Alba Petroleum Limited v National Land Commission & 4 others (Constitutional Petition 36 of 2022) [2024] KEELC 6882 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6882 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CONSTITUTIONAL PETITION 36 OF 2022

LL NAIKUNI, J

OCTOBER 17, 2024

N THE MATTER OF: PROCEEDINGS UNDER ARTICLES 22, 23,162(2) (B) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 24, 40, AND 60 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: BREACH OF THE PROVISIONS OF SECTIONS, 111,113 AND 120 OF THE. LAND ACT, 2012

AND

IN THE MATTER OF: RULES 3, 4,10,11 AND 20 OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013 AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW

BETWEEN

ALBA PETROLEUM LIMITED ..... PETITIONER

AND

THE NATIONAL LAND COMMISSION ..... 1ST RESPONDENT

KENYA NATIONAL HIGHWAY AUTHORITY ..... 2ND RESPONDENT

NATIONAL MUSEUMS OF KENYA ..... 3RD RESPONDENT

THE LAND REGISTRAR, MOMBASA ..... 4TH RESPONDENT

THE HON. ATTORNEY GENERAL ..... 5TH RESPONDENT

RULING

I. Introduction

1. This Honorable Court is tasked with the determination of two filed pleadings. Firstly, the Notice of Motion application dated 30th April, 2024 by Kenya National Highways Authority, the 2nd Respondent/Applicant herein. Secondly, the Notice of Preliminary objection dated 10th July, 2024 byAlba Petroleum Limited the Petitioner herein.

2. Upon service of the Notice of Motion application, the Petitioner/Respondent responded through a Replying Affidavit sworn on 10th July, 2024. The Honourable Court will be dealing with these issues on the own merit at a later stage of this Ruling.

II. The 2nd Respondent/Applicant's case

3. The 2nd Respondent/Applicant filed the afore - stated application under dint of the provision of Sections 1A, 1B, 3A & 95 of the *Civil Procedure Act* Cap. 21; Order 9 Rule 9 of the Civil Procedure Rules 2010, Order 9, Rule 10; Order 42 Rule 6; Order 50, Rule 6; Order 51 Rule 1 of the Civil Procedure Rules 2010 all enabling provisions of the Law.

4. The 2nd Respondent/Applicant sought for the following orders: -

    a. Spent.

    b. That pending the hearing and determination of this Application inter - partes, there be a stay of execution of the judgment made by Honourable Justice L.L. Naikuni delivered on the 26th day of February, 2024 and Decree dated 13th March, 2024 in Environment and Land Court Case No. 36 of 2022 and all orders consequent thereto.

    c. That this court be pleased to grant the Applicant leave to file Notice of Appeal Dated 30th April, 2024 and consequently upon that grant of leave deem the Notice of Appeal Dated 30th April, 2024 hereby deemed as duly filed and served

    d. That pending the hearing and determination of the intended Appeal, there be a stay of execution of the judgment made by Honourable Justice L.L. Naikuni delivered on the 26th day of February, 2024 and Decree dated 13th March, 2024 in Environment and Land Court Case No. 36 of 2022 and all orders consequent thereto.

    e. That the costs of this Application be in the cause of the intended appeal.

5. The Application was supported on the face of it, by the grounds, testimonial facts and the averments made out under the 21 Paragraphed affidavit in support sworn by LAWRENCE MARUTI, an advocate of the High Court of Kenya and the Senior Legal Officer of the 2nd Respondent/Applicant Corporation herein sworn on 30th April, 2024. He averred that:

    a. The Petitioner/1st Respondent herein sued the 2nd Respondent/Applicant in the Environment and Land Court at *Mombasa vide Constitutional Petition no. 36 of 2022* in which a Judgment was delivered in favour of the Petitioner on 24th February, 2024, in the following terms: -

        a. That notwithstanding the provisions of Sections 133A and 133C of the *Land Act*, No. 6 of 2012 as Amended by the Land Value (Amendment) Act, 2019 which are

couched in discretionary manner and the provision of Section 67 of the *Kenya Roads Act* No. 7 of 2007 and the Preliminary Objection dated 28th November, 2022 by the 1st and 2nd Respondents herein be and are both dismissed as this Honourable Court has Jurisdiction to hear and determine this Petition through the Petition dated 9th November, 2022.

b. That Judgment be and is hereby entered in favour of the Petitioner in terms of the Petition dated 9th November, 2022 in its entirety with costs.

c. That a declaration be and is hereby issued that the 1st Respondent's decision to grant the 2nd Respondent access to the Petitioner's suit properties known properties known as MSA/MS/ BLOCK 1/107 (MOMBASA/MAINLAND SOUTH/ BLOCK 1/107) and MSA/MS/BLOCK 1/108 (MOMBASA/MAINLAND SOUTH/ BLOCK 1/108) situate in Likoni in Mombasa County as contained in the 1st Respondent's notice dated 21st October 2022 before paying just compensation to the Petitioner is illegal, unconstitutional, null and void.

d. That a declaration be and is hereby issued that the 1st, 2nd and 3rd Respondents by their actions pleaded in this Petition breached and violated and/or threatened to breach and violate the Petitioner's constitutional right;

e. That an order of mandatory injunction and/or mandamus be and is hereby issued to compel the 1st and 2nd Respondents to pay full, adequate, fair, reasonable and just compensation to the Petitioner for the compulsory acquisition of the Petitioner's properties known as MSA/MS/ BLOCK 1/107(MOMBASA/MAINLAND SOUTH/BLOCK 1/107) and MSA/MS/ BLOCK 1/108 (MOMBASA/ MAINLAND SOUTH/ BLOCK I/108) situate in Likoni in Mombasa County WITHIN THE NEXT THIRTY (30) DAYS from the delivery of this Judgment;-

f. That an order of Permanent injunction be and is hereby issued prohibiting and restraining the 1st, 2nd, 3rd, 4th and 5th Respondents, whether by themselves, agents, employees, contractors, servants and/or whomsoever is acting under their authority or instruction, from accessing, entering onto, developing, undertaking any constructions works, taking over possession and ownership of and/or in any manner whatsoever interfering with the Petitioner's properties known as MSA/MS/ BLOCK 1/107 (MOMBASA/MAINLAND SOUTH/ BLOCK 1/107)and MSA/MS/ BLOCK 1/108 (MOMBASA/MAINLAND SOUTH/ BLOCK 1/108) situate in Likoni in Mombasa County before full, adequate, fair, reasonable and just compensation is paid to the Petitioner.

g. That an order of permanent injunction be and is hereby issued to restrain the 4th Respondent from registering any restriction, entry or transaction regarding the compulsory acquisition of the Petitioner's suit properties known properties known as MSA/MS/ BLOCK 1/107 (MOMBASA/MAINLAND SOUTH/ BLOCK 1/107) and MSA/MS/ BLOCK 1/108(MOMBASA/MAINLAND SOUTH/ BLOCK 1/108) situate in Likoni in Mombasa County by the Government and the Respondents before full and just compensation is paid to the Petitioner.

h. That an order be and is hereby issued that the valuation of the suit land be undertaken, the value of which shall be paid to the Petitioner by the 1st Respondent within the next 30 days of this Judgment.

i. That an order that the Petitioner be awarded general and exemplary damages at 5% of the value of the suit property arising from the delay in the payment of the award of compensation from the compulsory acquisition of the suit land being that the same was not.

j. That costs of the suit to be awarded to the Petitioner to be borne by the 1st, 2nd , 3rd , 4th & 5th Respondents jointly and severally

b. Subsequently, the Petitioner/Respondent had commenced execution proceedings against the Applicant herein and has extracted a Decree dated 13th March, 2024 to that effect.

c. The 2nd Respondent/Applicant was desirous to file an appeal as it is dissatisfied with the said judgment delivered by Hon. Justice L.L. Naikuni on 26th February, 2024. (Annexed in the affidavit and marked "LM - 1" were copies of the Notice of Appeal and letter requesting certified copies of the Judgement and typed proceedings).

d. The delay in filing the Notice of Appeal was inadvertent and/or a justifiable mistake that could be attributed to the 2nd Respondent/Applicant's previous advocates M/s. Rachier and Amollo, LLP Mayfair Centre 5th floor Ralph Bunche Road P.O. Box Numbers 55645 - 00200 Nairobi ,failure to provide a copy of the Judgment to themselves. The 2nd Respondent/ Applicant made reasonable effort to follow up on the matter and was issued a copy of the Judgment way after the prerequisite period for lodging an Appeal had passed. (Attached and marked as "LM – 2" was a copy of the letter from the previous Advocates Dated 3rd April, 2024 Forwarding a copy of the Judgment and Decree).

e. Despite the delay, they promptly reassigned the case to the Law firm of Messrs. Dulo & Advocates, Elgon Court Suite E D3, NO. 1 Ralph Bunche Road, UPPERHILL, P.O Box 48978 - 00100, Nairobi to conduct the Appeal on our behalf. (Annexed in the affidavit and marked as "LM – 3" a copy of the consent to change of advocates)

f. The 5th Respondent, the Attorney General had alreadt filed a Notice of Appeal within the stipulated timelines hence the 1st Respondent/ Petitioner would not suffer any prejudice if the application was allowed.

g. The Judgment intended to be appealed from was vitiated by the following errors of fact and law which the Applicant assert were arguable and fit for determination in the intended appeal;

i. The Learned Judge erred in law and in fact by determining that it had jurisdiction to entertain the matter while completely ignoring the fact that no Constitutional questions arose from the Petition and in total disregard of the threshold for Constitutional Petitions still went ahead to arrive at a determination that the 1st, 2nd and 3rd Respondents violated and/or threatened to breach and violate the Petitioner's Constitutional Rights and granted orders as prayed in the suit.

ii. The Learned Judge erred in law and in fact by determining the 1st Respondent erred in granting 2nd Respondent access to the property MSA/MS/ BLOCK 1/107(MOMBASA/MAINLAND SOUTH/ BLOCK 1/107) and MSA/MS/ BLOCK 1/108(MOMBASA/MAINLAND SOUTH/ BLOCK 1/108) situate in Likoni in Mombasa County before payment of just compensation to the unconstitutional, null and void. Without examining evidence to proof actual possession of the Land within the meaning of section 120 of the *Land Act*, 2012.

iii. The Learned Judge erred in law and in fact by making an order of Permanent injunction prohibiting and restraining the 1st, 2nd, 3rd, 4th and 5th Respondents, whether by themselves, agents, employees, contractors, servants and/or whomsoever is acting under their authority or instruction, from accessing, entering onto, developing, undertaking any constructions works, taking over possession and ownership of and/ or in any manner whatsoever interfering with the Petitioner's properties known as MSA/MS/ BLOCK 1/107 (MOMBASA/MAINLAND SOUTH/ BLOCK 1/107)and MSA/MS/ BLOCK 1/108 (MOMBASA/MAINLAND SOUTH/ BLOCK 1/108)situate in Likoni in Mombasa County before full, adequate, fair, reasonable and just compensation is paid to the Petitioner whilst completely failing to recognize that the project is yet to commence and thus no possession of site can be attributed to the Appellant herein in accordance with the provisions of the *Land Act*.

iv. The Learned Judge erred in law and in fact by issuing a mandatory injunction and/ or Mandamus compelling the Appellant to pay full adequate, fair, reasonable and just compensation to the Petitioner whilst failing to appreciate that the Appellant plays a secondary role in the process of Compulsory acquisition and any such payment is subject to the 1st Respondents assessment, determination, approval, valuation, inspection before any compensatory amounts are determined and deemed payable. That no evidence was tendered of any payment schedule presented by the 1st Respondent to the 2nd Respondent/Applicant, which was yet to be fulfilled and paid.

v. The Learned Judge erred in law and in fact by issuing a mandatory injunction and/ or Mandamus compelling the Appellant to pay full adequate, fair, reasonable and just compensation to the Petitioner whilst failing to appreciate that the 1st Respondent (the National Land Commission) has discretion to revoke a direction to acquire land at any time before possession takes place. That the order being ulta vires limits the discretionary power assigned in the 1st Respondent to stop Compulsory Acquisition at any stage before an award is made.

vi. The Learned Judge erred in law and fact by failing to appreciate proper effect and purport of evidence in arriving at its decision to award the Petitioner general and aggravated damages, which were unsubstantiated and not supported by any valuation reports.

vii. The Learned Judge erred in law and fact by in awarding damages which were inordinately excessive and pegged on the value of the property and rather than the value of alleged damage. There is no evidence of demolition of property or perimeter wall tendered before the trial court additionally no valuation done on the suit property to ascertain the extent of damage done to the property if any and as such the amount of general and aggravated damages was with tremendous respect to the learned Judge without basis.

viii. The Learned Judge erred in law and in fact by holding all the Respondents Jointly and severally liable for costs of the suit and failed to appreciate the different Roles assigned to the Respondents in the Process Compulsory Acquisition.

h. The Applicant's intended appeal was arguable and had overwhelming prospects of success as evidenced by the ground in the Memorandum of Appeal.(Attached and marked as "LM – 4" a copy of the draft Memorandum of Appeal.)

i. It was in the interest of justice that the time for filing and serving of the Notice of Appeal be enlarged for the Applicant.

j. The 2nd Respondent/Applicant was reasonably and justifiably apprehensive that unless this matter was dealt with urgently, it stood the risk of suffering substantial loss and irreparable damage as execution has commenced and the 2nd Respondent/Applicant risks attachment and sale of their property in fulfilment of the Judgement and Orders of the trial court.

k. There was the real danger and likelihood that the Auctioneers would sell and dispose of the Applicants property if the time to file the Notice of Appeal was not enlarged by this Honourable Court.

l. No prejudice would be suffered by the Respondents should this Application leave to file the Notice of Appeal out of time be granted as they can be compensated by an Order of Costs. In any event, one of the parties herein namely, the Honourable Attorney General which was the 5th Respondent had already filed a Notice of Appeal within the stipulated timelines.

m. The application had not been guilty of laches. In view of the foregoing it was only fair and just that this Court certifies this matter as urgent and grant the orders sought herein.

n. On an account of public interest and the balance of convenience clearly weighs in favour of the Applicant in this matter as the Applicant have proved that they have an arguable appeal which was not frivolous. The 2nd Respondent/Applicant stood to suffer irreparable financial loss of public funds.

o. This application had been brought before this Honourable Court without unreasonable delay.

p. This application was made purely on the consideration of justice and fairness.

q. The Affidavit was in support of the prayers on the face of the Notice of Motion Application now before this Honourable Court.

III. The responses by the Petitioner/Applicant

6. The Petitioner responded and opposed the Application through a 40 Paragraphed Replying Affidavit sworn by AL NOOR HABIB JIWAN, the Director of the Petitioner Company on 10th July, 2024 who averred that: -

a. For avoidance of doubt, the Petitioner vehemently opposed the application.

b. This court delivered its Judgment on 26th February 2024 and the last day for filing notice of appeal was 11th March 2024.

c. The Petitioner's advocate served both the Judgment and extracted decree on the parties as follows:

i. On 13th March 2024, the judgment and decree were served upon the parties via email. Annexed in the affidavit and marked as "AJ - 1" a copy of the email dated 13th March 2024.

ii. On 18th March 2024, the decree was served upon the parties physically and the service was acknowledged by affixing the respective official rubber stamps on the documents. Annexed in the affidavit and marked as "AJ - 2" a copy of the decree duly served and received

d. On 7th May, 2024, the Applicant served the Petitioner's. Advocates with a Notice of Appeal dated 30th April 2024. Annexed in the affidavit and marked as "AJ - 3" a copy of the Notice of Appeal.

e. Although the Notice of Appeal was dated 30th April, 2024, it was filed on 4th May, 2024. Annexed in the affidavit and marked as "AJ - 4" was a copy of the filing receipt no. FSED-0150426 indicating that the Notice of Appeal was filed on 4th May 2024.

f. The Notice of Appeal was filed 71 days after the judgment which is way beyond the 14 days allowed in the law.

g. Upon being served with the Notice of Appeal, since the same was filed out of time and without leave, the Petitioner filed an application in the Court of Appeal under Rule 86 of the Court of Appeal Rules, 2022 being "Civil Appeal Application No. E053 of 2024: Alba Petroleum Limited – Versus - Kenya National Highways Authority & 4 Others" seeking to strike out the Notice of Appeal. Annexed herewith and marked as "AJ - 5" was a copy of the application filed in the Court of Appeal.

h. The Court of Appeal application was served upon the Applicant's advocates through email on 14th May 2024 at 6.17AM. Specifically, the Applicant's advocates, Dulo & Company Advocates were served via their email address indicated in their pleadings which are: aegisofjusticekenya@gmail.com and info@dulolaw.co.ke. Annexed in the affidavit and marked as "AJ - 6" was a copy of the email of service dated 14th May 2024.

i. Instead of responding to the Court of Appeal application, on 15th May 2024, just one day after being served with the Court of Appeal application, the Applicant filed the present application seeking to enlarge time. Annexed herewith and marked as "AJ - 7" was a copy of the filing Receipt No. FSED-0151654 indicating that the Applicant's application dated 30th April 2024 was actually filed on 15th May 2024.

j. The application sought to enlarge time was therefore filed in reaction to the Court of Appeal application with the motive to short-circuit and defeat the same. The Applicant did not have any genuine intention of seeking enlargement of time before this court.

k. In order to hide its motive of defeating the Court of Appeal application, the Applicant deliberately back-dated its application to 30th April, 2024 so as to appear like the same had been prepared earlier. If it was true that the application had been prepared on 30th April 2024, the same would have been filed immediately because it was brought under certificate of urgency and not on 15th May 2024 which was 15 days from the date in which it was dated.

l. Further, it could not be true that the application was prepared and dated on 30th April, 2024 because it contained the Notice of Appeal lodged on 3rd May 2024 (three days later) which was marked as Exhibit "LM – l" at page 21 of the application as well as the consent dated 2nd May 2024 (two days later) which was marked as Exhibit "LM – 3" at page 26 of the application. The fact that the application contained documents which came into existence long after 30th April 2024 was a clear indication that the application was deliberately backdated so as to conceal the fact that it was actually prepared and filed on 15th May 2024 after the Petitioner had filed the Court of Appeal application which was served upon the Applicant's advocates just a day earlier on 14th May 2024.

m. There was no way the deponent of the supporting affidavit, Lawrence Maruti could have sworn his affidavit on 30th April 2024 and annexed in the affidavit documents which came to existence in future, that is on 2nd May 2024 and 3rd May 2024. Where did Lawrence Maruti get those exhibits yet as at 30th April 2024 when he swore his affidavit the consent dated 2nd May 2023 did not exist and the Deputy Registrar had not signed the Notice of Appeal which the Deputy Registrar signed on 3rd May 2024.

n. The foregoing was a clear manifestation of mischief on the part of the Applicant which disentitled him to benefit from the discretion of this court.

o. The moment the propriety of the Notice of Appeal was challenged in the Court of Appeal through the application seeking to strike it out, this Honourable Court ceased to have jurisdiction to hear any question touching on whether the Notice of Appeal should be deemed as properly filed. As it was, the question of whether the Notice of Appeal should be allowed to stand or not is pending determination in the Court of Appeal in "Civil Appeal Application No. E053 of 2024: Alba Petroleum Limited – Versus - Kenya National Highways Authority & 4 Others". Accordingly, this Honourable Court must show deference to the Court of Appeal by desisting from determining the any question touching on the validity of the Notice of Appeal.

p. Accordingly, this Honourable Court lacked jurisdiction to approve and sanction the Notice of Appeal by admitting the same out of time. This Honourable Court must show deference to the Court of Appeal by downing its tools to let the Court of Appeal determine the issue in dispute which was whether the Notice of Appeal should be allowed to stand or not.

q. This Court would be embarrassed should it insist on hearing the matter and then arrive at a decision which was in conflict with the Court of Appeal. To avoid such embarrassment and possible conflict of decisions, the only option was for this Honourable court to down its tools and let the Court of Appeal, which was superior, determine the question of whether the Notice of Appeal should be allowed to stand or not.

r. But even if the application were to be considered on its merits, the same must be dismissed because the reason given by the Applicant for the late filing of the Notice of Appeal was not valid or justified at all.

s. The Applicant blamed its former advocates, Rachier & Amollo LLP for the late filing of the Notice of Appeal and contended that the said firm notified the Applicant of the judgment after the appeal period had lapsed. At paragraph 6 of the supporting affidavit, the Applicant stated that it was notified of the judgment on 3rd April 2024. However, the blame heaped on the law firm of Messrs. Rachier & Amollo LLP was just a mere excuse. The Applicant was using its former advocates as a mere scapegoat to hoodwink the court into believing that the Applicant had a genuine reason for the late filing of the Notice of Appeal.

t. The Applicant only filed the Notice of Appeal on 4th May, 2024 which was over one month after it allegedly became aware of the judgment. The Applicant had not explained that delay and the blame on Messrs. Rachier & Amollo LLP was just a lame excuse.

u. Further, the Applicant was aware that the Judgment in this case was due for delivery on 31st January 2024. The said judgment date was given in the presence of the Applicant's counsel, Ms. Maina way back on 4th October 2023. However, because the Judgment was not ready on 31st January 2024, it was deferred to be delivered on notice.

v. The fact that the date, when the Applicant was expecting the Judgment had passed, it was upon them to follow up with Messrs. Rachier & Amollo LLP to ascertain whether the same had been delivered or not. After all, the case belonged to the client and not the advocate hence the client should be proactive to follow up with the advocate and not vice versa. The Applicant could not blame Rachier &Amollo LLP for its own failure to follow up on the Judgment especially because the date when the same was due to be delivered had passed.

w. In any event, the letter dated 3rd April 2024 by Messrs. Rachier & Amollo LLP only forwarded copy of the Judgment and decree. It did not mean that the said firm had not informed the Applicant of the outcome of the Judgment before forwarding the actual copy thereof.

x. Vide a letter dated 19th April 2024, addressed to, among others, the Applicant's Director General, the. Petitioner's advocates, Oluga & Company Advocates, notified the Applicant to comply with the Judgment. The said letter was received in the Applicant's Records Management Office on 23rd April 2024 by a person identified as Pastina B. who stamped and signed the letter in acknowledgement. If the Applicant had genuine intention to appeal, the Applicant could have filed the Notice of Appeal and the application to enlarge time immediately. The Applicant waited until 4th May, 2024 to file the Notice of Appeal and until 4th May 2024 to file the application. The Applicant's delay could not be blamed on Messers. Rachier & Amollo LLP as the Applicants wanted the court to believe.

y. The Notice of Appeal which the Applicant sought to ratify was fatally defective. The same was filed online and paid for on 4th May 2024 yet it was lodged and signed by the Deputy Registrar on 3rd May 2024. As at 3rd May 2024, the Notice of Appeal had not been filed and paid for and there was nothing to lodge before the Deputy Registrar. Accordingly, the Notice of Appeal is fatally defective and could not be sanctioned by the Court by granting the orders sought in the application.

z. The Applicant alleged that the Petitioner would not suffer prejudice if the time within which to file Notice of Appeal was enlarged because the 5th Respondent had already filed a Notice of Appeal. The Notice of Appeal by the 5th Respondent was withdrawn by consent and was no longer in force. Annexed in the affidavit and marked as "AJ - 8" was a copy of the consent.

aa. Accordingly, the Notice of Appeal by the 5th Respondent could not be cited as a reason and justification to allow the Applicant to file the Notice of Appeal out of time.

ab. As far as the stay of execution order was concerned, the same should not be granted by the court. In all the 8 grounds in support of the application enumerated from [a] to [h], the Applicant did not plead a single ground in support of stay of execution. On that score alone, the order for stay of execution must be declined.

ac. The closest the Applicant had attempted to justify the order for stay of execution was at paragraph 12 of the supporting affidavit where it was alleged that the Applicant's property would attached and sold. In response, the Applicant was government entity and is insulated from attachment and sale of its property. The Applicant's apprehension was taken care of and therefore there was no reason to stay execution of the Judgment.

ad. The Application to enlarge time as well as the order seeking stay of execution should not be granted as it would be inimical to the public interest to grant those orders. The Government of Kenya was desirous of building the Mombasa Gate Bridge and the suit property was one of the parcels of land that was required for the construction. Annexed in the affidavit and marked

as "AJ - 9" was a true copy of a letter dated 3rd July, 2024 by KeNHA which confirmed that the Government was keen to progress with the construction of the bridge.

ae. If the judgment was stayed, there would be delay in paying out compensation with the resultant consequence that the construction of the more important and most anticipated and awaited Bridge will delay. This court should not be used by KENHA to delay Government projects. The Respondents should pay the due compensation to the Petitioner as ordered by this court to enable the construction of the Bridge to continue.

af. The Applicant did not serve upon the Petitioner the present application in good time. It was alleged that the Petitioner's advocate was served via email. The said affidavit showed that the email address used to effect service was olungaadvocates@gmail.com which was not the email address of Messrs. Oluga and Company Advocates which was olugadvocates@gmail.com as clearly indicated in the said firm's pleadings. The Petitioner's advocates email does not have the letter "n" or double "aa" in it. Annexed in the affidavit and marked as "AJ - 10" was a copy of the affidavit of service.

ag. The application was finally served upon the Petitioner's advocates using the correct email address, olugadvocates@gmail.com on 24th June 2024 hence tis Replying Affidavit. Annexed in the affidavit and marked as "AJ - 11" was a copy of the email dated 24th June, 2024.

ah. The Applicant was not only guilty of delay in filing the notice of appeal and the application to enlarge time but also in serving the said application.

ai. Further, the Applicant had no genuine intention to appeal but was only intent on delaying compliance with the judgment. The issues raised by the Applicant as its ground of appeal were not raised in response to the Petition. For instance, the question of whether the Petitioner owned the suit property was clearly settled by the documents filed in court by the NLC and the Attorney General. The Applicant never filed any documents to prove that the Petitioner was not the owner of the suit property.

IV. The Notice of Preliminary objection by the Petitioner

7. While raising to object the application dated 30th April, 2024 by the 2nd Respondent, the Petitioner filed a four (4) paragraphed Notice of Preliminary objection dated 10th July, 2024 under the following grounds: -

a. This Honourable Court was no longer seized with jurisdiction to hear and determine the question on whether the 2nd Respondent's Notice of Appeal dated 30th April 2024 should be admitted out of time because the matter is already before the Court of Appeal vide Civil Appeal Application No. E053 of 2024: Alba Petroleum Limited – Versus - Kenya National Highways Authority & 4 Others in which the Petitioner herein (the Applicant in the Court of Appeal) filed an application dated 9th May 2024 seeking to strike out the Notice of Appeal on the basis that it was filed out of time.

b. Since the question touching on the propriety of the said Notice of Appeal and whether the same should be struck out or allowed to stand was already before the Court of Appeal for determination, this Honourable court lacks jurisdiction to approve and sanction the Notice of Appeal by admitting the same out of time.

c. This Honourable Court must show deference to the Court of Appeal by downing its tools to let the Court of Appeal determine the issue in dispute which is whether the Notice of Appeal should be allowed to stand or not.

d. This Court will be embarrassed should it insist on hearing the application and then arrive at a decision which is in conflict with the Court of Appeal. To avoid such embarrassment and possible conflict of decisions, the only option is for this court to down its tools and let the Court of Appeal, which is superior, determine the question of whether the 2nd Respondent's Notice of Appeal should be allowed to stand or not.

IV. Submissions

8. On 10th June, 2024 while the Parties were present in Court, they were directed to have the Notice of Motion application dated 30th April, 2024 be disposed of by way of written submissions. Pursuant to that on 24th June, 2024 a ruling date was reserved on 17th October, 2024 by the Honourable Court accordingly.

A. The Written Submissions by the 2nd Respondent

9. The 2nd Respondent through the firm of Messrs. Dulo & Company Advocates filed their written submissions dated 30th April, 2024. The Learned Counsel commenced their submissions by stating that before the Honourable Court was the notice of Motion application for enlargement of time to file a Notice of Appeal and stay of execution pending the intended Appeal from the Judgment made by Honourable Justice L.L. Naikuni delivered on the 26th day of February, 2024 in Environment and Land Court Case No. 36 of 2022 and Decree dated 13th March, 2024 all orders consequent thereto in which the 2nd Respondent/Applicant sought for the above stated reliefs.

10. The Learned Counsel submitted that this Honourable Court delivered a Judgment on the 26th day of February, 2024 issuing an order for injunction, payment of full compensatory amounts arising from the award on compulsory acquisition, payment of general and aggravated damages and costs of the suit in favour of the Petitioner/1st Respondent. The 2nd Respondent/Applicant being aggrieved and dissatisfied with the Judgment of Hon. L.L. Naikuni dated 26th February, 2024 was desirous to Appeal on the decision in its entirety and filed its Notice of Appeal dated 30th April, 2024.

11. The 2nd Respondent/Applicant made these submissions in support of its Application for leave to file its Appeal and sought a stay of execution pending hearing and determination of the intended Appeal. The 2nd Respondent/ Applicant had presented its draft grounds of Appeal to which it was confident were arguable and had overwhelming chances of success. The 2nd Respondent/Applicant was reasonably and justifiably apprehensive that unless this matter was dealt with urgently and leave to file the Notice of Appeal out of time granted, it stood the risk of suffering substantial loss if orders to stay of execution were not granted.

12. The Learned Counsel relied on the following two (2) issues for determination. Firstly, whether the court should grant the prayer of extension of time. The Learned Counsel submitted on the issue of the guiding principles for enlargement of time that the 2nd Respondent made this application for enlargement of time to file its Notice of Appeal dated 30th April, 2024. According to the Learned Counsel the delay in filing and serving Notice of Appeal dated 30th April, 2024 was not inordinate and a justifiable mistake occasioned by the Applicant's previous Advocates Messrs. Rachier and Amollo, LLP Mayfair Centre 5th floor Ralph Bunche road P.O.BOX 55645 - 00200 Nairobi, who notified the Applicant of the outcome of the judgment way after the Appeal window had lapsed.

13. The Learned Counsel asserted that the Applicable law for enlargement of time was the provision of Section 95 of the *Civil Procedure Act*, Cap. 21 and Order 50 Rule 6 of the Civil Procedure Rules, 2010 that allows for the court to exercise its discretion to enlarge time where period fixed or granted has expired. The court in the case of: "Moughal – Versus - Mwai (Miscellaneous Application E035 Of 2021) [2022] Kehc 10583 (KIr) (26 April 2022) (Ruling)" highlighted the principles developed in "Vishva Stone Suppliers Company Limited – Versus - RSR Stone case" as the applicable principles for enlargement of time can be summarized as follows:-

    i. "Extension of time is not a right of a party but an equitable remedy that is only available to a deserving party at the discretion of the court.

    ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.

    iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.

    iv. Whether there is reasonable reasons for the delay, the delay should be explained to the satisfaction of the court.

    v. Whether there will be any prejudice suffered but the Respondent of the extension if the extension is granted.

    vi. Whether the application has been brought without undue delay; and

    vii. Whether in certain cases, like election petitions, public interest should bed a consideration for extending time."

14. The Learned Counsel further submitted that additionally in the case of:- "Moughal – Versus - Mwai (Supra)", relied on the case of "First American Bank of Kenya Limited – Versus - Gulab P. Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002]1 EA 65", where the Court set out the factors to be considered in deciding whether or not to grant such an application:

    i. the explanation if any for the delay;

    ii. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;

    iii. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favour of the applicant

15. The 2nd Respondent/Applicant in its Notice of Motion dated 30th April, 2024 provided reasons to justify the inadvertent and justifiable mistake occasioned by its previous advocates M/s. Rachier and Amollo, LLP Mayfair Centre 5th floor Ralph Bunche road P.O. Box 55645 - 00200 Nairobi who failed to notify the Applicant of the outcome of the Judgment and only did so after the expiry of the statutory timelines necessitating this present Application. The 2nd Respondent/Applicant has been keen to prosecute its matter and has taken steps to have to file its intended Appeal. The 2nd Respondent/ Applicant promptly initiated a change of advocate post judgment and instructed the law firm of Messrs. Dulo & Company Advocates, Elgon Court, Suite D3, no 1 Ralph Bunche road, Upperhill, P. O Box 48978-00100, Nairobi to file its intended appeal on its behalf. Additionally, the Applicant had requested for certified copies of the judgment as well as typed proceedings vide a letter to the Deputy Registrar dated 30th April, 2024 and filed its Notice of Appeal Dated 30th April, 2024.

16. It was their further submission that the 2nd Respondent brought this application in the interest of justice and with consideration of the overriding objectives of the court. The Application was not frivolous and was not aimed at occasioning delay but aimed at achieving a fair hearing on behalf of the 2nd Respondent/ Applicant whose previous advocates failed to file a Defence on its behalf and Judgment was therefore entered against it unheard.

17. It was further the submission of the Learned Counsel that no prejudice shall be suffered by the Respondents that could not be compensated by an order of cost and in any event the 5th Respondent, the Honourable Attorney General, had already filed a Notice of Appeal in the matter within the stipulated timelines. Having fulfilled the above-mentioned preconditions for expansion of time, the Court be pleased to grant the order as prayed.

18. Secondly, on whether the court should grant orders of stay of execution. On the guiding principles for the grant of stay orders, the Learned Counsel submitted that the 2nd Respondent sought for the Stay of Execution pending the Appeal from the Judgment and Decree made by Honourable Justice L.L. Naikuni delivered on the 26th day of February, 2024 and Decree dated 13th March, 2024 in Environment and Land Court Case No. 36 of 2022 and all orders consequent thereto. The 2nd Respondent/Applicant relied on Order 42 Rule 6 of the Civil Procedure Rules, 2010, which gives this Honourable Court the mandate to grant a stay of execution upon the application by a party that was intending to appeal. The provision of Order 42 Rule 6(2) gives the circumstances under which a court may grant stay of execution.

19. For the Court to grant stay of execution the 2nd Respondent/Applicant had to satisfy certain conditions, Musyoka, J in HGE v SM [2020] eKLR stated that:

> " 9. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely
>
> (a) that substantial loss may result to the applicant unless the order is made,
>
> (b) that the application has been made without unreasonable delay, and
>
> (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See Antoine Ndiaye vs. African Virtual University [2015] eKLR"

20. These three conditions were also referred to in the case of "Amal Hauliers Limited – Versus - Abdulnasir Abukar Hassan [2017] eKLR" where Korir, J stated thus:

> " 16. This is an application that invokes the discretionary powers of the court. Of course discretionary powers must be exercised judiciously. It is brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which empowers this court to stay execution, either of its judgement or that of a court whose

decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the Rule 6(2) as follows:

> "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."

21. The Learned Counsel argued that the Petitioner/1st Respondent on 13th March, 2024, obtained a decree and order from the court as against the 2nd Respondent/Applicant and the other Respondents upon which the 2nd Respondent/Applicant was apprehensive of a pending execution by the Petitioner. In the case of "Machira T/A Machira & Co. Advocates –Versus - East African Standard [2002] eKLR" the court held:

> " ..if the applicant cites as a ground substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant's business (e.g. appeal or intended appeal).

22. On the first limb, the 2nd Respondent/Applicant adduced that it would suffer substantial loss resulting from the orders under part (e) of the Judgment dated 26th February, 2024 and Decree dated 13th March, 2024 where it was ordered to make full, adequate, fair, reasonable and just compensation on the Petitioner/ 1st Respondent for properties known as MSA/MS/ Block 1/107 (Mombasa/Mainland South/Block 1/107) and MSA/MS/Block 1/108 (Mombasa/Mainland South/Block 1/108) situate in Likoni in Mombasa County within the next thirty (30) days from the delivery of the Judgment yet the amount was still to be determined and remained unknown to both the Applicant and Respondents as no award had been issued.

23. The Learned Counsel further submitted that the 2nd Respondent/ Applicant in its intended Appeal and draft Memorandum of Appeal intended to appeal on the grounds that the Compulsory Acquisition process was yet to be complete and it could only be complete once an award was issued and a payment voucher presented by the National Land Commission on behalf of any acquiring authority. Payment of compensatory amounts without finalization of the Compulsory Acquisition process from the National Land commission was detrimental to the 2nd Respondent/Applicant, which may not recover the said sums as if the Appeal succeeds.

24. Additionally, it was the Learned Counsel's submission that the Process of Compulsory Acquisition was revocable and up until an award was issued and possession was taken by itself, the Paid out compensatory awards may not be recoverable, leading to a substantial loss on its part as the 2nd Respondent/Applicant contends having taken possession of the property. On the second limb, part (i) of the Judgment dated 26th February, 2024 and Decree dated 13th March, 2024 the Petitioner/1st

Respondent is awarded general and exemplary damages at 5% of the value of the suit property arising from the delay in the payment of the award of compensation from the compulsory acquisition of the suit land.

25. The 2nd Respondent/ Applicant in it was intended Appeal contends the award in general and exemplary damages at 5% of the value of the property as opposed to the award being against value of alleged destroyed property. It was the Learned Counsel's submission that the payment of the said aggravated and general damages without proper valuation of alleged destroyed property and as against the value of the property was a sufficient ground for appeal, that payment of any such compensatory amounts would render the appeal nugatory.

26. On the third limb, the 2nd Respondent/Applicant disputed the award of cost under part (j) of the Judgement and Decree 1st, 2nd, 3rd, 4th and 5th Respondents jointly and severally, ignoring the different roles played by the different institutions and degrees of contribution to the alleged contravention. The Learned Counsel submitted that if any such costs were as payable at this stage they may not be recoverable if the Appeal succeeded. The payment of the above noted Compensatory award, general and aggravated damages, and costs among other awards to the Petitioner, are of such magnitude that if paid over would adversely affect the Applicant's operations and prejudice the Applicant.

27. To buttress on these points, the Learned Counsel relied on the case of "Victory Construction – Versus - BM (a minor suing through next friend one PMM) [2019] eKLR" Odunga, J cited with approval the case of "Century *Oil Trading Company Ltd – Versus - Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007*" where Kimaru, J stated thus:

> "Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the Respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the Respondent refunding the decretal sum in the event that the Applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his Judgement."

28. Similarly, in the case of "Kenya Shell Limited – Versus - Benjamin Karuga Kibiru & Another [1986] eKLR" the court stated that:

> "Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented."

29. The 2nd Respondent having sufficiently demonstrated the financial loss anticipated and in protection of the public funds it was in public interest that the order for stay of execution was issued. The Judgment, which the 2nd Respondent/Applicant has appealed against, was delivered on 26th February, 2024. The 2nd Respondent/Applicant being aggrieved with the Judgment of the Court decided to appeal. Consequently, the 2nd Respondent/Applicant made this application seeking leave of the Court to serve the Notice of Appeal out of time and obtain a stay of execution in this court pending hearing and determination of the Intended Appeal.

30. The 2nd Respondent/Applicant filed its the Notice of Appeal dated 30th April, 2024.The Notice of Appeal was therefore deemed duly filed on 3rd May 2024. The present Application had been filed, a period of three (3) months after the Judgment was delivered. The delay was not inordinate and sufficient reasons for the delay have been given and explained. It was the 2nd Respondent/Applicant's

submission that the undue delay was orchestrated by a delay in communicating the outcome of the Judgment from their previous advocates M/s. Rachier & Amollo, LLP Mayfair Centre 5th floor Ralph Bunche Road P.O. Box No. 55645 - 00200 Nairobi.

31. The Learned Counsel submitted that they made reasonable and consistent effort to follow up the case and had adduced evidence in their Notice of Motion application of receipt of a copy of the Judgment way after the period of Appeal had lapsed. Upon receipt of the copy of Judgment they promptly undertook to request for a change of advocates and filed their Notice of Appeal dated 30th April, 2024. The 2nd Respondent/Applicant prayed that the mistakes of their Advocate should not be visited upon them as they intend to prosecute the matter and challenge the ex-parte judgment against them.

32. It was the Learned Counsel's submission that the Applicant had been keen to prosecute the matter however, its Advocates failed to file a Defence and update on the delivery of the Judgment even after various follow ups. The delay was inadvertent and not occasioned by willful neglect. They therefore beseerched this Honourable court not to visit hardship on the Applicant and instead allow for an extension of time to file its Appeal as well as a Stay in the Execution and allow for it to make its case in the interest of justice for both parties.

33. Indeed, it was the decision of the court in "Phillip Chemwolo & Another – Versus - Augustine Kubende [1986] eKLR" where Apaloo, J.A enunciated the broad equitable approach in these sort of cases as follows:

> " I think a distinguished equity Judge has said: 'Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on the merits'. I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

34. The Learned Counsel submitted that they invoked the wide judicial discretion of this Honourable court and state that from the foregoing, it was only fair and just for the court to exercise its discretion to extend time for the Applicant to file its intended Appeal and stay the execution process rely on the case of "Pithon Waweru Maina – Versus – Thuka Mugiria [1983] eKLR" where the Court of Appeal stated that stated the following with regards to judicial discretion in setting aside ex parte orders:

> " The court has a very wide discretion under the order and rule and there are limits and restrictions on the discretion of the judge except that if the judgment is varied it must be done on terms that are just: Patel v EA Cargo Handling Services Ltd [1974] EA 75, 76 BC.
>
> This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice: Shah – Versus - Mbogo [1969] EA 116,123 BC Harris J.
>
> The matters which should be considered, when an application is made, were set out by Harris J in Jesse Kimani – Versus -McConnel [1966] EA 547, 555 F which included, among other matters, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any material factor which appears to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable to set aside or vary the

judgment, upon terms to be imposed. This was approved by the former Court of Appeal for East Africa in Mbogo – Versus - Shah [1968] EA 93, 95 F.

There is also a decision of the late Sheridan J in the High Court of Uganda in Sebei District Administration – Versus - Gasyali [1968] EA 300,301,302 in which he adopted some wise words of Ainley J, as he then was, in the same court, in Jamnadas Sodha – Versus - Gordandas Hemraj (1952) 7 ULR 7 namely:

> "The nature of the action should be considered, the defence if one has been brought to the notice of the court, however, irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court."

And, because it is a discretionary power it should be exercised judicially, or in the Scots phrase, used by Lord Ainslie in Smith v Middleton [1972] SC 30:

> "... in a selective and discriminatory manner, not arbitrarily or idiosyncratically,"

or otherwise, as Lord Diplock said in his speech in Cookson v Knowles [1979] AC 556:

> "...the parties would become dependent on judicial whim..."

35. The Learned Counsel averred that it was indeed the decision of the court in "Hunker Trading Company Limited – Versus - Elf Oil Kenya Limited [2010] eKLR" that the Court will not, in the exercise of its mandate under *the Constitution* and the *Civil Procedure Act*, be encumbered with technicalities of procedure in the dispensation of justice but shall endeavor to determine the substantive issues, notwithstanding the technicalities of procedure therein. It was therefore the Learned Counsel's submission that this Honourable Court should proceed to hear the 2nd Respondent/Applicants and rule on this Application on basis of merit without undue regard to procedural technicalities. Thus, according to the Counsel, the Application for stay of execution was filed expeditiously, timeously and without any unreasonable delay.

36. In conclusion, the Learned Counsel submitted that the 2nd Respondent to their believe had demonstrated that it had met the standard of the orders of expansion of time under the provision of Order 50 Rule 6 and granting the stay under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 hence the 2nd Respondent/Applicant ought to be afforded an opportunity to prosecute the intended appeal lest the appeal be rendered nugatory.

37. It was the Learned Counsel's contention that the court should exercise its discretion and with consideration to the special circumstances in the case, not prevent an appeal in the matter as good grounds have been established in the Application as well as the 5th Respondent has equally filed a Notice of Appeal in the matter, that eliminates any potential prejudice upon the Petitioner. The Court be persuaded by the case of "Sunrise *Hauliers Limited – Versus -Motaroki (Appeal E019 of 2023*) [2024] KEELRC 631 (KLR) (29 February 2024) (Ruling)" where the court echoed the decision of the Court of Appeal in "Butt – Versus - Rent Restriction Tribunal [1982] KLR 417" which gave guidance on how a court should exercise discretion and held that: -

> " 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

38. According to the Learned Counsel, no prejudice would be or was likely to be suffered by the Petitioner if a stay was granted as the 5th Respondent the Honourable Attorney had already filed its Notice of Appeal within the stipulated timelines. The upshot of it all, he argued that the application was made in the interest of justice and was not frivolous.

B. The Written Submissions by the Petitioner

39. The Petitioner through the Law firm of Messrs. Oluga & Company Advocates filed their written submissions dated 10th July, 2024. Mr. Oluga Advocate commenced their submissions by stating that the submissions were on the 2nd Respondent's application dated 30th April 2024. The Petitioner opposed the application by relying on the following documents:

i. Notice of Preliminary objection dated 10th July, 2024

ii. Replying Affidavit sworn by ALNOOR HABIB JIWAN on 10th July 2024

40. The Learned Counsel submitted that the 2nd Respondent's application must fail because of the following six (6) reasons:-

41. Firstly, this Honourable Court was no longer seized with jurisdiction to hear and determine the application. The Learned Counsel submitted that this Honourable Court lacked jurisdiction to hear and determine the application because of the following reasons:

i. The question on whether the 2nd Respondent's Notice of Appeal dated 30th April 2024 should be admitted out of time because the matter is already before the Court of Appeal vide "Civil Appeal Application No. E053 of 2024: Alba Petroleum Limited – Versus - Kenya National Highways Authority & 4 Others" in which the Petitioner herein (the Applicant in the Court of Appeal) filed an application dated 9th May 2024 seeking to strike out the Notice of Appeal on the basis that it was filed out of time.

ii. Since the question touching on the propriety of the said Notice of Appeal and whether the same should be struck out or allowed to stand is already before the Court of Appeal for determination, this Honourable court lacks jurisdiction to approve and sanction the Notice of Appeal by admitting the same out of time.

iii. This Honourable Court must show deference to the Court of Appeal by downing its tools to let the Court of Appeal determine the issue in dispute which is whether the Notice of Appeal should be allowed to stand or not.

iv. This Court will be embarrassed should it insist on hearing the application and then arrive at a decision which is in conflict with the Court of Appeal. To avoid such embarrassment and possible conflict of decisions, the only option is for this court to down its tools and let the Court of Appeal, which is superior, determine the question of whether the 2nd Respondent's Notice of Appeal should be allowed to stand or not.

According to the Learned Counsel, the above issues needed no belabouring.

42. Secondly, on the reason cited by the 2nd Respondent for failing to file the notice of appeal within time is not justified, the Learned Counsel submitted that the Notice of Appeal was filed 71 days after the Judgment which was way beyond the 14 days allowed in the law. The reason cited by the 2nd Respondent for failing to file the notice of appeal within time was that the 2nd Respondent's former advocates never notified the 2nd Respondent of the judgment until 3rd April 2024. They found the reason to be unjustified because of a number of reasons discussed below.

43. The Learned Counsel went further to stated that the reason given was insincere. If it was true that the 2nd Respondent was notified of the Judgment on 3rd April 2024, the 2nd Respondent could not have delayed until 4th May 2024 to file the notice of appeal. The delay of one month from 3rd April 2024 to 4th May 2024 was not explained. The Applicant blamed its former advocates, Messrs. Rachier & Amollo LLP for the late filing of the Notice of Appeal and contended that the said firm notified the Applicant of the Judgment after the appeal period had lapsed. At paragraph 6 of the supporting affidavit, the Applicant stated that it was notified of the judgment on 3rd April 2024. However, the blame heaped on Messrs. Rachier & Amollo LLP was just a mere excuse. The Applicant was using its former advocates as a mere scapegoat to hoodwink the court into believing that the Applicant had a genuine reason for the late filing of the Notice of Appeal.

44. The Learned Counsel further went to state that they said so because the Applicant only filed the Notice of Appeal on 4th May 2024 which was over one month after it allegedly became aware of the judgment. The Applicant had not explained the delay of one month and the blame on Rachier & Amollo LLP was just a lame excuse. Further, it was upon a party/litigant to follow up with his advocates to find out the status of the case. The Applicant was aware that the Judgment in this case was due for delivery on 31st January 2024. The said Judgment date was given in the presence of the Applicant's counsel, Ms. Maina way back on 4th October 2023. However, because the Judgment was not ready on 31st January 2024, it was deferred to be delivered on notice.

45. The fact that the date when the Applicant was expecting the Judgment had passed, it was upon them to follow up with Rachier & Amollo LLP to ascertain whether the same had been delivered or not. The case belonged to the client and not the advocate hence the client should be proactive to follow up with the advocate and not vice versa. The Applicant could not blame Rachier & Amollo LLP for its own failure to follow up on the judgment especially because the date when the same was due to be delivered had passed.

46. Further the Learned Counsel argued that in any event, the letter dated 3rd April 2024 by Rachier & Amollo LLP only forwarded copy of the judgment and decree. It does not mean that the said firm had not informed the Applicant of the outcome of the Judgment before forwarding the actual copy thereof. Vide a letter dated 19th April 2024, addressed to, among others, the Applicant's Director General, the Petitioner's advocates, Messrs. Oluga &Company Advocates, notified the Applicant to comply with

the Judgment. The said letter was received in the Applicant's Records Management Office on 23rd April, 2024 by a person identified as Pastina B. who stamped and signed the letter in acknowledgement. If the Applicant had genuine intention to appeal, the Applicant could have filed the Notice of Appeal and the application to enlarge time immediately. The Applicant waited until 4th May 2024 to file the Notice of Appeal and until 4th May 2024 to file the application. The Applicant's delay could not be blamed on Messrs. Rachier & Amollo LLP as the Applicants wanted the court to believe.

47. The Learned Counsel submitted that the Applicant was not sincere in that upon being served with the Notice of Appeal, since the same was filed out of time and without leave, the Petitioner filed an application in the Court of Appeal under Rule 86 of the Court of Appeal Rules, 2022 being "Civil Appeal Application No. E053 of 2024: Alba Petroleum Limited – Versus - Kenya National Highways Authority & 4 Others" seeking to strike out the Notice of Appeal. The Court of Appeal application was served upon the Applicant's advocates through email on 14th May 2024 at 6.17AM

48. Instead of responding to the Court of Appeal application on 15th May, 2024 just one day after being served with the Court of Appeal application, the Applicant filed the present application seeking to enlarge time. The application seeking to enlarge time was therefore filed in reaction to the Court of Appeal application with the motive to short-circuit and defeat the same. The Applicant did not have any genuine intention of seeking enlargement of time before this court.

49. In order to hide its motive of defeating the Court of Appeal application, the Applicant deliberately back-dated its application to 30th April 2024 so as to appear like the same had been prepared earlier. If it was true that the application had been prepared on 30th April 2024, the same would have been filed immediately because it was brought under certificate of urgency and not on 15th May 2024 which is 15 days from the date in which it is dated.

50. Further, it could not be true that the application was prepared and dated on 30th April 2024 because it contained the Notice of Appeal lodged on 3rd May 2024 (three days later) which is marked as Exhibit LM - 1 at page 21 of the application as well as the consent dated 2nd May 2024 (two days later) which is marked as Exhibit LM - 3 at page 26 of the application. The fact that the application contains documents which came into existence long after 30th April 2024 was a clear indication that the application was deliberately backdated so as to conceal the fact that it was actually prepared and filed on 15th May 2024 after the Petitioner had filed the Court of Appeal application which was served upon the Applicant's advocates just a day earlier on 14th May 2024.

51. The Learned Counsel went further to state that there was no way the deponent of the supporting affidavit, Lawrence Maruti could have sworn his affidavit on 30th April, 2024 and annexed thereto documents which came to existence in future, that is on 2nd May 2024 and 3rd May 2024. Where did Lawrence Maruti get those exhibits yet as at 30th April 2024 when he swore his affidavit the consent dated 2nd May 2023 did not exist and the Deputy Registrar had not signed the Notice of Appeal which the Deputy Registrar signed on 3rd May 2024. The foregoing was very a clear manifestation of mischief on the part of the Applicant which disentitle him to benefit from the discretion of this court.

52. Thirdly, on the Notice of Appeal being defective. The Learned Counsel submitted that the Notice of Appeal which the Applicant seeks to ratify was fatally defective. The same was filed online and paid for on 4th May 2024 yet it was lodged and signed by the Deputy Registrar on 3rd May 2024. As at 3rd May 2024, the Notice of Appeal had not been filed and paid for and there was nothing to lodge before the Deputy Registrar. Accordingly, the Notice of Appeal was fatally defective and could not be sanctioned by the Court by granting the orders sought in the application.

53. The Applicant alleged that the Petitioner would not suffer prejudice if the time within which to file Notice of Appeal was enlarged because the 5th Respondent has already filed a Notice of Appeal. The Notice of Appeal by the 5th Respondent was withdrawn by consent and was no longer in force. Accordingly, the Notice of Appeal by the 5th Respondent could not be cited as a reason and justification to allow the Applicant to file the Notice of Appeal out of time.

54. According to the Learned Counsel no issue had been given for stay of execution as far as the stay of execution order is concerned, the same should not be granted by the court. In all the 8 grounds in support of the application enumerated from [a] to [h], the Applicant did not plead a single ground in support of stay of execution. On that score alone, the order for stay of execution must be declined.

55. The closest the Applicant had attempted to justify the order for stay of execution was at paragraph 12 of the supporting affidavit where it was alleged that the Applicant's property was attached and sold. In response, the Applicant was government entity and was insulated from attachment and sale of its property. The Applicant's apprehension was taken care of and therefore there was no reason to stay execution of the Judgment.

56. Fourthly, the Learned Counsel submitted that the orders sought were against public interest in that the application to enlarge time as well as the order seeking stay of execution should not be granted as it will be inimical to the public interest to grant those orders. The Learned Counsel said so because the Government of Kenya was desirous of building the Mombasa Gate Bridge and the suit property was one of the parcels of land that was required for the construction. If the Judgment was stayed, there would be delay in paying out compensation with the resultant consequence that the construction of the moreimportant and most anticipated and awaited Bridge would delay. This court should not be used by KENHA to delay Government projects. The Respondents should pay the due compensation to the Petitioner as ordered by this court to enable the construction of the Bridge to continue

57. In conclusion the Learned Counsel stated that further the Applicant had no genuine intention to appeal but was only intent on delaying compliance with the Judgment. The Learned Counsel further submitted so because the issues raised by the Applicant as its ground of appeal were not raised in response to the Petition. For instance, the question of whether the Petitioner owns the suit property was clearly settled by the documents filed in court by the NLC and the Attorney General. The Applicant did not file any documents to prove that the Petitioner is not the owner of the suit property.

V. Analysis and Determination

58. The Honourable Court has considered the application by the 2nd Respondent/Applicant, the responses and the objection by the Petitioner, their written submissions and the relevant provision of *the Constitution* of Kenya, 2010 and the statures.

59. To reach an informed, reasonable and fair decision, the Honourable Court has condensed the subject matter into the following three (3) salient issues that fall for determination: -

    a. Whether the Objection by the Petitioner raises pure points of law

    b. Whether the Preliminary objection is merited and as a result of which whether the Application is non functus officio being an application for striking out the Notice of Appeal has already been filed in the Court of Appeal on the same Appeal the Applicants seek a stay on?

    c. Who bears the Costs of the Notice of Motion application dated 30th April, 2024 and Notice of Preliminary objection dated 10th July, 2024?

Issue No. a). Whether the Objection by the Petitioner meets the threshold by raising pure points of law

60. Under this sub – heading the Honourable Court shall determine whether the Notice of Preliminary objection meets its fundamental threshold – it raised pure points of law and what amounts a preliminary objection. Subsequently, it will then Juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description. Considering the nature of a Preliminary Objection, I will start by analyzing its merits first. For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of a suit or application.

61. According to the Black Law Dictionary a Preliminary Objection is defined as being:

> " In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary....."

62. The above legal preposition has been made graphically clear in the now famous case of "Mukisa Biscuits – Versus - Westend Distributor Ltd [1969] EA 696", the court observed that: -

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue.".

63. The same position was held in the case of "Nitin Properties Limited – Versus - Jagjit S. Kalsi & another Court of Appeal No. 132 of 1989[1995-1998] 2EA 257" where the Court held that;

> " A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion."

64. Similarly, in the case of "United Insurance Company LTD – Versus - Scholastica A Odera Kisumu HCC Appeal No. 6 of 2005(2005) LLR 7396", the Court held that;

> " A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed ."

65. Therefore, from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of "In the matter of Siaya Resident Magistrate Court Kisumu HCCMisc. App No. 247 of 2003" where the Court held that;

> " A Preliminary Objection cannot be raised if any facts has to be ascertained."

66. I have further relied on the decision of "Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR": - as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

(i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

(ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

(iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

67. Taking into account the above findings and holdings of various Courts on what amounts to a preliminary Objection, the Court now turns to the grounds raised by the Petitioner. These were on the grounds that theHonourable Court was no longer seized with jurisdiction to hear and determine the question on whether the 2nd Respondent's Notice of Appeal dated 30th April 2024 should be admitted out of time. Ideally, the Petitioner argued that the matter is already before the Court of Appeal vide Civil Appeal Application No. E053 of 2024: Alba Petroleum Limited vs. Kenya National Highways Authority & 4 Others in which the Petitioner herein (the Applicant in the Court of Appeal) filed an application dated 9th May 2024 seeking to strike out the Notice of Appeal on the basis that it was filed out of time. The Petitioner further objected that since the question touching on the propriety of the said Notice of Appeal and whether the same should be struck out or allowed to stand was already before the Court of Appeal for determination, this Honourable court lacks jurisdiction to approve and sanction the Notice of Appeal by admitting the same out of time.

68. The Petitioner in turn implied that the Honourable Court must show deference to the Court of Appeal by downing its tools to let the Court of Appeal determine the issue in dispute which is whether the Notice of Appeal should be allowed to stand or not. Certainly, the Jurisdiction of Court is extremely fundamental. Thus, in this case, I am satisfied that the objection raises pure points of law in that the preliminary objection as it touches on the jurisdiction of the Court to hear a notice of motion application on stay where there is already an application in the court of appeal touching on the same and whether the Court is "functus officio" as a result of the same.

Issue No. b). Whether the Preliminary objection is merited and as a result of which whether the Application is non functus officio being an application for striking out the Notice of Appeal has already been filed in the Court of Appeal on the same Appeal the Applicants seek a stay on

69. Under this substratum the Honourable Court shall examine the merits of the Preliminary objection by the Petitioner. I have already determined that the Preliminary objection was raised on pure points of law and on its own merit.

70. As stated above grounds raised by the Petitioner which were that this Honourable Court was no longer seized with jurisdiction to hear and determine the question on whether the 2nd Respondent's Notice of Appeal dated 30th April 2024 should be admitted out of time because the matter is already before the Court of Appeal vide Civil Appeal Application No. E053 of 2024: Alba Petroleum Limited vs. Kenya National Highways Authority & 4 Others in which the Petitioner herein (the Applicant in the Court of Appeal) filed an application dated 9th May 2024 seeking to strike out the Notice of Appeal on the basis that it was filed out of time.

71. The Petitioner further objected that since the question touching on the propriety of the said Notice of Appeal and whether the same should be struck out or allowed to stand was already before the Court of Appeal for determination, this Honourable court lacks jurisdiction to approve and sanction the Notice of Appeal by admitting the same out of time.

72. In the instant case, the Applicant herein had invoked Order 42 Rule 6(2) of the Civil Procedure Rules seeking to stay judgment of this Honourable Court delivered on 24th February, 2024 and further seeking to file a Notice of Appeal out of time. According to the 2nd Respondent, the delay in filing the Notice of Appeal was inadvertent and/or a justifiable mistake that can be attributed the 2nd Respondent/Applicant's previous advocates M/s. Rachier and Amollo, LLP Mayfair Centre 5th floor Ralph Bunche road P.O Box 55645 - 00200 Nairobi, failure to provide a copy of the Judgment to themselves. The 2nd Respondent/Applicant made reasonable effort to follow up on the matter and was issued a copy of the judgment way after the prerequisite period for lodging an Appeal had passed. (Attached and marked LM-2 was a copy of the letter from the previous Advocates Dated 3rd April, 2024 Forwarding a copy of the Judgment and Decree).

73. The application elicited a preliminary objection on ground that the court has no jurisdiction to entertain the application for stay to file Notice of Appeal out of time as there is already an application in the Court of Appeal by the Petitioner dated 9th May 2024 seeking to strike out the Notice of Appeal on the basis that it was filed out of time. Going by the law as settled above and on the material before court, the preliminary objection raised herein is on the face of it a pure point of the law capable of finally disposing the application before the court.

74. I take judicial notice though this application was filed on 30th April, 2024 and the Application in the Court of Appeal by the Petitioner was conveniently filed their application on 9th May 2024. Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 empowers the court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal.

75. In the Bench Book on Environment and Land Matters at Page 138, it has been stated that:-

> " The Court of Appeal has categorically stated that in exercise of its discretion, the power should be exercised in such a way as not to prevent an appeal; if there is no overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory; a judge should not refuse stay if there are good grounds for granting it merely because a better remedy may become available to the applicant at the end of the proceedings; the court should consider special circumstances of the case and unique requirements; and the court in exercising its powers under Order XLI Rule 4(2)(b) of the CPR can order security upon application by either party or on its own motion, failure to which will cause the order for stay of execution to lapse (Butt v Rent Restriction Tribunal [1979] eKLR (Nairobi Court of Appeal).

76. The functus officio doctrine is one of the mechanisms by which the law gives expression to the principle of finality. Discussing the same, the Supreme Court in "Raila Odinga & Others – Versus - IEBC & Others [2013] eKLR" cited with approval an excerpt from an article by Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law" (2005) 122 SALJ 832 in the following words: -

> " The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers

only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

77. But in this case, the Petitioner has already gone ahead and invoked a court of higher status the issue of stay and the notice of appeal the Applicants herein intend to file in the Court of Appeal out of time. I want to point out that a court does not merely become functus officio merely because it has delivered a final decision in civil proceedings. The court retains its power to undertake several actions including but not limited to stay, review, execution proceedings and such other acts and steps towards the closure of the file. In the case of:- "Leisure Lodge Ltd – Versus - Japhet Asige and another (2018) eKLR" the court said and held:

> "On the question that this court is functus officio, I do find that a trial court retains the duty and jurisdiction to undertake and handle all incidental proceedings even after a final judgment is delivered provided such proceedings do not amount to re-trying the cause but geared towards bringing the litigation to an end. That is the reason, the court must undertake settlement of a decree, if parties cannot agree, handle applications for stay, review, setting aside and even execution proceeding including applications under Section 94 of the Act. In Mombasa Bricks & Tiles Limited & 5 Others – Versus - Arvind Shah & 7 Others [2018] eKLR, this court said of the doctrine of functus officio:-
>
> > "I understand the doctrine, like its sister, the res- judicata rule to seek to achieve finality in litigation. It is a way of a court saying, 'I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level'. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits.
>
> It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes.
>
> As was held by the court of Appeal in Telkom Kenya Limited – Versus - John Ochanda, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.
>
> Put in the context of the application before me, I do not consider the Decree/holder to ask the court to rehear and make a decision about the disputes in the file on the merits.
>
> I understand the decree-holder /applicant to be saying that the judgment of the court that gave timelines for compliance remains unattended by the judgment debtor. That is not merit based decision on the dispute that has been determined in the suit. The decree holder is merely asking the court to remind the judgment -debtor that they have a judgment debt to settle as far as delivery of share certificates is concerned. That has more to do with moving the file towards closure and making the judgment final rather than re-opening the dispute for determination on the merits. I decline to hold that the court has become functus officio. This is because I consider that there are several proceedings that can only be undertaken after judgment and not before.
>
> The following are just but examples:
> Application for stayApplication to correct the decreeApplication for accountsApplication for execution including garnishee applicationsApplications for reviewApplication under section 34 of the Act

If one was to accede to the position taken by the judgment debtor that the court is functus officio then it would mean that the provisions of law providing for such proceedings are otiose or just decorative and of no substance to the administration of justice. As far as the application before the court is concerned, the court is well seized of power and jurisdiction to entertain and determine same on the merit and based on materials availed".

This court has not changed its views on the point and reiterates that here it has become functus officio as far as application for review is concerned. In any event a Court of Law cannot shut its eyes to an impropriety or indeed injustice just because it has rendered a judgment. To do that would be an abdication of duty and a license for parties to do the unimaginable then shout from rooftops that the court is functus officio because there is a final judgment".

78. It is permissible for a judicial officer to strongly believe in her/his decision but it is expected that once an appeal is preferred, a reversal by the appellate court is one of the probable outcomes. Such appreciation is always a consideration in an application for stay pending appeal. Be that as it may, this Court has been rendered functus officio by the application by the Petitioner in the Court of Appeal.

79. At this juncture the Court finds its hands tied as to how to proceed with the Application by the 2nd Respondent/Applicant being that they have a right to appeal and that the Court has the obligation to stay the execution but on the other hand the Petitioner have invoked the jurisdiction of a Court of higher status than this Honourable Court rendering this Honourable Court functus on the issue of stay of execution until the determination of the Civil Appeal Application No. E053 of 2024: Alba Petroleum Limited – Versus - Kenya National Highways Authority & 4 Others.

80. What does it mean that this Court is functus officio on this issue and the current application. The doctrine of functus officio was considered by the Court of Appeal in "Telkom Kenya limited – Versus - John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited) [2014] eKLR", where the court held that –

> " Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon."

81. The Supreme Court of Kenya in the case of "Raila Odinga & 2 Others – Versus - Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR", cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, "The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832 which reads: -

> " The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

82. In this instance case, the invocation of the Court of Appeal being a superior court in stature has rendered this Honourable Court functus officio in trying to determine the Notice of Motion application dated 30th April, 2024 with fear that it may deliver a decision that will contradict that of the Appellate Court and in turn make a mockery of the judicial process. So as it is the Court pens down and proceeds to strike out the Notice of Motion application dated 30th April, 2024.

83. Further the Court takes judicial notice that the Counsel representing 2nd Respondent/Applicant ostensibly took over this matter from the previous Advocates, the Law firm of Rachier & Omollo Advocates, LLP after the Honourable Court had already delivered its Judgement. In so doing, it never sought leave under the provision of Order 9 Rule 9 of the Civil Procedure Rules, 2010 which provides that:-

> " 9. Change to be effected by order of court or consent of parties
>
> When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-
>
> a upon an application with notice to all the parties; or
>
> b upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

84. As has been held in various court decisions, the intent of Order 9 Rule 9 and 10 of the Civil Procedure Rules was to cure the mischief of litigants sacking their advocates at the execution stage or at the point of filing their bill of costs thus denying their advocates their hard-earned fees. There is thus a requirement that all parties including the outgoing advocates should be served. Whilst, there is no doubt the 2nd Respondent is entitled to legal representation but they need to follow the laid down procedure by seeking leave after judgment has been entered, were it that the Applicant would have sought leave this court would not have hesitated to grant leave to have the new advocate come on record. As it is there is no proof that the said firm of Advocates was served. Neither is there a consent filed between the two firms with regards to the change of advocates. I discern that this stand alone legal reasoning renders the application before court invalid. It cannot succeed.

Issue No. c). Who bears the Costs of the Notice of Motion application dated 30th April, 2024 and Notice of Preliminary objection dated 10th July, 2024

85. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of "Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

86. In the present case, the Honourable Court reserves the discretion not to award costs to the Notice of Motion and the Notice of Preliminary objection; the Court being functus officio the parties shall bear their own costs.

V. Conclusion and Disposition.

87. Ultimately in view of the foregoing detailed and expansive analysis to the this rather omnibus application, the Court arrives at the following decision and make the following orders: -

    a That the Notice of Preliminary objection dated 10th July, 2024 be and is hereby found to have merit as is hereby allowed and the same is upheld with no orders as to costs.

    b That the Notice of Motion application dated 30th April, 2024 be and is hereby stayed pending the hearing and outcome of the Court of Appeal "Civil Appeal Application No. E053 of 2024: Alba Petroleum Limited – Versus - Kenya National Highways Authority & 4 Others".

    c. That there shall be no orders as to costs of both the Notice of Motion application dated 30th April, 2024 and the Notice of Preliminary objection dated 10th July, 2024 for the reason that the court has been rendered "functus officio".

    It is so ordered accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, MEANS SIGNED AND DATED AT MOMBASA THIS 17TH DAY OF OCTOBER 2024.

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HON. MR. JUSTICE L. L. NAIKUNI

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

a. M/s. Firdaus Mbula, the Court Assistant;

b. M/s. Machogu Advocate holding brief for Mr. Oluga Advocate for the Petitioner/Respondent.

c. M/s. Ochako Advocate for the 2nd Respondent/Applicant.

d. No appearance for the 1st, 3rd, 4th, 5th and 6th Respondents.