



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION 21 OF 2020

IN THE MATTER OF ARTICLES 1, 2, 3 (1), 10, 19, 20, 21, 22, 27 (1) (2) (3), 28,

47 (1) (2), 50 (1), 165 (3) (B) & AND 258 (1) OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 27 (1) (2) (3), 28, 41 (1) AND 50 (1) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF RULES 4, 10, 11, 13 AND 20 OF THE CONSTITUTION OF KENYA
(SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES**

AND

**IN THE MATTER OF SECTION 31 AND 40 (1) & (2) OF THE
COUNTY GOVERNMENTS ACT NO. 17 OF 2012**

AND

IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF SECTIONS 41 AND 45 OF THE EMPLOYMENT ACT

BETWEEN

ABDIAZIZ SHEIKH MAAD.....1ST PETITIONER

SHAMSA MOHAMMED HAJI.....2ND PETITIONER

JOHORA MOHAMED ABDI.....3RD PETITIONER

HASSAN MOHAMED AHMED.....4TH PETITIONER

AND

THE GOVERNOR, MANDERA COUNTY.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF MANDERA.....2ND RESPONDENT

MANDERA COUNTY PUBLIC SERVICE BOARD.....3RD RESPONDENT

RULING

1. This Ruling relates to three Applications being the Petitioners' Notice of Motion dated 8.3.2021, and the respondents' Motions dated 12.3.2021 and 17.3.2021 respectively. All the applications have been contested through Replying Affidavits and the submissions by each side.

Notice of Motion dated 8.3.2021

2. The Petitioners seek the following orders:

a. THAT a Notice to Show Cause does issue compelling, His Excellency Captain Ali Roba, the Governor Mandera County, Abdinur Hussein, the 2nd Respondent's County Secretary and Ethila Mohamud, the 3rd Respondent's Chair, to appear in court to show cause why they should not be cited for contempt for disobeying the orders of this Honourable Court given 25.1.2021.

b. THAT His Excellency Captain Ali Roba, the Governor Mandera County, Abdinur Hussein, the 2nd Respondent's County Secretary and Ethila Mohamud, the 3rd Respondent's Chair be committed to civil jail for a period not exceeding 6 months for disobeying the orders of this Honourable Court given on 25.1.2021 and orders of sequestration of the contemnors' properties be issued as deemed appropriate by this Honourable Court

c. THAT His Excellency Captain Ali Roba, the Governor Mandera County, Abdinur Hussein, the 2nd Respondent's County Secretary and Ethila Mohamud, the 3rd Respondent's Chair be compelled to immediately and unconditionally pay the Petitioners their outstanding salary and gratuity less PAYE amounting to:

i. Kshs. 2, 829, 476.30 to the 1st Petitioner

ii. Kshs. 3,473,034.05 for the 2nd Petitioner

iii. Kshs. 2, 896, 976.30 for the 3rd Petitioner; and

iv. Kshs. 1, 836, 405.95 for the 4th Petitioner

d. That the costs of the instant application and interest thereon be provided.

e. Any other and further relief that this Honourable Court may deem fit and just to grant in the circumstances.

3. The application is based on grounds that the 1st and 2nd Respondents have failed, refused and/or neglected to comply with the Judgment of this Honourable Court delivered on 29.4.2020 which ordered them to compute and pay damages to the Petitioners within 90 days and costs of the suit; that the 1st and 2nd Respondents have failed, refused and/or neglected to comply with the Ruling of this Court rendered on 25.1.2021 ordering them to properly compute the outstanding salary and gratuity payable to each Petitioner less PAYE, and pay these amounts plus costs within 30 days from 25.1.2021; that the Court's orders were clear, unambiguous and the Respondents who were represented by the advocates of their choice have all along been aware of the existence of the orders but blatantly disregarded them; that the failure or refusal to honour the orders is in contempt of this court and tantamount to undermining the honour, dignity and existence of the courts; and that the Judgment of this Court has neither been reviewed and nor has it been appealed.

4. The application is supported by the affidavit of Abdiaziz Sheikh Maad, the 1st Petitioner sworn on 8.3.2021. He deposed that instead of complying with the Ruling of the Court, the Respondents extracted the order and have since appealed against it. He further deposed that the petitioners did contract a firm of Accountants who computed their outstanding salary and gratuity less PAYE which amounts to the sums sought in the motion.

5. The 1st and 2nd Respondents opposed the application vide a Replying Affidavit sworn by Adan Kullow, the 2nd respondent's Director Legal Services, on 16.3.2021 who deposed that the substantive issue raised in the petitioners' application, relates to issue pending at the Court of Appeal in **Nairobi Civil (Appeal) Application No. E60 of 2021 The Governor Mandera County & Another v Abdiaziz Sheikh Maad & 4 Others** which was filed alongside an appeal **Nairobi Civil Appeal No. E091 of 2021 The Governor, Mandera County & Another versus Abdiaziz Sheikh Maad & 4 Others**.

6. He averred that the 30 days within which the Court ordered them to pay have lapsed and the Petitioners have already obtained an ex-parte order for Notice to Show Cause despite the pendency of the application for stay in the Court of Appeal which they have been duly served. She further averred that continuing with the contempt application amounts to pre-judging the outcome of the stay application and the appeal and it would mean that this Court has determined that the appeal is not arguable.

7. The 3rd Respondent opposed the application through a Replying Affidavit sworn 17.3.2021 by Ethila Issack the Chairprson of the 3rd Respondent who deposed that the 3rd Respondent's is established under section 57 of the County Government Act and its role is prescribed under section 59 of the Act, which does not encompass processing of payroll/payment of terminal benefits. She contended that the Mandera County Public Service Management Board is the department that processes payroll and gratuities for public servants and the Board is headed by a County Executive Committee Member. Therefore according to her, the Notice to Show Cause issued against her is fatally defective and founded on a misunderstanding and misapprehension of the law.

8. She further averred that 3rd Respondent was aggrieved by part of the Ruling, filed and served a Notice of Appeal against the same on 29.1.2021; that the 1st and 2nd Respondents filed an application in the Court of Appeal seeking stay of execution of that ruling; that the intended appeal and the application seeking stay of execution are not frivolous and have high chances of success; that unless this Court stays the proceedings herein the intended appeal and the 1st and 2nd Respondents application will be rendered nugatory; and that, in the interest of justice, the Petitioners' application should be stayed so that this Court does not make a decision at variance with the decision of the Court of Appeal.

Notice of Motion dated 12.3.2021

9. The 1st and 2nd Respondents seek the following orders:

a. THAT this Honourable Court be pleased to stay further proceedings in this matter including contempt of court proceedings filed by way of the Notice of Motion dated 8.3.2021.

b. THAT this Honourable Court be pleased to issue stay of further proceedings in this matter including contempt of court proceedings filed by way of a Notice of Motion dated 8.3.2021 pending the hearing and determination of stay application by the Court of Appeal in Nairobi Civil (Appeal) Application No. E60 of 2021: The Governor Mandera County & Another v Abdiaziz Sheikh Maad & 4 Others.

c. THAT the costs of this application be provided for

10. The application is based on grounds that the 1st and 2nd Respondents have filed an application for stay in **Nairobi Civil (Appeal) Application No. E060 of 2021 The Governor, Mandera County & Another versus Abdiaziz Sheikh Maad & 4 Others** alongside an appeal **Nairobi Civil Appeal No. 091 of 2021: The Governor, Mandera County & another versus Abdiaziz Sheikh Maad & 4 others**; that the application for stay was filed in record time on 26.2.2021 and served on the Petitioners on 4.3.2021; that on 8.3.2021, the application was certified urgent and the parties were ordered to file submissions, and the Respondents have already complied; that the 30 days this Court directed the Respondents to act have since lapsed and the Petitioners have now filed an application dated 8.3.2021 and obtained orders summoning the Respondents to appear in court in person on 18.3.2021 to show cause why they should not be cited for contempt of the Orders issued on 25.1.2021; and that the stay of further proceedings including contempt proceedings is good for the judicial process and the rule of law.

11. The application is supported by the affidavit of Adan Kullow, the Director Legal Services for the 2nd Respondent, sworn on 12.3.2021 in which he basically reiterates the grounds set out in the application.

12. The Petitioners opposed the application by way of a Replying Affidavit sworn by Abdiaziz Sheikh Maad on 17.3.2021 in which he contended that this application is *sub judice* as a similar application is pending before the Court of Appeal in **Civil Appeal Application No. E060 of 2021**; that if this Honourable Court proceeds with the application, there is a real possibility of the two courts coming up with conflicting determinations, thus it's prudent of the court to down its tools and allow the Court of Appeal to proceed with the application for stay.

13. He further averred that there is no Order by this Court or the Court of Appeal staying the execution proceedings; that the filing of an appeal and/or an application for stay does not *ipso facto* guarantee stay of execution of the court's orders; that the contemnors ought to appear in court to show cause why they should not be cited for contempt and that there is no order stopping the alleged contemnors from appearing in court in person.

14. He further averred that the Respondents have not satisfied the conditions for grant of an application for stay; that the 1st to 3rd Petitioners having served the Applicant's County Executive Committee Members and the 4th Petitioner having served the 2nd Respondent's Chief Officer, are not paupers and are able to repay the decretal amount plus interests if the appeal is successful. Therefore, he urged that this application be dismissed with costs.

Notice of Motion dated 17.3.2021

15. The 3rd Respondent seeks the following Orders:

a. That this Honourable Court be pleased to stay the hearing of the Notice of Motion application dated 8.3.2021 seeking to cite the Respondents for contempt of court pending hearing and determination of the instant application.

b. That this Honourable Court be pleased to stay the contempt of court proceedings of this Honourable Court pending hearing and determinations of Civil Appeal (Application) No. E060 of 2021, The Governor Mandera County & another v Abdiaziz Sheikh Maad & 4 Others pending the hearing and determination of the intended appeal by the 3rd Respondent

c. THAT costs of this application be provided for.

16. The application is based on grounds that on 29.2.2021 the 3rd Respondent filed and served a Notice of Appeal against the Ruling delivered by this Court on 25.1.2021; that on 26.2.2021, the 1st and 2nd Respondents filed an application seeking stay of execution of that Ruling in the Court of Appeal, the application was certified urgent and on 8.3.2021 directions were issued as to filing submissions; that on 8.3.2021, the Petitioners filed the instant application seeking to cite the Chairperson of the 3rd Respondent for contempt, the application was certified urgent and the Honourable Court issued a Notice to Show Cause against her to appear before this Court on 18.3.2021; that unless this Honourable Court stays the proceedings herein, the 3rd Respondent's intended appeal and the 1st and 2nd Respondents' application seeking stay of execution will be rendered nugatory; and that it is proper that the application for contempt be stayed pending the determination of the stay application before the Court of Appeal so that this Court does not make a decision at variance with the decision of the Court of Appeal.

17. The application is supported by the Affidavit of Ethila Issack, the Chairperson of the 3rd Respondent sworn on 17.3.2021, in which she basically restates the grounds set out on the face of the motion.

18. The Petitioners opposed the application by a Replying Affidavit sworn by Abdiaziz Sheikh Maad, the 1st Petitioner, sworn on 18.3.2021. He contended that the application is an afterthought; that a Notice of Appeal is neither stay execution nor does it stay proceedings; that the intended appeal will not be rendered nugatory if stay is declined; and that the 3rd Respondent has neither met the conditions for stay pending appeal nor has it tendered its financial position to show how this would be affected if stay is refused.

19. He contended that contradicting court orders can only arise if this Court grants stay and the Court of Appeal returns a finding that stay ought not to be granted. He further contended that the Respondents should not be allowed to create an untidy situation by filing multiplicity of applications and then allege the possibility of contradicting the court orders.

20. He averred that parallel court proceedings before this court and the Court of Appeal have been created by the Respondents and not the Petitioners, therefore it is the Respondents who are the authors of their own misfortune. He further averred that there is no application for stay of execution by the 3rd Respondent as against the Petitioner hence it appears that the 3rd Respondent has resigned to fate, and as such prayed for the application should be dismissed with costs.

Petitioner's submissions

21. The Petitioner submitted that, in order to succeed in civil contempt proceedings, an applicant has to prove the terms of the order; knowledge of these terms by the Respondent and failure by the Respondent to comply with the terms of the order. They reiterated that the Ruling was clear, ambiguous, binding on the Respondents and they had knowledge of the Ruling since they were represented by their advocates when it was rendered on 25.1.2021; and that they have extracted the order emanating from the Ruling and have lodged an appeal against the Ruling and Order of the Court.

22. They further submitted that the Respondents have acted in breach of the Ruling and order because they have hitherto not properly computed and paid the outstanding salary payable to each Petitioner as indicated in the Ruling. They argued that although the Respondents have a right of appeal against the Ruling, they ought to have first complied with the Ruling by paying the outstanding dues then seek to reverse it at the Court of Appeal. For emphasis, they relied on **Hadkison v Hadkison [1952] All ER 567** where the Court held that the plain and unqualified obligation of every person against whom an order was made is to obey it unless the order is discharged and disobedience of the order would result to being in contempt.

23. They further submitted that the Court should not fold its arms because the Respondents have filed their appeals since contempt proceedings are serious. They maintained that the failure, refusal and neglect by the Respondents to honour the Order is in contempt of this Court and tantamount to undermining the honour, dignity and existence of the courts. Consequently, they urged for the contemnors to be committed to civil jail for a period not exceeding 6 months so as to uphold the rule of law since in their view, they have demonstrated beyond peradventure that the contemnors are in contempt of the orders of this Court.

24. They relied on **Econet Wireless Kenya Ltd v Minister for Information and Communication of Kenya & Ano [2005] eKLR** where the Court held that a contemnor would have no right of audience in any court of law unless he is punished or he purges the contempt.

25. They reiterated that the untidy situation in these proceedings have been created by the Respondents who should have first filed their application for stay before this Court and if unsuccessful they would then have filed their stay application at the Court of Appeal. However, they did the reverse and have now rushed to this Court seeking similar orders as those sought at the Court of Appeal.

26. They submitted that the Respondents' applications are an abuse of the process of the Court thus they are proper for striking out *in limine* with costs. They relied on **Global Tours & Travels Limited; Nairobi HC Winding Up Case No. 43 of 2000** where the Court held that in deciding whether to grant an order of stay the court should weigh the pros and cons and should bear in mind factors such as the need for expeditious disposal of cases, the prima facie merits of the intended appeal and the scarcity and optimum utilization of judicial time.

27. They submitted that the need for expeditious disposal of cases dictates that the Respondents do pay the Petitioners the outstanding dues for there to be a closure in this matter. They argued that the appeals do not raise a single arguable point and that the issues raised in the appeals were fully canvassed and settled.

28. According to them, the respondents' applications have not been brought expeditiously and were brought as reactionary measures when he filed the contempt application. The petitioners further submitted that it would not be in the interest of justice to grant stay of proceedings as it will only delay conclusion of the matter yet the Respondents have not indicated their willingness to deposit the security for costs.

29. For emphasis they relied on **Kenya Hotels Properties Ltd v Willesden Properties Ltd Civil Application No. Nai 322 of 2006** where the Court held that the success of a decree would not be rendered nugatory if the decree is a money decree. In the end, they prayed for their application to be allowed and for the Respondents' applications to be dismissed.

1st and 2nd Respondents' submissions

30. The 1st and 2nd respondent submitted that this Court has inherent jurisdiction to stay further proceedings as they await the determination of the application for stay of the subject Ruling pending before Court of Appeal as it was held in **Adam Miller v Insight Limited [2020] eKLR**. They contended that the continuation of the contempt proceedings in this Court whilst the issue of allowances is actively being challenged in the Court of appeal stands to render the appeal and application great prejudice.

31. To fortify the foregoing view, they relied on **Lucy Waithera Kimanga & 2 Others v John Waiganjo Gichuri [2015] eKLR** where the Court cited with approval the decisions in **Daniel Walter Rasugu Nbi HCCC No. 15 of 2006; Global Tours & Travel Limited; Nairobi HC Winding Up Cause No. 43 of 2000** and **Kenya Power and Lighting Company Limited v Esther Wanjiru Wokabi [2014] eKLR** on the guiding legal principles for granting stay of proceedings.

32. They submitted that the interest of justice doctrine tilts towards staying further proceedings in the matter to avoid conflicting decisions because the outcome of the Court of Appeal will directly affect the outcome of these proceedings. They contended that the appeal, cross-appeal and the application for stay pending at the Court of Appeal are based on the same issue of whether the Petitioners are entitled to allowances. They argued that the proceedings should be stayed to avoid parties filing more cases to have the money recovered.

33. They further submitted that if the Appeal succeeds after the allowances have already been paid, the Petitioners will not be in a position to reconstitute the sums paid.

34. They argued that, citing the Respondents for contempt at this stage will amount to denying them the right to be heard at the Court of Appeal because the issue of allowance being challenged at the Court of Appeal has resulted to the contempt application. Finally, they urged the Court to stay further proceedings pending the determination of the application for stay pending, appeal and cross-appeal.

3rd Respondent's submissions

35. Mr. Issa, counsel for the 3rd Respondent orally submitted that the Petitioner's application is premature. He argued that there is no reason to cite Ms. Ethila Issack for contempt because there was no order directed against her and that the Petitioners did not extract or serve the Order upon her. He stated that in this circumstance the 3rd Respondent's Board members ought to have been served personally since that mere knowledge is not enough.

36. He restated that the Court of Appeal has received submissions and responses to the application for stay and that the parties are awaiting a Ruling. He submitted that in **Kenya Breweries Limited & another v Bia Tosha Limited & 5 Others Civil Appeal (Application) No. 163 of 2016** the Court of Appeal held that whereas there was no formal stay, it had to fold its hands and wait for the determination of the same matters by the Supreme Court.

37. He also stated that in **Alfred N. Mutua v Ethics & Anti-corruption (EACC) & 3 Others [2016] eKLR**, the Court of Appeal held that where there is a matter pending before another Court, parties are required not to proceed with the matters before other Courts which would render the decision of the Court of Appeal nugatory. He also cited **Law Society of Kenya v Attorney General & Another [2019] eKLR** where the Supreme Court held that the High Court ought to have awaited for the Appellate Court to pronounce itself on a related matter and acknowledge the hierarchy of court.

38. The counsel urged that in the foregoing case the Supreme Court was stating that where a matter is pending before a higher court the lower court should fold its hands pending the determination by the higher court. Therefore, he prayed that that this Court does stay the proceedings before it since the issue for contempt does not arise as salary was paid and what was in dispute is the allowances.

Petitioners' Rejoinder

39. Mr. Mokuu, counsel for the petitioners submitted that the orders being sought before the Court of Appeal are essentially what is being sought before this Court since they are just seeking stay of execution of this Court's orders. He maintained that the position of the law is that knowledge supersedes service of the order and that the mere filing of an appeal does not automatically stay proceedings. He argued that the decree herein is a monetary one which ought to be executed because the Respondents have not fully paid salary allowances and gratuity.

40. He argued that the authorities cited by Counsel for the 3rd Respondent, are distinguishable because the application in the instant suit is on contempt of Court. He relied on the **Econet Case, supra** and stated that the court held that parties must wait for determination of the application for contempt.

Issues for determination

41. I have carefully considered the applications, affidavits and submissions by the parties. It is common ground that this Court delivered judgment on 24.4.2020 quashing dismissal of the petitioners from service and offered the respondent the option of paying the petitioners salary and gratuity for the unexpired period of their fixed term contracts. It is also clear that the respondents did not appeal but took the option of paying the petitioners salaries plus gratuity and indeed computed and paid what they believed to be the rightful dues.

42. However, a dispute arose thereafter regarding the correct amount payable as salary and gratuity, and the petitioners filed application dated 14.8.2020 for adoption of their assessed dues. On 25.1.2021 I rendered a ruling directing the respondents to properly compute the outstanding salary and gratuity payable to each petitioner and pay the same within 30 days of the ruling based on the guidelines highlighted in the ruling.

The respondents appealed against the ruling on 29.1.2021 and filed application for stay of the ruling in the Court of Appeal on 26.2.2021 and served the petitioners on 4.3.2021. Subsequently, the Petitioners by way of the application dated 8.3.2021 commenced contempt proceedings against Governor Ali Roba and Ethila Issack for failure to comply with the said ruling. The Respondents then filed their respective applications seeking stay of further proceedings in this matter as the parties are actively before the Court of Appeal and have already filed submissions with respect to the application for stay filed there.

43. The main issues for determination, in my view, are:

- a. Whether this Court should grant stay of further proceedings awaiting determination of the application before the Court of Appeal.
- b. Depending on the outcome in (a) above, whether the Court should cite the named individuals for contempt.

Stay of further proceedings

44. The Respondents averred that this Court should stay any further proceedings pending the determination of the application for stay filed at the Court of Appeal to avoid there being a conflict in the decisions by both Courts and rendering the application and the appeal nugatory. However, the Petitioners contended that the Respondents have not complied with the Order of the Court which they had knowledge of; that an appeal does not act as stay; that the Respondents have not met the conditions for stay pending appeal; and that this Court should not fold its arms because the acts by the Respondents constitute contempt of court and are calculated at subverting the administration of justice.

45. Having considered the chronology of the events after I rendered my ruling on 25.1.2021, it would appear that the 1st and 2nd respondents were dissatisfied with the ruling and swiftly moved to the Court of Appeal to impugn the decision by way of an appeal and in the meantime applied for stay of execution of the ruling pending the appeal before the same Court. The petitioners were duly served with the Appeal and the stay application but still instituted the contempt proceedings on 8.3.2021, which in my view amounts to executing the impugned ruling.

46. There is no dispute that on 8.3.2021 the Deputy Registrar of the Court of Appeal issued directions on the application, via email and therefore, the parties were cognizant of the proceedings before the Court of Appeal. It is also a fact that there is no order for stay of the Ruling and Order issued by this Court or the Court of Appeal. However, in my opinion it is untidy for the parties to continuously approach this Court for competing orders while they are simultaneously engaging in same dispute in the Court of Appeal.

47. The principles for stay of proceedings were set out **In Re Global Tours and Travels Ltd : Winding Up Cause No.43 of 2000** as follows:

“.....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 interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests 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 the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”

48. The Petitioners in Paragraph 6 of their Replying Affidavit sworn on 17.3.2021 stated:

“THAT if this honourable court proceeds with the instant application for stay while the Court of Appeal similarly proceeds with an application for stay by the Respondents there is a real possibility of the courts coming up with conflicting determinations. It is thus prudent that this Court downs its tools and allows the Court of Appeal to proceed with the stay Application as it is the Court that was first seized of the Respondents’ stay application.”

49. The foregoing averment is factual because the application before the Court of Appeal is on stay of execution of the ruling dated 25.1.2021 which the petitioner seeks to enforce by the contempt proceedings and as such I agree that there is a possibility of conflicting determinations. The conflicting decisions would occur if this Court commits the contemnors to civil jail and thereafter the Court of Appeal grants stay of execution. It is therefore immaterial whether the decree is a money decree because the decisions by both courts will definitely lead to a never ending litigation process.

50. The doctrine of hierarchy of courts cannot be underscored more so in the present circumstances. In my view, the pros of granting stay of any further proceedings would outweigh the cons for reason that this Court is bound by decisions of the Court of Appeal and the expeditious resolution of these matters would only be achieved if this Court stays further proceedings.

51. The Supreme Court in the **Law Society Case Supra**, held that:

“We are greatly dismayed that the learned Judge did not take judicial notice of the pendency of this Appeal although he was aware of it. As a matter of fact, he stated so in his judgment that an appeal had been preferred to us against the decision

of the Court of Appeal to the apex court on matters whose determination may well have been binding on him. The learned judge ought to have held his horses, acknowledge the hierarchy of the courts, and await for this court to pronounce itself before rendering himself, if at all. As we perceive it, his judgment has created unnecessary confusion in the application of WIBA and cannot be allowed to stand as it may [may or is]” also be contrary to this Judgement..”

52. In addition, judicial time would be saved by staying any further proceedings herein because the suits are before different courts. The Court of Appeal in **Muchanga Investments Ltd V Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR** held:

“In our view, the often quoted principle that a party should have his day in court should not be taken literally. . .”

53. The Petitioners submitted that the Court in the **Econet case, [Supra]** stated that where there is a contempt application parties must wait until the application is determined. The distinguishing factor in that case is that the applications had been filed in the same matter and before the same Court while in the current circumstances different suits are before two Courts with distinct roles based on the Courts’ hierarchy structure.

54. In the end, I find that the Respondents’ applications for stay of proceedings have merit and proceed to stay the petitioners’ application for contempt of Court pending hearing and determination of the application for stay pending before the Court of Appeal. In my view, the option of stay of the proceedings herein is the proper order because if the Court of Appeal declines to grant stay, the petitioners will be at liberty to revisit the contempt proceedings even before the appeal is heard and determined. However, continuing with the contempt proceedings in disregard of the Court of Appeal proceedings would be an untidy situation and likely to end in some embarrassing decisions. Since the dispute is not fully resolved, I decline to award costs to any party.

DATED, AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY, 2021

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties online via Google Teams with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE