Gidjoy Investments Limited v Zero Point Construction Company Ltd & 63 others (Environment & Land Case 301 of 2018) [2024] KEELC 14156 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14156 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 301 OF 2018

JO MBOYA, J

DECEMBER 19, 2024

BETWEEN

GIDJOY INVESTMENTS LIMITED ..... PLAINTIFF

AND

ZERO POINT CONSTRUCTION COMPANY LTD ..... 1ST DEFENDANT

JOSHUA NGURE NJOROGE ..... 2ND DEFENDANT

RONALD MWERESA KERIND ..... 3RD DEFENDANT

MARAGA MAKORO SAMSON ..... 4TH DEFENDANT

KENNEDY ONDITI ..... 5TH DEFENDANT

ESTHER NYABOKE NYAMACHE ..... 6TH DEFENDANT

MAKORO OMBIVU JOB ..... 7TH DEFENDANT

JAMES MUSHI EBAYA ..... 8TH DEFENDANT

SHADRACK CHAHASI EBAYI ..... 9TH DEFENDANT

JANE WANGUI KAIRU ..... 10TH DEFENDANT

CATHERINE NYANDA WERU ..... 11TH DEFENDANT

EDWARD MUNGAI KANGETHE ..... 12TH DEFENDANT

MARIANA KHITIEYI SETH ..... 13TH DEFENDANT

KASALE LEPARAKUO ..... 14TH DEFENDANT

ALICE NYAMBURA MWANGI ..... 15TH DEFENDANT

RICHARD MACHARIA THONGO ..... 16TH DEFENDANT

EDWARD MACHARIA TAMA ..... 17TH DEFENDANT

NAHASHON WANJALA BARASA ..... 18TH DEFENDANT

FLORENCE MEDZA PENDA ..... 19TH DEFENDANT

JOSEPH WANDABI ..... 20TH DEFENDANT

JANE WAMAITHA MAINA ..... 21ST DEFENDANT

SAMUEL MAINA KAMAU ..... 22ND DEFENDANT

JOSEPH MUCHEKE KAMUA ..... 23RD DEFENDANT

PETER NOROGE KANIKA ..... 24TH DEFENDANT

TOBIKO KALAINE ..... 25TH DEFENDANT

KIKANAI OLE KALAINE ..... 26TH DEFENDANT

ZENTLINE KERUBO SIRIBA ..... 27TH DEFENDANT

PETER GITAU MUIRURI ..... 28TH DEFENDANT

ABDRAHIM CHERUIYOT HUSSEIN ..... 29TH DEFENDANT

SAMUEL PETER MBOGO NJUGUNA ..... 30TH DEFENDANT

VICTOR GEORGE GITAU MUIRUR ..... 31ST DEFENDANT

MESHACK ODIPO ..... 32ND DEFENDANT

SAMUEL EBAYI CHAHASI ..... 33RD DEFENDANT

JOEL NGECHA NJUGUNA ..... 34TH DEFENDANT

JAMES NGUNYU KABIRU ..... 35TH DEFENDANT

GRACE WANJA KAHUTO ..... 36TH DEFENDANT

GABRIEL KARIUKI RUNO ..... 37TH DEFENDANT

PAUL MAINA ..... 38TH DEFENDANT

LILIAN WAMBUI MWANGI ..... 39TH DEFENDANT

SAMUEL KAMAU GITHENDU ..... 40TH DEFENDANT

FRANK TAWA MVAYA ..... 41ST DEFENDANT

FATUMA MWAKA NYASI ..... 42ND DEFENDANT

CHARLES NZIOKI NZUKI ..... 43RD DEFENDANT

ERIC NGALA KAHINDI ..... 44TH DEFENDANT

JOYCE WANJUGU KAMUNYA ..... 45TH DEFENDANT

ZIPPORAH NEKESA WAMALWA ..... 46TH DEFENDANT

EVERLYN ALIVIDZA KIBUSU ..... 47TH DEFENDANT

ALBERT MURIUKI MUOHE ..... 48TH DEFENDANT

EVAN MANYARA NJOGU ..... 49TH DEFENDANT

FELIX AYUYA MIDIKIRA ..... 50TH DEFENDANT

MARY WAITHERERO NJOROGE ..... 51ST DEFENDANT

MICHAEL KABIRU MWAI ..... 52ND DEFENDANT

BELONCE WANGUI KARIUKI ..... 53RD DEFENDANT

SAMUEL MBOGO NJUGUNA ..... 54TH DEFENDANT

GRACE WANJA KAHUTHU ..... 55TH DEFENDANT

GITAU MUIRURI ..... 56TH DEFENDANT

THE CHIEF LAND REGISTRAR ..... 57TH DEFENDANT

THE DIRECTOR OF SURVEY ..... 58TH DEFENDANT

THE PRINCIPAL SECRETARY, MINISTRY OF LANDS AND PHYSICAL PLANNINING ..... 59TH DEFENDANT

THE .ATTORNEY GENERAL ..... 60TH DEFENDANT

THE COUNTY GOVERNMENT OF NAIROBI ..... 61ST DEFENDANT

ALEXANDER HOOPS ANDREW MUGAMBI PATROBAS AWINO (AS OFFICIALS OF SOWESAVA SELF HELP GROUP) ..... 62ND DEFENDANT

ANNA KHASOA (CHAIRPERSON OF SAVANNAH JUA KALI ASSOCIATION) ..... 63RD DEFENDANT

NATIONAL LAND COMMISSION ..... 64TH DEFENDANT

RULING

Introduction And Background:

1. The 67th Defendant/Applicant [hereinafter referred to as the Applicant] has approached the court vide Notice of Motion Application dated the 13th day of November 2024; and wherein the Applicant seeks for the following reliefs;

    i. That this Honorable court do issue an order of stay of proceedings herein pending appeal.

2. The application beforehand is premised on various grounds which have been highlighted in the body thereof. In addition, the application is supported by the affidavit of Seth Ojienda, advocate [hereinafter referred to as the Deponent] sworn on even date. Notably, the deponent of the supporting affidavit has averred inter-alia that the Applicant is desirous to pursue an appeal before the court of appeal and in this regard, same [Applicant] has filed a Notice of appeal.

3. Upon being served with the application under reference, the Plaintiff/Respondent filed a Replying affidavit sworn by Mark Munge and which affidavit was sworn on the 26th November 2024. The deponent of the replying affidavit has highlighted the background attendant to the entire suit and the nature of prejudice that the Plaintiff/Applicant is exposed to. Pertinently, the deponent of the Replying affidavit has averred that the grant of the orders sought shall occasion undue prejudice and grave injustice to the Plaintiff/Respondent.

4. On the other hand, the Honorable Attorney General who is on record for the 63rd to the 65th Defendants has filed grounds of opposition dated the 28th November 2024. Notably, the honorable attorney general has contended that the application beforehand constitutes a deliberate scheme by the Applicant to obstruct, delay or better still, to defeat the expeditious hearing of the suit.

5. Other than the Plaintiff/Respondent and the Honorable attorney general, the rest of the Defendants did not file any response to the application. At any rate, it is imperative to state that the rest of the Defendants intimated to the Court that same are not averse to the orders sought vide the application.

6. The application beforehand came up for hearing on the 2nd December 2024; whereupon the advocates for the parties covenanted to canvass the application by way of written submissions. In this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.

7. The Applicant herein filed written submissions dated the 26th November 2024 whilst the Plaintiff/Respondent filed written submissions dated the 4th December 2024. The Honorable attorney general filed written submissions dated the 28th November 2024. The three [3] sets of written submissions form part of the record of the court.

Parties' Submissions:

Applicant's Submissions:

8. The Applicant filed written submissions dated the 26th November 2024; and wherein the Applicant has adopted the grounds contained in the body of the application. In addition, the Applicant has also reiterated the averments contained in the supporting affidavit. Furthermore, the learned counsel for the Applicant has ventured forward and canvassed three [3] salient issues for consideration and determination by the court.

9. Firstly, learned counsel for the Applicant has submitted that following the dismissal of the Applicant's application dated the 4th November 2024, the Applicant felt aggrieved and dissatisfied. To this end, it has been contended that the Applicant thereafter proceeded to and filed a Notice of appeal to the court of appeal.

10. Additionally, learned counsel for the Applicant has also submitted that the Applicant has also requested for the typed proceedings in respect of the instant matter. For coherence, it was posited that the Applicant has taken the requisite steps towards appealing against the decision of the court.

11. Secondly, learned counsel for the Applicant has submitted that the intended appeal on behalf of the Applicant raises arguable grounds of appeal. In this regard, it has been submitted that what constitutes an arguable appeal arises where there is an issue that ought to be investigated and interrogated by the court of appeal. In any event, learned counsel has posited that even one single bona fide issue would suffice.

12. In support of the submissions concerning the existence of an arguable appeal, learned counsel for the Applicant has cited and referenced various decisions including Stanley Kinyanjui v Tony Keter & 5 Others [2013]eKLR; University of Nairobi v Ricatti Business of East Africa [2020]eKLR; Cooperative Bank of Kenya Ltd v Banking Insurance of Finance Union [2015] and Trans South Conveyors Ltd v Kenya Revenue Authority & Another [2007]eKLR.

13. Thirdly, learned counsel for the Applicant has submitted that unless the orders of stay sought are granted, the Applicant risks being condemned unheard. In any event, learned counsel for the Applicant

has submitted that it is in the interests of justice that the proceedings beforehand be stayed pending the hearing and determination of the intended appeal.

14. Finally, learned counsel for the Applicant has submitted that the application beforehand has been mounted timeously and with due promptitude. To this end, learned counsel has invited the court to take cognizance of the fact that the ruling being appealed against was rendered on the 12th November 2024 whilst the application was filed on the 13th November 2024. In short, it has been contended that the application was filed without unreasonable delay.

15. Arising from the foregoing submissions, learned counsel for the Applicant has implored the court to find and hold that the application beforehand is meritorious and thus ought to be allowed. In this regard, the court has been implored to grant the orders of stay of proceedings in the manner sought.

Plaintiff's/respondent's Submissions:

16. The Plaintiff/Respondent [hereinafter referred to as the Respondent] filed written submissions dated the 4th December 2024. The Respondent proceeded to and highlighted the contents of the replying affidavit sworn by Mark Munge.

17. Furthermore, learned counsel for the Respondent has canvassed and argued three [3] salient issues for consideration and determination by the court. First and foremost, learned counsel for the Respondent has submitted that the dispute beforehand was filed in the year 2018. Nevertheless, it has been posited that despite having been filed more than six [6] years ago, the matter has not proceeded for hearing because of antics deployed by the rest of the Defendants and the Applicant herein. In this regard, learned counsel has invited the court to take cognizance of the chequered history attendant to the subject matter.

18. Secondly, learned counsel for the Respondent has submitted that during the pendency of the instant matter, there have been encroachment[s] onto the suit property and which encroachments have negated the Respondent's rights to the suit property. To this end, it has been submitted that the Respondent has been exposed to undue prejudice and inconvenience.

19. Thirdly, learned counsel for the Respondent has submitted that the Applicant herein has neither established nor demonstrated any prejudice or injustice that same [Applicant] shall be disposed to suffer, if the orders sought are not granted. In any event, learned counsel for the Applicant has submitted that the affidavit in support of the application is deficient and thus incapable of underpinning the grant of an order of stay of proceedings.

20. Finally, learned counsel for the Respondent has submitted that the orders of stay of proceedings are discretionary in nature and hence the court must exercise its discretion judiciously and on the basis of plausible evidence. However, it has been posited that the Applicant herein has not established a basis to warrant the exercise of the discretion of the court.

21. In support of the submissions concerning the circumstances that underpin the grant of an order of stay of proceedings, learned counsel for the Respondent has cited and referenced the decision in the case of Kenya Wildlife Service v Joseph Mutembei [2018]eKLR.

22. In a nutshell, learned counsel for the Respondent has invited the court to find and hold that the application under reference is not only misconceived, but same is intended to defeat the expeditious hearing of the matter. To this end, learned counsel for the Respondent has cited and referenced the provisions of Sections 1A and 1B of the *Civil Procedure Act*,Chapter 21, Laws of Kenya.

Submissions By The Attorney General:

23. The Honorable attorney general [who appears for the 63rd to the 65th Defendants filed written submissions dated the 28th November 2024 and wherein same has reiterated the contents of the grounds of opposition dated the 28th November 2024.

24. Additionally, the honorable attorney general has raised and highlighted three [3] salient issues for consideration and determination by the court. Firstly, the honorable attorney general has submitted that an order of stay of proceedings have serious ramifications and consequences of the hearing of a case and hence such an order [stay of proceedings] ought to be granted in exceptional circumstances and not otherwise.

25. Nevertheless, the honorable attorney general has submitted that the Applicant has neither established nor demonstrated any special circumstances to warrant the grant of the orders of stay of proceedings.

26. To this end, learned counsel has cited and referenced various decisions including Niazons Kenya Ltd v Chaina Road & Bridge Corporation [2001]eKLR and Re-Global Tours and Travel Ltd [Nairobi HCC Winding Up Cause No. 43 of 2000] [UR].

27. Secondly, learned counsel has submitted that insofar as the orders of stay of proceedings are discretionary in nature, it behooves every Applicant, the Applicant herein not excepted, to approach the court with clean hands. Nevertheless, it has been contended that the Applicant herein has not approached the court with clean hands.

28. On the contrary, it has been submitted that the conduct of the Applicant herein and more particularly, the filing of the application for amendment of the defense on the eve of the scheduled hearing, was intended to defeat the hearing.

29. Additionally, it has been contended that the Applicant herein is merely engaging in tactics and manouvres calculated to obstruct, delay and/or defeat the expeditious hearing and disposal of the matter.

30. Thirdly, learned counsel has submitted that it is incumbent upon all parties, the Applicant not excepted, to act with due diligence and to assist the court in achieving the overriding objective[s] in accordance with the provisions of Section 1A and 1B of the *Civil Procedure Act*. According to learned counsel, it was incumbent upon the Applicant to deal with the question of amendment of defense [if any] in good time so as to ensure timely disposal of matters.

31. Be that as it may, learned counsel has contended that the Applicant herein has been guilty of lethargy and want of diligence. In this regard, it has been posited that the grant of the orders of stay herein would be tantamount to sanctioning lethargy, indolence and want of diligence on the part of the Applicant.

32. To underscore the submissions attendant to compliance with the overriding objectives of the court and timely disposal of matters, learned counsel has cited and referenced the decision in Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR, wherein it is stated that the Court of Appeal highlighted the necessity to act with due diligence.

33. Finally, learned counsel has submitted that the application beforehand constitutes and amounts to an abuse of the due process of the court. To this end, it has been contended that the application beforehand has not been made in good faith, but same is intended to scuttle the timely disposal of the matter.

34. To buttress the submissions concerning abuse of the court process, learned counsel has cited and referenced the case of Muchanga Investment Ltd v Safaris Unlimited Africa Ltd [2009]eKLR.

35. Flowing from the foregoing submissions, learned counsel has implored the court to find and hold that the application beforehand is devoid of merits and thus same ought to be dismissed with costs.

Issues For Determination:

36. Having reviewed the application beforehand; the responses thereto and the written submissions filed on behalf of the respective parties, the following issues crystalize [emerge] and are thus worthy of determination;

    i. Whether the Applicant has established sufficient cause/basis or otherwise.

    ii. Whether the Applicant has proved that same shall be disposed to suffer any prejudice or injustice if the orders sought are not granted.

    iii. Whether it is in the interests of justice to grant the orders sought or otherwise.

Analysis And Determination

Issue Number 1 Whether the Applicant has established sufficient cause/basis or otherwise.

37. The Applicant herein filed an application dated the 4th November 2024 and wherein the Applicant sought for leave to file and serve an amended statement of defence. Instructively, the application for leave to amend the statement of defence was filed on the eve of the scheduled hearing of the main suit.

38. Despite the fact that the application was filed on the eve of the hearing of the main suit but taking into account that same [application] was interlocutory in nature, the court was obligated to entertain the application beforehand. For good measure, the application was indeed heard and disposed of vide ruling rendered on the 12th November 2024.

39. Following the delivery of the ruling under reference on the 12th November 2024, the court ordered and directed that the hearing of the main suit shall proceed on the 13th November 2024, same being one of the dates that had hitherto been reserved for the hearing of the main suit.

40. Nevertheless, on the return date, learned counsel for the Applicant intimated to the court that the Applicant had filed a notice of appeal to the court of appeal. Furthermore, learned counsel also intimated to the court that same [applicant] has also filed an application for stay of proceedings.

41. To the extent that the Applicant herein has filed and served a Notice of appeal to the court of appeal in accordance with the Court of Appeal Rules 2022, it suffices to state that the Applicant has indeed satisfied the preliminary steps towards appealing the impugned orders of the court.

42. Consequently and in the premises, the question that does arise and which the court is obligated to answer is whether the filing of the notice of appeal constitutes sufficient cause and/or basis. Instructively, a notice of appeal is deemed to constitute an appeal for all intents and purposes under the provisions of Order 42 Rule 6[4] of the Civil Procedure Rules, 2010.

43. To this end, it is therefore my finding and holding that there is in existence a pending appeal, predicated on the basis of the Notice of appeal filed. However, as to whether or not the appeal predicated on the notice of appeal raises arguable issues or otherwise, is a matter for the Court of Appeal and not this court.

44. I am aware that learned counsel for the Applicant has extensively submitted on the question that the intended appeal raises arguable grounds. Furthermore, counsel has ventured forward and cited several decisions to underpin the submissions on the existence of an arguable appeal.

45. Nevertheless, it is apposite to state and underscore, that proof of an arguable appeal is a critical ingredient provided for in terms of Rule 5[2][b] of the Court of Appeal Rules 2022. However, the said rules do not guide this court whilst dealing with an application for stay of proceedings or at all.

46. On the contrary, the jurisdiction of this court to handle and entertain applications for stay of proceedings or better still, stay of execution pending appeal is underpinned by the provisions of Order 42 Rule 6[1] and [2] of the Civil Procedure Rules 2010.

47. Back to the question of whether the Applicant has established a sufficient cause or basis, it suffices to state that the Applicant has complied with the preliminary steps towards appealing the impugned orders of the court. To this end and taking into account, the provisions of Order 42 Rule 6[4] of the CPR, it is my finding and holding that the Applicant has demonstrated sufficient cause.

Issue Number 2 Whether the Applicant has proved that same shall be disposed to suffer any prejudice or injustice if the orders sought are not granted.

48. Even though the demonstration of sufficient cause is paramount and critical in an application for stay of proceedings and by extension stay of execution pending appeal, it is imperative to underscore that proof of sufficient cause per se does not catapult an Applicant to procuring an order of stay of proceedings.

49. To my mind, the demonstration of sufficient cause constitutes a prelude/percussor to partaking of an order of stay of proceedings. Nevertheless, it is critical to state that once an Applicant has demonstrated sufficient cause, same [Applicant] must venture forward and demonstrate the prejudice or injustice that is likely to arise if the orders sought are not granted.

50. Pertinently, it is important to point out that it is the prejudice or injustice, if any, that may be suffered by an Applicant that underpins the grant of an order of stay of proceedings. In this regard, where an Applicant does not prove undue prejudice or injustice likely to be suffered, then the court is not obligated to grant an order of stay of proceedings.

51. Furthermore, it is not lost on this court that an order of stay of proceedings has serious and grave ramifications on the general hearing and expeditious determination of suits [proceedings]. In this respect, it is an order that must therefore issue only in special and exceptional circumstances.

52. Put differently, an order of stay of proceedings constitutes a serious, grave and fundamental interruption in the right of a party to have his/her matter heard expeditiously and thus such an order can only issue with necessary caution and due circumspection. It is an order that does not issue for the mere asking by a party.

53. To buttress the foregoing exposition of the law, it is apposite to take cognizance of the decision in the case of Global Tours & Travels Global Tours &Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000 persuasively stated thus;

> " As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order

a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously" [emphasis added].

54. Similarly, the ingredients to be considered and circumstances to be taken into account before granting an order of stay of proceedings were also elaborated in the case of Kenya Wildlife Service v James Mutembei (Civil Appeal 40 of 2018) [2019] KEHC 10478 (KLR) (31 January 2019) (Ruling), where the court stated as hereunder;

> (5) I have carefully considered the instant application and the rival submissions by the parties. This is essentially an application for stay of proceedings in Maua CMCC 46 of 2017 James Mutembei v Kenya Wildlife Service pending the hearing and determination of this appeal. Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial.

55. Other than the cited decisions, the grave consequences attendant to the grant of an order of stay of proceedings were highlighted and espoused by the learned authors in Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332, where it stated as follows:

> " The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."
>
> "This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases."
>
> "It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case."

56. Guided by the ratio decidendi espoused in the decision [supra] and taking into account the learned opinion of the authors of Halsbury's Law of England cited in the preceding paragraph, it is evident that an Applicant desirous to partake of an order of stay of proceedings must substantiate the prejudice and injustice that is likely to be suffered. For good measure, the prejudice and injustice to be suffered must be adverted to and highlighted at the foot of the supporting affidavit.

57. Arising from the foregoing, it is therefore incumbent upon the court to interrogate the supporting affidavit filed on behalf of the Applicant herein and to discern whether the Applicant has substantiated the prejudice or injustice to be suffered or otherwise.

58. To start with, it is instructive to note that the affidavit in support of the application beforehand has been sworn by learned counsel for the Applicant. Nevertheless, it is not lost on the court that proof

of prejudice and injustice, [if any] touches on evidential matters and hence same [proof] requires the affidavit of the Applicant who is contending that same is likely to suffer prejudice and injustice.

59. Put differently, substantiation of prejudice and injustice to be suffered if any is a question of evidence which can only be demonstrated by the Applicant. Notably, the Applicant's counsel cannot take it upon himself and swear an affidavit on contentious evidential matters. Quite clearly, the affidavit by learned counsel for the Applicant herein cannot found a basis for the grant of an order of stay of proceedings.

60. To underscore the exposition of the law, that the Applicant's counsel cannot depone to and swear an affidavit on contentious evidential matters, it suffices to reiterate the holding in the case of Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 56 (KLR) (Election Petitions) (26 September 2022) (Judgment).

61. For coherence, the court stated thus;

> 136. This court cannot countenance this type of conduct on the part of counsel who are officers of the court. Though it is elementary learning, it bears repeating that affidavits filed in court must deal only with facts which a deponent can prove of his own knowledge and as a general rule, counsel are not permitted to swear affidavits on behalf of their clients in contentious matters, like the one before us, because they run the risk of unknowingly swearing to falsehoods and may also be liable to cross-examination to prove the matters deponed to.
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> 137. In stating so, we echo the words of Ringera, J in Kisya Investment Limited & others v Kenya Finance Corporation Ltd HCCC No 3504 of 1993 (Unreported) that:
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> "It is not competent for a party's advocate to depone to evidentiary facts at any stage of the suit. By deponing to such matters, the advocate courts an adversarial invitation to step (down) from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions. It is impossible and unseemly for an advocate to discharge his duty to the court and his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case. Besides that, the counsel's affidavit is defective for the reason that it offends the proviso (to) order XVIII rule 3 (1) (now order 19 rule 3 of the Civil Procedure Rules failing to disclose who the sources of his information are and the grounds of his belief."

62. Secondly, even assuming for the sake of arguments only, that learned counsel for the Applicant was at liberty to swear an affidavit on contentious evidential matters in an endeavour to prove prejudice and injustice to be suffered by the Applicant [which is not the case], it is imperative to state that the affidavit by counsel is so deficient and lacking is material particulars.

63. For good measure, the impugned affidavit sworn by Mr. Seth Ojienda, Advocate; states as hereunder;

> " 1. That I am Advocate of the High Court of Kenya and the advocate with conduct of this matter therefore competent to swear this affidavit.

2. That this matter has a hearing date of 13th and 14h November and is likely to proceed.

3. That the Court made a Ruling on the 6th Defendant 2024 dismissing our motion dated 4th November, 2024.

4. That being dissatisfied with the said decision intend to appeal to the court of Appeal.

5. That we have already filed Notice of Appeal and sought for proceedings.

6. That I am therefore seeking for an order for stay of proceedings herein pending Appeal.

64. The foregoing excerpts, represent the entirety of the averments contained in the supporting affidavit. No where in the said affidavit has the deponent adverted to any prejudice, injustice, detriment or hardship [if any], that may arise if the orders are not granted. Surely, the Applicant herein cannot partake of and or procure exercise of discretion in vacuum.

65. Without belabouring the point, it is my finding and holding that the Applicant herein has neither established nor proven any prejudice, hardship or injustice; that is likely to be suffered. In the absence of such proof and taking into account the grave consequences attendant to an order of stay of proceedings, I am afraid that the Applicant herein is not entitled to the orders in question.

Issue Number 3 Whether it is in the interests of justice to grant the orders sought or otherwise.

66. The instant suit was filed and/or commenced in the year 2018. Thereafter the various parties filed and exchanged their pleadings; witness statements and documents. Suffice it to state that upon the close of pleadings, the matter was subjected to the requisite case conference in accordance with the provisions of Order 11 of the Civil Procedure Rules, 2010.

67. There is no gainsaying that the various parties herein filed and exchanged their documents and confirmed to the court that the matter was ready for hearing. To this end, the court indeed fixed/ scheduled the matter for hearing of the main suit.

68. Pertinently, the subject matter was fixed for hearing with the consent of all the advocates on the 15th April 2024; 16th April 2024 and 17th April 2024, all the dates inclusive. Nevertheless, it transpired that the dates which had been fixed [details in terms of the preceding paragraph] fell during the timeline when the court was to be on leave/ easter vacation. In this regard, the advocates for the parties agreed to vary the hearing date[s]. Suffice it to state that the hearing dates were varied with the consent of parties.

69. Subsequently, the instant matter was scheduled for hearing on various dates, namely, the 4th November 2024, 5th November 2024 and 7th November 2024, all dates inclusive. However, there is no gainsaying that the scheduled hearing could not take place because the Applicant herein filed the Applicant dated the 4th November 2024 and which application had to be disposed of beforehand.

70. Be that as it may, it is not lost on the court that the application dated the 4th November 2024 was filed on the face of a scheduled hearing and no explanation was tendered for the late filing. Nevertheless, it behoved the court to hear the application and same was indeed heard and disposed.

71. Suffice it to state that the filing of the application dated the 4th November 2024 was found to have been a deliberate ploy to obstruct and defeat the scheduled hearing. Other than the foregoing, it is also worthy to recall that the subject matter has been pending in the court corridors for 6 or more years.

During the entire duration, the court is still engaged with interlocutory applications and the parties, more particularly, the 67th, 68th and 69th Defendants appear keen to delay the hearing.

72. Pertinently, it behoves the parties, including the Defendants herein to assist the court in the realization of the overriding objectives. For good measure, the obligation of the parties and their advocates are clearly highlighted at the foot of Section 1B of the *Civil Procedure Act*.

73. I beg to point out that it is the duty of the court, this court not excepted, to ensure that matters are heard and disposed of expeditiously. For good measure, this court is enjoined to give meaning and life to the provisions of Article 159[2][b] of *the Constitution* 2010.

74. Other than the foregoing, it is also imperative to reiterate the ratio decidendi in the case of Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR, where the court stated as hereunder;

> "Justice shall not be delayed" is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the *Civil Procedure Act* are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge's conclusion that the suit in the High Court was not properly handled by the appellant's advocate. The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation.

75. I reiterate the succinct exposition of the law in the decision [supra]. Suffice it to posit that parties and their advocates have a duty to facilitate expeditious hearing and determination of suits. To this end, it is in the interests of justice that disputes be handled in a timely and expeditious manner, unless there be compelling reasons to the contrary.

Final Disposition:

76. Fo the various reasons [which have been highlighted in the body of the ruling], it is my finding and holding that the application beforehand is devoid of merits. In any event, the Applicant did not substantiate the prejudice and/or injustice, if any, that same [Applicant] may be disposed to suffer.

77. In the circumstances, the final order[s] of the court are as hereunder;

    i. The Application dated the 13th November 2024 be and is hereby dismissed.

    ii. Costs of the Application be and are hereby awarded to the Plaintiff/Respondent; and the 63rd to 66th Defendants/Respondents only.

    iii. The matter herein shall be mentioned on a date to be agreed upon by the parties before the incoming Judge for further directions and appropriate orders on hearing of the main suit.

78. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER 2024.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson/ Hilda: Court Assistant

Mr. George Sichangi for the Plaintiff/Respondent

Mr. George Gilbert for the 68 th Defendant/Respondent

Mr. George Gilbert h/b for Ms. Herine Kabita for the 69th Defendant/Respondent

Mr. Allan Kamau for the 63rd , 64 th , 65 th and 66 th Defendants/Respondent

Mr. Seth Ojienda for the 67 th Defendant/Applicant.

Mr. Korir for the 1 st Interested Party

Ms. Susan Nyang for the 2 nd Interested Party

Mr. Gitau Mwara for the 2 nd , 10 th , 11 th , 12 th , 15 th , 17 th , 21th, 22 nd , 23 rd , 24 th , 28 th , 29, 30 th , 31 st , 35 th , 36 th , 37 th , 38 th , 39 th , 42 nd , 49 th , 50 th , 54 th , 55 th , 57 th and 67 th Defendants/Respondents

Mr. Mbuthia for the 70 th Defendant/Respondent

N/A for the rest of the Defendants/Respondents