the suit down for hearing for a period of over one year; and that the respondents' witnesses were aged and a number of them had died, hence it will not be possible to have a fair trial; in the premises the respondents stood to suffer prejudice if the suit continued pending in court. That the trial court considered the period the suit had been in court and as such it did not sit on appeal over the decision by a judge of concurrent jurisdiction.

22. The respondents further submitted that they had filed two applications for dismissal of the suit which were later dismissed by Ochieng, J. and from that time the appellant had not done any act in pursuit of having the suit heard. That this necessitated the filing of another application which was heard and allowed as there was no reason that was advanced by the appellant that would have caused the suit not to be dismissed. That the file was always available at the Court registry despite the claims by the appellant to the contrary.

23. Having considered the record of appeal, the submissions of counsel and the authorities cited, the sole issue for determination by this Court is whether the trial court exercised its discretion properly in allowing the application. It is obvious that in determining whether or not to dismiss the suit for want of prosecution, the trial court was exercising its wide and unfettered discretion. An appellate court will in such circumstances rarely interfere with such exercise of discretion unless it is manifest that the lower court was clearly wrong in the exercise of its discretion- see *Mbogo Vs. Shah [1968] (supra)* in which Sir Charles Newbold P. held;

> ...a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice....."

24. In Matiba Vs. Moi & 2 Others [2008] 1 KLR 670, this Court on the same** subject delivered itself thus:

> The High Court was exercising discretion and the Court of Appeal was not entitled to substitute the Judges' discretion with its own discretion. It had to be shown that the Judges' decision was clearly wrong because he misdirected himself or because he acted on matters on which he should not have acted on or because he failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong decision."

25. Order 17 rule 2 of the Civil Procedure Rules,which was the basis of the 1st respondents' application provides thus:

> 2. (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
>
> (2) If cause is shown to the satisfaction of the court, it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
>
> (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order."

26. The rationale behind Order 17 rule 2 is that suits should be heard and determined expeditiously, for as is often said, justice delayed is justice denied. In *Fitzpatrick Vs. Batger & Co .Ltd* [1967] 2 ALL ER 657, Salmon L.J. expressed the proposition as follows:

> It is of the greatest importance in the interests of justice that these actions should be brought to trial with reasonable expedition. It is not in the interests of defendants that this should be done, but it is perhaps even more in the interests of "plaintiffs themselves."

27. In the same judgment, Lord Denning, M. R. added that it was a demand of public policy that the business of courts should be conducted with expedition. In *Victory Construction Co Vs. A. N. Duggal* [1962] EA 697, Edmonds, J. stated as follows on the former provision, which is now substantially Order 17 rule 2:

> The purpose of r. 6 in my view is to provide the court with administrative machinery whereby to disencumber itself of case records in which the parties appear to have lost interest."
>
> (See also Ngwambu Ivita Vs. Akton Mutua Kyumbu (supra). It is also apt to observe that since the promulgation of *the Constitution* of Kenya, 2010, Order 17 rule 2 is one of the provisions that give meaning to Article 159 (2) (b), which demands that justice shall not be delayed.

28. The courts of this land have settled the principles which guide them in determining whether or not to dismiss a suit for want of prosecution. Among those decisions, include *Ngwambu Ivita Vs. Akton Mutua Kyumbu (supra)*, and *Moses Miriira Maingi & 2 Others Vs.. Maingi Kamuru & Another*,CA No. 151 of 2010 (Nyeri). In Moses Muriira Maingi & 2 Others Vs. Maingi Kamuru & Another [2013] eKLR, this Court held as follows:

> The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

29. In *Eliud Munyua Mutungi Vs. Francis Murerwa* [2014] eKLR, this Court reiterated that:

> The power of the court to dismiss a suit for want of prosecution is a discretionary power, but which should be exercised judicially. In Allen -vs- Sir Alfred Mc. Alpine & Sons (1968) ALL ER, the Court of Appeal of England established the following as principles governing applications for dismissal for want of prosecution:
>
> a. the delay is inordinate;

b. the inordinate delay is inexcusable;

c. or the defendant is likely to be prejudiced by the delay.

On the whole, and having examined the record with the tooth comb, we are not satisfied that the alleged delay was inordinate, inexcusable nor that the respondents will be prejudiced by the delay contrary to the holding by the trial court. We shall however revert to this issue substantively later in this judgment.

30. On the issue raised by the appellant that the trial court sat on appeal over a similar ruling by a judge of concurrent jurisdiction, we note that there was an application made earlier by the 1st and 2nd respondents seeking the dismissal of the appellant's suit for want of prosecution for inaction from 8th December 2014 . The same was heard by Ochieng, J. who in a ruling delivered on 27th February 2017 dismissed it by holding that as at 27th February 2017, there was no indolence by the appellant and that there was evidence of the steps taken by the appellant to fix the suit for hearing, and the explanation for the delay was in any event sufficient. However, Kasango, J. in her ruling on a subsequent similar application dated 30th May 2019 which dealt with the period commencing 27th February 2017, while acknowledging that the period between 2006 and 2016 had been considered in the ruling of Ochieng, J. was of the view and indeed proceeded to consider the said period again despite the same having been taken into account earlier. Having considered that period, and which was one of the reasons that led the trial court to reach a different conclusion than that of Ochieng, J. it is obvious to us that the trial court was either reviewing and or sitting on appeal over a decision of a judge of concurrent jurisdiction which was not permissible. We are fortified in this holding by the decision of this court in *Stephen Mwaura Njuguna Vs. Douglas Kamau Ngotho* Civil Appeal No. 90 of 2005 consolidated with Civil Appeal No. 247 of 2007 where it was held:

> The learned Judge had no jurisdiction to determine a matter that was decided by a fellow Judge of concurrent jurisdiction. He could not for instance set aside a judgment of Muga Apondi, J. a Judge who has the same jurisdiction as himself. Such setting aside could only be by an appellate court but not by a Judge of the High Court as the appellant sought."

31. The issue of the earlier period having been addressed sufficiently by a judge of concurrent jurisdiction in a ruling, it was not open to the trial court to revisit the issue in a bid to reach a conclusion different from that of the earlier ruling. We thus find this ground of appeal merited.

32. On the delay and reasons thereof, the appellant advanced various grounds in its filings. There is evidence that the appellant had made several attempts to set down the suit for hearing, albeit unsuccessfully. The main drawback in all these endeavours was the non-availability of the court file. It cited several instances and dates it had moved the court to have the suit listed for hearing or invited the other parties to fix a date for hearing of the suit and attended court on both occasions. Further, within this period, the appellant wrote emails to the Deputy Registrar of the court seeking assistance to trace the court file but this did not bear any fruits.

33. These depositions and submissions were not seriously challenged, controverted or denied by the respondents. We also note that the application related to the period between 27th April 2017 and 27th April 2018 which period we are satisfied there had been numerous efforts and attempts to have the suit fixed for hearing, contrary to the finding by the trial court. Thus, there were actions on the court file in between and the trial court apparently did not consider the record properly and the replying affidavits that had been filed by the appellant to that effect, was an error that led to injudicious exercise of discretion.

34. To our mind, if what was set out by the appellant in various documents as reasons that led to the delay in the prosecution of the suit does not amount to sufficient cause, we do not know what else can be. We are of the view that the trial court should also have considered the colossal sums involved; the fact that the suit had in the past been heard partly; and that there was a counter-claim as well as money deposited in a joint interest earning account to be operated by the advocates of both parties. None of the parties would have therefore been prejudiced if the suit was allowed to run its full course. Further on account of the counterclaim, the respondents too had a responsibility to fix the suit for hearing unless of course the counterclaim was just but a red herring.

35. In their plea before the High Court the respondents stated that they would be prejudiced if the suit was allowed to proceed to trial since they would not be able to trace and call witnesses who had the history and knowledge of the facts in dispute to testify, and that they had even been compelled to substitute some of the witnesses who had passed on during the pendency of the suit. This allegation was accepted by the trial court, which held that the respondents would be prejudiced in getting a fair trial. It is trite that a party alleging prejudice must prove it. In *Ivita Vs. Kyumbu (supra)* it was held that a defendant must satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. From the genesis of the facts, the appellant had advanced the 1st respondent the sum of USD 1,325,829.77. The 1st respondent repaid some amount, leaving a balance of USD 839,093.56 which the appellant claimed in the suit. As such, and without pre-empting the trial in the High Court, the central issue in the trial would be whether the appellant was entitled to the remaining amount of what it advanced to the respondents. In our view, this comes out as a commercial claim and with all documentation in place any official of the respondents can testify. The 1st respondents' argument that they might not be able to trace relevant witnesses does not therefore suffice.

36. On the other hand, the prejudice that may be suffered by the appellant is apparent. It stands to lose colossal amounts of money given that there was no direction as to what would happen to the funds held in the joint interest earning account as aforesaid. In this scenario, it is prudent to consider whether locking out the appellant from the seat of justice will serve the course of justice. The main consideration for courts is to do justice to the parties in a suit. The discretion to dismiss suits or strike out pleadings generally should be exercised sparingly and judicially and only in deserving cases which cannot be mitigated. The practice nowadays is to elevate substantial justice to the parties over and above the strictures of rules of procedure, which have been stated to be mere hand maidens of justice. This is especially so in view of the saving provisions under sections 1A, 1B and 3A of the *Civil Procedure Act*. Similarly, Article 159 (2) (d) of *the Constitution* obligates courts and tribunals to exercise judicial authority without undue regard to technicalities. See *Abdirahman Muhumed Abdi Vs. Safi Petroleum Products Ltd. & 6 Others* [2011] eKLR, where this Court stated as follows;

> The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice.....
>
> The enactment of Sections 3A and 3B of the *Appellate Jurisdiction Act*, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of *the Constitution* of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of *the Constitution* makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by

the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion."

37. No doubt the appellant or its representatives should have been more prudent or keen in the prosecution of its suit. However, as at the time of the application the appellant was still inviting the respondents to fix a hearing date and showing attempts to prosecute the suit. In our view, it cannot therefore be said that there was an inordinate delay in the prosecution of the suit. The attempts to set the suit down for hearing ought to count for something and it was wrong for the High Court to brush them off as inconsequential. To avoid injustice to either party in the circumstances of this case, and to prevent prejudice to one party, justice behoves this Court to allow this appeal.

38. In view of the above, the appeal is allowed with costs to the appellant. The Ruling and order of Kasango, J. is set aside and substituted with an order dismissing the notice of motion dated 27th April 2018 with costs to the appellant.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR