



**Gidjoy Investments Limited v Zero Point Construction Company Ltd & 63 others (Environment & Land Case 301 of 2018) [2023] KEELC 15923 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15923 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 301 OF 2018  
JO MBOYA, J  
FEBRUARY 23, 2023**

**BETWEEN**

**GIDJOY INVESTMENTS LIMITED ..... PLAINTIFF**

**AND**

**ZERO POINT CONSTRUCTION COMPANY LTD ..... 1<sup>ST</sup> DEFENDANT**  
**JOSHUA NGURE NJOROGE ..... 2<sup>ND</sup> DEFENDANT**  
**RONALD MWERESA KERIND ..... 3<sup>RD</sup> DEFENDANT**  
**MARAGA MAKORO SAMSON ..... 4<sup>TH</sup> DEFENDANT**  
**KENNEDY ONDITI ..... 5<sup>TH</sup> DEFENDANT**  
**ESTHER NYABOKE NYAMACHE ..... 6<sup>TH</sup> DEFENDANT**  
**MAKORO OMBIVU JOB ..... 7<sup>TH</sup> DEFENDANT**  
**JAMES MUSHI EBAYA ..... 8<sup>TH</sup> DEFENDANT**  
**SHADRACK CHAHASI EBAYI ..... 9<sup>TH</sup> DEFENDANT**  
**JANE WANGUI KAIRU ..... 10<sup>TH</sup> DEFENDANT**  
**CATHERINE NYANDA WERU ..... 11<sup>TH</sup> DEFENDANT**  
**EDWARD MUNGAI KANGETHE ..... 12<sup>TH</sup> DEFENDANT**  
**MARIANA KHITIEYI SETH ..... 13<sup>TH</sup> DEFENDANT**  
**KASALE LEPARAKUO ..... 14<sup>TH</sup> DEFENDANT**  
**ALICE NYAMBURA MWANGI ..... 15<sup>TH</sup> DEFENDANT**  
**RICHARD MACHARIA THONGO ..... 16<sup>TH</sup> DEFENDANT**  
**EDWARD MACHARIA TAMA ..... 17<sup>TH</sup> DEFENDANT**



NAHASHON WANJALA BARASA .....	18 <sup>TH</sup> DEFENDANT
FLORENCE MEDZA PENDA .....	19 <sup>TH</sup> DEFENDANT
JOSEPH WANDABI .....	20 <sup>TH</sup> DEFENDANT
JANE WAMAITHA MAINA .....	21 <sup>ST</sup> DEFENDANT
SAMUEL MAINA KAMAU .....	22 <sup>ND</sup> DEFENDANT
JOSEPH MUCHEKE KAMUA .....	23 <sup>RD</sup> DEFENDANT
PETER NOROGE KANIKA .....	24 <sup>TH</sup> DEFENDANT
TOBIKO KALAINA .....	25 <sup>TH</sup> DEFENDANT
KIKANAI OLE KALAINA .....	26 <sup>TH</sup> DEFENDANT
ZENTLINE KERUBO SIRIBA .....	27 <sup>TH</sup> DEFENDANT
PETER GITAU MUIRURI .....	28 <sup>TH</sup> DEFENDANT
ABDRAHIM CHERUIYOT HUSSEIN .....	29 <sup>TH</sup> DEFENDANT
SAMUEL PETER MBOGO NJUGUNA .....	30 <sup>TH</sup> DEFENDANT
VICTOR GEORGE GITAU MUIRUR .....	31 <sup>ST</sup> DEFENDANT
MESHACK ODIPO .....	32 <sup>ND</sup> DEFENDANT
SAMUEL EBAYI CHAHASI .....	33 <sup>RD</sup> DEFENDANT
JOEL NGECHA NJUGUNA .....	34 <sup>TH</sup> DEFENDANT
JAMES NGUNYU KABIRU .....	35 <sup>TH</sup> DEFENDANT
GRACE WANJA KAHUTO .....	36 <sup>TH</sup> DEFENDANT
GABRIEL KARIUKI RUNO .....	37 <sup>TH</sup> DEFENDANT
PAUL MAINA .....	38 <sup>TH</sup> DEFENDANT
LILIAN WAMBUI MWANGI .....	39 <sup>TH</sup> DEFENDANT
SAMUEL KAMAU GITHENDU .....	40 <sup>TH</sup> DEFENDANT
FRANK TAWA MVAYA .....	41 <sup>ST</sup> DEFENDANT
FATUMA MWAKA NYASI .....	42 <sup>ND</sup> DEFENDANT
CHARLES NZIOKI NZUKI .....	43 <sup>RD</sup> DEFENDANT
ERIC NGALA KAHINDI .....	44 <sup>TH</sup> DEFENDANT
JOYCE WANJUGU KAMUNYA .....	45 <sup>TH</sup> DEFENDANT
ZIPPORAH NEKESA WAMALWA .....	46 <sup>TH</sup> DEFENDANT
EVERLYN ALIVIDZA KIBUSU .....	47 <sup>TH</sup> DEFENDANT
ALBERT MURIUKI MUOHE .....	48 <sup>TH</sup> DEFENDANT
EVAN MANYARA NJOGU .....	49 <sup>TH</sup> DEFENDANT



FELIX AYUYA MIDIKIRA .....	50 <sup>TH</sup> DEFENDANT
MARY WAITHERERO NJOROGE .....	51 <sup>ST</sup> DEFENDANT
MICHAEL KABIRU MWAI .....	52 <sup>ND</sup> DEFENDANT
BELONCE WANGUI KARIUKI .....	53 <sup>RD</sup> DEFENDANT
SAMUEL MBOGO NJUGUNA .....	54 <sup>TH</sup> DEFENDANT
GRACE WANJA KAHUTHU .....	55 <sup>TH</sup> DEFENDANT
DIRECTOR OF SURVEY .....	56 <sup>TH</sup> DEFENDANT
GITAU MUIRURI .....	57 <sup>TH</sup> DEFENDANT
CHIEF LAND REGISTRAR .....	58 <sup>TH</sup> DEFENDANT
PRINCIPAL SECRETARY, MINISRTY OF LANDS AND PHYSICAL PLANNING .....	59 <sup>TH</sup> DEFENDANT
ATTORNEY GENERAL .....	60 <sup>TH</sup> DEFENDANT
COUNTY GOVERNMENT OF NAIROBI .....	61 <sup>ST</sup> DEFENDANT
ALEXANDER HOOPS, ANDREW MUGAMBI & PATROBAS AWINO (AS OFFICIALS OF SOWESAVA SELF HELP GROUP) .....	62 <sup>ND</sup> DEFENDANT
ANNA KHASOA (CHAIRPERSON OF SAVANNAH JUA KALI ASSOCIATION) .....	63 <sup>RD</sup> DEFENDANT
NATIONAL LAND COMMISSIO .....	64 <sup>TH</sup> DEFENDANT

## RULING

1. Vide Notice of Motion Application dated the August 12, 2022, the 68<sup>th</sup> Defendant/Applicant has approached the Honourable court seeking for the following reliefs;
  - i. That the Application be certified urgent and heard *ex parte* in the first instance.
  - ii. That there be a Stay of Proceedings in the instant Suit (ELC Case No 301 of 2018) pending hearing and determination of the Appeal.
  - iii. That the Cost of this Application be borne by the Respondents.
2. The instant application is premised on the grounds alluded to and enumerated at the foot thereof. Besides, the application is further supported by one Patrobas Awino, sworn on the August 12, 2022 and in respect of which, the deponent has averred inter-alia, that the 68<sup>th</sup> Defendant/Applicant has since lodged and mounted an appeal before the Honourable Court of Appeal and which appeal is currently pending hearing and determination.
3. Upon being served with the current application, the Plaintiff responded thereto vide Replying Affidavit sworn on the September 22, 2022 and in respect of which, the deponent has annexed and exhibited three annexures thereto.



4. Other than the Plaintiff/Respondent, the instant application was also opposed by the 63<sup>rd</sup> to the 66<sup>th</sup> Defendants/Respondents, who filed Grounds of opposition dated the December 16, 2022.
5. Furthermore, the instant application was also responded to by the 69<sup>th</sup> Defendant/Respondent by a Replying Affidavit sworn by one Annah Khasoa. For clarity, the Replying affidavit was sworn on the September 30, 2022.
6. For completeness of record, the other Defendants/Respondents did not file any responses to the instant application. Consequently, the totality of the pleadings pertaining to and concerning the subject application are as enumerated in the preceding paragraphs.
7. Other than the foregoing, it is appropriate to state and underscore that the instant application came up for hearing, whereupon the advocates for the respective Parties agreed to canvass and ventilate same by way of written submissions. In this regard, the court thereafter proceeded to and set time lines for the filing and exchange of the written submissions.

## **Submissions By The Parties**

### **Applicant's Submissions**

8. The Applicant herein filed two sets of written submissions dated the 28<sup>th</sup> September 2022 and the Supplementary submissions dated the 19<sup>th</sup> February 2023. For clarity, learned counsel for the Applicant has raised, highlighted and amplified five salient issues for due consideration by the Honourable court.
9. Firstly, learned counsel for the Applicant has submitted that upon the delivery and rendition of the ruling dated the 3<sup>rd</sup> August 2022, the Applicant herein felt aggrieved and dissatisfied. Consequently, the Applicant proceeded to and filed a Notice of appeal and thereby demonstrating her desire to pursue an appeal before the Court of appeal.
10. Furthermore, learned counsel for the Applicant has added that thereafter the Appellant proceeded to and indeed filed a Substantive appeal before the Court of Appeal, which appeal is contended to raise arguable points, deserving interrogation and investigation by the Court of Appeal.
11. In the premises, learned counsel for the Applicant has therefore submitted that the Applicant herein has established and demonstrated that same has an arguable appeal before the Honourable Court of Appeal.
12. Secondly, learned counsel for the Applicant has submitted that the instant application was filed and lodged timeously and with due promptitude. For clarity, counsel has pointed out that whereas the impugned ruling was rendered on the 3<sup>rd</sup> August 2022, the current application was however filed on the 17<sup>th</sup> August 2022.
13. In view of the foregoing, counsel has therefore pointed out that the current application was filed and lodged within 14 days of delivery of the ruling, which is the subject of the Appeal.
14. Thirdly, learned counsel for the Applicant has submitted that unless the order of stay of proceedings are granted as sought, this Honourable court will proceed with the hearing in respect of the subject matter and may very well conclude the hearing of the matter prior to and before the disposal of the appeal before the court of appeal.
15. Additionally, learned counsel has submitted that in the event that the subject matter is heard and determined before the appeal before the Court of Appeal, the Applicant herein would be unduly



- prejudiced and may very well be exposed to eviction from the suit property, wherein same has (sic) been in occupation for more than 12 years.
16. Other than the foregoing, learned counsel has further submitted that if the order of stay of proceedings is not granted as sought, the appeal by the Applicant herein will be rendered nugatory.
  17. In the circumstances, learned counsel for the Applicant has submitted that it is in the interest of justice that the orders of stay of proceedings be granted, pending the hearing and determination of the appeal before the Honourable court of appeal.
  18. In support of the contention that the orders of stay ought to be granted, so as to avert the appeal being rendered nugatory, counsel for the Applicant has invited the court to take cognizance in the case of *Ezekiel Mule Musemi versus H Young & Company (EA) Ltd* (2019)eKLR, *David Motorne Silverstein versus Atsango Chesoni*, Civil Application No 189 of 2009 (2002)eKLR, *Niazones (K) Ltd versus Chaina Bridge & Road Corportion (K) Ltd* Nairobi HCC 126 of 1999 (unreported) and *Wichira Waruru & Another versus Francis Oyatsi* Civil Application No 23 of 2000 (2002) 2EA 664.
  19. In addition, learned counsel for the Applicant has further submitted that the grant of the orders of stay of proceedings would avert wastage of judicial time, in conducting proceedings, which may ultimately be superseded or otherwise reversed by the Honourable court of appeal.
  20. In the premises, learned counsel contended that Judicial time is the only resource that the courts do have at their disposal and hence same ought to be efficiently managed, in the interest of administration of justice.
  21. In respect of the foregoing submissions, learned counsel has invited the court to take cognizance of the decision in the case of *Muchanga Investment Ltd versus Safaris & Ltd (Africa) Ltd & 2 Others* (2009)eKLR, wherein, the Court of Appeal underscored the importance of appropriate utilization of Courts time.
  22. Furthermore, learned counsel for the Applicant has also submitted that an application like the one beforehand, cannot be defeated merely because the Applicant has invoked the wrong provisions of the law or worse still, where the Applicant has not cited the correct provision of the law.
  23. In any event, learned counsel has submitted that either way, the Honourable court is bestowed with the requisite and inherent Jurisdiction to entertain and adjudicate upon every matter/application placed before same on the basis of merits thereof.
  24. To this end, learned counsel for the Applicant has invited the court to take cognizance of the decision of the Supreme Court of Kenya in the case *Hamanus Philipus Steyn versus Geovani Gnechi – Ruscone* (2013)eKLR, where the Supreme Court considered the question of the failure to cite and invoke the correct position of the law.
  25. In a nutshell, learned counsel for the Applicant has contended and submitted that the Applicant herein has established and met the requisite threshold to warrant the grant of the orders sought.

### **Plaintiff's/Respondent's Submissions**

26. The Plaintiff/Respondent filed written submissions dated on the October 17, 2022 and in respect of which same has raised and highlighted three salient issues for consideration by the court.
27. First and foremost, the learned counsel for the Plaintiff/Respondent has submitted that the orders of the court made on the August 3, 2022 dismissed the various applications and the preliminary objections which had been mounted/filed by inter-alia the Applicant herein.



28. Furthermore, learned counsel has contended that to the extent that the named application and the preliminary objection, were dismissed, what thereafter followed was a negative order and not otherwise. In this regard, counsel added that a negative order is incapable of being stayed, either in the manner sought or at all.
29. In support of the foregoing submissions, learned counsel for the Plaintiff/Respondent has cited and relied on inter-alia, the case of *Western College of Arts & Technology versus Oranga* (1976)eKLR, *Kenya Commercial Bank Ltd versus Tamarind Middos Ltd & 7 Others* (2016)eKLR and *Kanwal Sarjit Singh Dhiman versus Keshavji Juvraj Shah* (2008)eKLR.
30. Secondly, learned counsel for the Plaintiff/Respondent has further submitted that the Applicant herein has neither shown nor demonstrated what prejudice, if any, that same shall suffer if the orders of stay of proceedings are not granted.
31. In addition, learned counsel for the Plaintiff/Respondent has contended that an order of stay of proceedings is a grave order, with serious ramifications and hence same ought not to be granted lightly.
32. In any event, learned counsel has contended that the Applicant herein has not met the stringent threshold and conditions to warrant the grant of the impugned orders of stay of proceedings.
33. To amplify his submissions in this respect, learned counsel for the Plaintiff/Respondent has cited and relied on inter-alia, the case in *Global Tours & Travels Ltd Nairobi HCC Winding Up Cause No 43 of 2000* (unreported, Kenya Wildlife Service versus James Mutembei (2019)eKLR and *David Motor Silverstein versus Atsongo Chesoni* (2002)eKLR.
34. Thirdly, learned counsel for the Plaintiff/Respondent has submitted that the Applicant herein has not demonstrated that same has an arguable appeal before the Court of Appeal to warrant the grant of the orders sought.
35. In this regard, counsel has invited the court to find and hold that the Applicant has not placed sufficient material before this honourable court to warrant a finding and holding that the named appeal is arguable.
36. In respect of determining whether or not the Applicant has demonstrated the existence of an arguable appeal, learned counsel for the Plaintiff/Respondent has invited the court to take cognizance of the case of *Stanley Kinyanjui versus Tony Ketter & 5 Others* (2013)eKLR and *University of Nairobi versus Racati Business of East Africa* (2020)eKLR.
37. In a nutshell, learned counsel for the Plaintiff/Respondent has therefore implored the Honourable Court to find and hold that the instant application is not meritorious and hence ought to be dismissed.

#### **Submissions by the 63<sup>rd</sup> to 66<sup>th</sup> Defendants/respondents**

38. On behalf of the 63<sup>rd</sup> to the 66<sup>th</sup> Defendants/Respondents, the Honourable Attorney General has raised and ventilated three salient issues for consideration and ultimate determination by the court.
39. Firstly, the Honourable Attorney General has submitted that the grant of an order of Stay of Proceedings or otherwise falls within the discretion of the court. In this regard, the Honourable attorney general has therefore contended that it is incumbent upon the Applicant to justify the existence of exceptional circumstances to warrant the exercise of judicial discretion in his/her favor.
40. Secondly, the Honourable Attorney General has also submitted that an order of stay of proceedings is a grave order, which operates to suspend and hold proceedings in abeyance and hence such an order



ought not to be granted unless the Applicant meets and satisfies the stringent conditions set under the law.

41. In this respect, the Honourable Attorney General has cited various decisions *inter-alia*, [Cooperative Bank of Kenya Ltd versus Banking Insurance of Finance Union \(K\)](#) (2015)eKLR, [UAP Insurance Company Ltd versus Michael John Beckett](#) (2004)eKLR, [David Moto Silverstain versus Atsango Chesoni](#) (2002)eKLR, [Kenya Commercial Bank Ltd versus Benjob Amalgamated Ltd & another](#) (1998)eKLR and [Niazones K Ltd versus Chaina Roads & Bridge Corporation K Ltd](#) (2001)eKLR.
42. Thirdly, the Honourable Attorney General has submitted that it is incumbent upon the Honourable court to ensure that proceedings mounted and placed before same, are timeously handled and disposed of in accordance with the dictates of Article 159 (2) (b) of the [Constitution](#) 2010.
43. In this regard, the Honourable Attorney General has reiterated that it is the duty of the court to facilitate the expeditious hearing and timely disposal of matters before self, unless there exists a peculiar and exceptional circumstance(s).
44. To this end, the Honourable Attorney General has invited the Honourable court to take cognizance to the case of Saaid Sweillem Gheithan Saanum versus The Commissioners of Lands (being sued through the Attorney General & 5 Others) (2015)eKLR.
45. Based on the foregoing, the Honourable Attorney General on behalf of the 63<sup>rd</sup> to 66<sup>th</sup> Defendants/ Respondents has implored the court to find and hold that the current application does not meet the requisite threshold and hence ought to be dismissed.

#### **Submissions by the 69<sup>th</sup> Defendant/respondent**

46. The 69<sup>th</sup> Defendant/Respondent filed written submissions dated the October 25, 2022 and in respect of which same has similarly raised, highlighted and amplified three issues for consideration by the court.
47. First and foremost, learned counsel for the 69<sup>th</sup> Defendant/Respondent has submitted that the appeal which has since been filed by and on behalf of the 68<sup>th</sup> Defendant/Applicant, raises arguable issues, worthy of interrogation and investigation by the Honourable Court of appeal.
48. In addition, learned counsel for the 69<sup>th</sup> Defendant/Respondent has ventured to and indeed enumerated various grounds and issues, which same considers to be arguable in the appeal which has since been filed.
49. Secondly, learned counsel for the 69<sup>th</sup> Defendant/Respondent has contended that unless the orders sought, are granted, there is a likelihood that this Honourable court will proceed to hear and determine this suit before it and thereby grant adverse orders against the 68<sup>th</sup> and 69<sup>th</sup> Defendants herein.
50. Furthermore, learned counsel has submitted that the issues pertaining to the suit property had hitherto been canvassed and ventilated before the National Land Commission, which proceeded to and issued a determination vide gazette notice published on the 9<sup>th</sup> November 2018.
51. In the premises, learned counsel for the 69<sup>th</sup> Defendant/Respondent has submitted that the suit property therefore lawfully and legally belongs to the 69<sup>th</sup> Defendant/Respondent, who are even in occupation and possession thereof.
52. In view of the foregoing, learned counsel for the 69<sup>th</sup> Defendant/Respondent has submitted that if the hearing in respect of the subject matter proceeds and judgment is passed in favor of the Plaintiff/ Respondent, there is a likelihood that the 68<sup>th</sup> and 69<sup>th</sup> Defendants may be evicted from the suit property, prior to and before the hearing and determination of the appeal before the Court of Appeal.



53. Furthermore, learned counsel has added that in the event of such an eventuality, the Plaintiff/ Respondent may thereafter proceed to and alienate, sell or dispose of the suit property and thereby defeat the interests of the Applicant.
54. In a nutshell, learned counsel for the 69<sup>th</sup> Defendant has submitted that unless the orders sought are granted, the appeal which has since been filed will be defeated and thus rendered nugatory.
55. In respect of the foregoing submissions, learned counsel has cited and relied on the decision in the case of *Ezekiel Mule Musembi versus H Young & Company (EA) Ltd* (2019)eKLR and *Niazons K Ltd versus China Road & Bridge Corporation* (2001)eKLR, respectively.
56. Finally, learned counsel for the 69<sup>th</sup> Defendant/Respondent has submitted that this Honourable court is vested and conferred with the requisite Jurisdiction to entertain and adjudicate upon the subject application. In this regard, counsel have cited and quoted the provision of Order 42 Rule 6(1) of the *Civil Procedure Rules 2010*.
57. Other than the foregoing, learned counsel has also cited and quoted the decision in the case of *Ezekiel Mule Musembi versus H Young & Company (EA) Ltd* (2019)eKLR and *George Oraro versus Kenya Television Network* HCC No 151 of 1992 (unreported).
58. To surmise, learned counsel for the 69<sup>th</sup> Defendant has therefore contended that the application by the Applicant is meritorious and hence ought to be granted, pending the hearing and determination of the appeal which has since been filed before the Honourable Court of Appeal.

#### **Issues For Determination**

59. Having reviewed the Notice of Motion Application dated the 12<sup>th</sup> August 2022, together with the supporting affidavit thereto and having taken into account the various responses filed in opposition thereto; and having considered the written submissions filed by the Parties, the following issues do arise and are thus worthy of determination.
  - i. Whether the Applicant has established a Sufficient cause or basis to warrant the invocation of the Jurisdiction of the court pursuant to Order 42 Rule 6(1) of the *Civil Procedure Rules 2010*.
  - ii. Whether the Applicant herein is bound to suffer prejudice, if any, unless the orders of Stay of Proceedings are granted or otherwise.

#### **Analysis And Determination**

##### **Whether the Applicant has established a sufficient cause or basis to warrant the invocation of the Jurisdiction of the court pursuant to Order 42 Rule 6(1) of the Civil Procedure Rules 2010.**

60. It is not in dispute that the Applicant herein, together with the 69<sup>th</sup> Defendants, filed and mounted various applications and preliminary objections, wherein same sought to have the suit by and on behalf of the Plaintiff struck out. For clarity, the named applications raised inter-alia the question of Res-judicata, Sub-judice and Limitation of Actions.
61. Subsequently, the named applications/preliminary objections, were heard and disposed of vide the ruling of the court rendered on the 3<sup>rd</sup> August 2022, whereupon the Honourable court dismissed both the applications as well as the preliminary objections.



62. Suffice it to point out that upon the delivery of the ruling rendered on the 3<sup>rd</sup> August 2022, the Applicant herein felt aggrieved and thereafter lodged a Notice of Appeal indicating her desire to challenge the named ruling before the Honourable Court of Appeal.
63. Furthermore, the Applicant herein thereafter proceeded to and mounted the substantive appeal vide Court of Appeal Civil Appeal No E560 of 2022, which appeal is still pending hearing and determination before the Honourable Court of Appeal.
64. Arising from the foregoing, it is therefore common ground that there is in existence an appeal pending before the Honourable Court of appeal. Consequently, there is no gainsaying that the Applicant herein has established a basis upon which an application for stay of proceedings can be mounted and anchored.
65. In any event, it is worthy to point out that an application for stay of proceedings or stay of execution pending appeal, is provided for vide the provisions of Order 42 Rule 6(1) of the [Civil Procedure Rules 2010](#).
66. For coherence, the provisions of Order 42 Rule 6(1) (*supra*) provides as hereunder;
6. Stay in case of appeal [Order 42, rule 6.](1)
- No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
67. Furthermore, this Honourable court accrues and acquires Jurisdiction to deal with an application for stay of proceedings or stay of execution pending appeal (whichever is applicable), immediately the Applicant files and lodges the requisite Notice of Appeal in respect of the impugned decision.
68. To this end, it is appropriate to take cognizance of the provisions of Order 42 Rule 6(4) of the [Civil Procedure Rules 2010](#), which provides as hereunder;
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court Notice of Appeal has been given.
69. Based on the foregoing provisions, (details which have been reproduced herein before), it is evident and apparent that this Honourable court accrues jurisdiction to entertain and adjudicate upon an application as the one filed herein, immediately a Notice of appeal is filed.
70. In this respect, it is appropriate to cite the holding in the case of [Ezekiel Mule Musembi versus H. Young & Company \(E.A\) Limited](#) [2019] eKLR, where the Honourable court stated and held as hereunder;
- “It is not in doubt that this Court has powers to stay proceedings pending appeal and this jurisdiction is derived from both Order 42 rule 6 of the Civil Procedure Rules as well the inherent jurisdiction reserved in section 3A of the Civil Procedure Act. See George Oraro vs. Kenya Television Network Nairobi HCCC No 151 of 1992”
- “This jurisdiction is meant to avoid a waste of valuable judicial time; prevent the court from duplication of efforts and prevent multiplicity of suits and applications being filed



and where if the stay is not granted and defendant were to succeed it would have rendered the appeal nugatory. In such applications the Court aims at ensuring that the object of the application is not rendered nugatory and that substantial loss and irreparable harm is not suffered by the applicant once the Plaintiff proceeds with the suit and the appeal succeeds. Obviously the decision whether or not to grant stay of proceedings being discretionary, the application must be made without unreasonable delay. Whereas I agree that delay is neither the sole factor nor the predominant factor to be considered....."

71. Additionally, I wish to underscore that the filing of the Notice of Appeal, like the one that was filed by the Applicant herein and which was thereafter followed by the substantive appeal, would denote the existence of a sufficient cause or basis to anchor an application for stay of proceedings.
72. Be that as it may, whether or not the order for stay of proceedings would issue or be granted, is however dependent on the existence of peculiar and exceptional circumstance, taking into account the facts of each case. In addition, the grant of such an order is discretionary.
73. In this respect, I wish to state that the consideration as to whether or not there exists peculiar and exceptional circumstances in respect of the subject matter, shall be addressed and discussed in the next issue.
74. Nevertheless, before departing from the issue herein, I wish to observe that the advocates for the Parties, namely the Applicant, the Plaintiff/Respondent and the 69<sup>th</sup> Defendant/Respondent, respectively, spent a great deal of energy and efforts in ventilating the issue as to whether or not the appeal which has since been filed before the Court of appeal is arguable or otherwise.
75. On the part of the Applicant and the 69<sup>th</sup> Defendant/Respondent, it was contended that the said appeal raises pertinent and salient issues of law, pertaining to the errors committed by this Honourable court in dismissing the various applications and preliminary objections at the foot of the ruling rendered on the 3<sup>rd</sup> August 2022.
76. Furthermore, counsel for the Applicant and the 69<sup>th</sup> Defendant/Respondent, have gone ahead to demonstrate how, in their humble view, the impugned errors of law would succeed before the Court of Appeal.
77. On the other hand, learned counsel for the Plaintiff/Respondent has also spent considerable energy in contending that the appeal, which has since been filed before the Court of Appeal has not been shown to be arguable. In this regard, learned counsel for the Plaintiff/Respondent holds the view that no material has been placed before the court to warrant confirmation that the appeal is indeed arguable.
78. Despite the considerable efforts by the named Parties in endeavoring to persuade this court to find and hold that the appeal before the Court of Appeal is arguable or otherwise, I beg to point out that the determination of whether or not, the said appeal is arguable falls within the constitutional province, competence and mandate of the Court of Appeal.
79. Put differently, it is not within the competence of this Honourable court to adjudge whether the appeal that has been mounted before the Court of appeal, is arguable or otherwise. In the regard, I eschew the invitation by the respective advocates to make pronouncement on an issue that certainly, does not fall within my competence or purview.
80. Nevertheless, I must point out to the respective advocates that the considerable energy and efforts that has been put forth in their respective submissions, must await its opportune and due time before the Court of appeal, who no doubt, shall give the appropriate verdict on the arguability of the Appeal or otherwise.



81. Be that as it may, it is my finding and holding that the moment a Notice of appeal has been duly filed and lodged in line with the provisions of Rule 75 of the Court of Appeals Rules as read together with Order 42 Rules 6(4) of the Civil Procedure Rules, 2010, this Court accrues the requisite Jurisdiction to entertain an application like the one beforehand.

**Whether the Applicant herein is bound to suffer prejudice, if any, unless the orders of Stay of Proceedings are granted or otherwise.**

82. It is worth repeating that the current application seeks an order of stay of proceedings, pending the hearing and determination of the appeal, namely, Court of Appeal Civil Appeal No E560 of 2022, which has since been filed and lodged before the Court of Appeal.

83. Additionally, it is imperative to state that an order of stay of proceedings is a serious and grave order, given that it has the consequence of suspending, holding in abeyance and or better still, interrupting the conduct of proceedings before the trial court. In this regard, there is no gainsaying that an order of stay of proceedings is ordinarily bound to occasion a delay in the expeditious hearing and determination of the impugned proceedings.

84. Given the nature and consequence of an order of stay of proceedings, various Superior courts have pronounced themselves on the requisite threshold that must be met, satisfied or achieved, before an order of stay of proceedings can issue and/or be granted.

85. In this regard, I beg to sample a number of decisions which have since been handed down by various cadres of the Superior courts, who have underscored the seriousness and grave nature of an order of stay of proceedings.

86. Firstly, it is imperative to take cognizance of the decision in the case of *Global Tours & Travels Limited: Nairobi HC Winding up Cause No 43 of 2000*; where Ringera J, (as he then was) stated that:-

“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”.

87. In the case of *Kenya Wildlife Service Versus James Mutembei* (2019) eKLR, Gikonyo J quoted *Halsbury's Law of England*, 4th Edition.Vol.37 page 330 and 332, that:

“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".

88. Other than the foregoing, the considerations attendant to and relevant prior to a grant or denial of an order of stay of proceedings, were also calibrated upon and discussed in the case *Timothy Kisina Kitbokoï versus Elijah Kitele & another* [2022] eKLR, where the court stated and observed as hereunder;

“It is therefore clear that in determining whether or not to grant an order for stay of proceedings, the court must bear in mind the general rule that once a suit is filed, proceedings ought to continue without interruption until the suit is determined. This is premised on the right of every person to a fair trial which includes the right to have the trial begin and conclude without unreasonable delay as enshrined in Article 50(2) (e) of the *Constitution* as well as the principle that justice delayed is justice denied, being a cardinal principle that guides courts in the exercise of judicial authority. It is against this background that orders for stay of proceedings ought to be sparingly granted and only in exceptional circumstances that demonstrate that there are compelling reasons and it would go against all that is deemed just and fair to proceed with the suit. The threshold for such proof is beyond reasonable doubt.”

89. Recently, the issue of stay of proceedings was re-visited in the case of *Turbo Highway Eldoret Ltd versus Munii* (Civil Appeal E040 of 2021)[2022] KEHC 10197 (KLR) (30 June 2022) (Ruling) it was stated as hereunder;

“whether the fact that a party had preferred an interlocutory appeal is entitled to a stay of proceedings cannot, therefore, merely be based on the fact that the Trial Court might consider what the appellant considers to be erroneous conclusions in its judgment. If the rule were otherwise, it would seriously impede proceedings in the trial Courts.

This is because a party who is keen on obstructing a case from proceeding would simply prefer multiple appeals against interlocutory rulings by the Trial Court and then seek stay of proceedings in the Trial Court. The rule is more exacting for a party requesting for a stay of proceedings. In particular, an Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal. The Applicant has not met this high threshold in this case.

90. Having considered and reviewed the various decisions, which have been reproduced in the proceedings paragraphs, various conditions are discernable and evident. In this regard, it is worthy to state that prior to and or before an Applicant can partake of an order of stay of proceedings, same must establish and prove inter-alia, the following;

- i. Show and establish sufficient cause/basis, essentially as underscored vide Order 42 Rule 6 (4) of the *Civil Procedure Rules, 2010*.
- ii. File and mount the relevant application timeously and with due promptitude.
- iii. Show and establish the prejudice or inconvenience likely to arise or accrues, if the order is not granted.



- iv. Establish and demonstrate peculiar and exceptional circumstances attendant to the case beforehand.
  - v. Appreciate that the order of stay of proceedings does issue sparingly and with necessary circumspection.
  - vi. In any event, appreciate that the issuance of the order, or otherwise, is at the discretion of the court.
91. Bearing the foregoing conditions, it is now appropriate to interrogate whether the Applicant herein has established and satisfied the requisite conditions, to warrant the grant of the order of stay of proceedings, either in the manner sought or at all.
  92. It is not lost on this court that the Applicant herein and the 69<sup>th</sup> Defendant/Respondent had filed separate applications and preliminary objection, whose purport was essentially to strike out the Plaintiff's suit, on various grounds, inter-alia Res-judicata, Res-sub-judice and Limitation of Actions.
  93. Pursuant to and upon the filing of the named applications and preliminary objections, this court was called upon to resolve the various issues, which were alluded to at the foot of the named pleadings.
  94. Subsequently, the Honourable court rendered and delivered a ruling dated the 3<sup>rd</sup> August 2022 and in respect of which the court dismissed the impugned applications and preliminary objections.
  95. It is imperative to note that it is the dismissal of the said applications and preliminary objections that were raised and ventilated by the Applicant and the 69<sup>th</sup> Defendant, which has provoked the appeal before the court of appeal.
  96. Essentially, if the Applicant were to succeed before the Honourable Court of Appeal, what would happen is that the Plaintiff's suit herein would stand struck out and (sic) the matter would end there.
  97. Conversely, if the appeal before the court of appeal does not succeed, then the Plaintiff's case would have to proceed for hearing and determination in the conventional manner. In this regard, the parties involved, the Defendants not excepted, would be obliged, to call witness and tender evidence.
  98. Given the foregoing scenarios, the question that falls for determination is whether a denial to grant the order of stay of proceedings will prejudice, the hearing and determination of the appeal before the Honourable Court of Appeal.
  99. Additionally, the incidental issue that also follows is whether the Applicant herein would suffer any prejudice, if the proceedings before the court were to proceed, pending the hearing and determination of the appeal before the Court of Appeal.
  100. In my humble view, the appeal before the Court of Appeal may very well be prosecuted, heard and determined and once a decision is made therein, that decision would affect and impact on the current proceedings, irrespective of the stage in which the proceedings shall have reached.
  101. Consequently, if the Honourable Court of Appeal were to find and hold that indeed the current suit was (sic) barred by the doctrine of Res-judicata, Res-sub-judice and Limitation of Actions, then a suitable order for striking out of the current suit would ensue. In this regard, the suit, if at all, shall stand struck out irrespective of the stage of proceedings.
  102. Conversely, if the Honourable court of appeal were to find otherwise, the subject matter would still proceed for hearing and determination, in the conventional manner.



103. In view of the foregoing, the lower risk of injustice, which is acceptable in the instant matter, relates to having the subject matter proceed for hearing in the usual way, whereupon the Defendants and in particular the Applicant, would still have to test the various issues during cross examination.
104. For the avoidance of doubt, the Applicant herein would not be exposed to suffer any prejudice.
105. Furthermore, if and once the appeal by the Applicant succeeds, the Applicant would, no doubt be entitled to appropriate orders, including orders on costs, subject no doubt, to the relevant Advocate Remuneration Order.
106. To this end, I derive due guidance and inspiration from the holding of the Court of Appeal in the case of *Kenya Commercials Bank Ltd VS Benjob Amalgamated Ltd & another*, Civil Application No NAI 50 of 2001 (29/2001 UR), (Unreported) .
107. In its ruling regarding whether the intended appeal's success would be rendered nugatory if a stay was not granted, the Court stated as follows:
- “... The onus of satisfying us on the second condition, that unless a stay is granted, the intended appeal would be rendered nugatory, is also upon the applicant. In our view, it has unfortunately failed to discharge this onus. We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if a stay is not granted. The appeal may be heard and, if successful, the proceedings in the superior court would be determined in accordance therewith. The hearing in the superior court might have been unnecessary for which appropriate costs can be ordered but the appeal will not have been worthless.”
108. Furthermore, the subject matter was re-visited by the same Court of appeal in the case of *David Morton Silverstein versus Atsango Chesoni* [2002] eKLR, where the court stated as hereunder;
- “What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and, if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory.”
109. Apparently, the proceedings before this Honourable court may very well go on, but as soon as the court of appeal concludes the hearing and disposal of the appeal filed, the instant matter and proceedings, shall abide by the determination rendered by the Honourable Court of Appeal.
110. In my humble view, the ultimate outcome of the court of appeal, will supersede any orders made herein. Consequently, no evident prejudice or inconvenience, will arise, or ensue, whatsoever.
111. In any event, whatever prejudice or inconvenience, subject to proof, can very well be atoned for and remedied by payment for costs.
112. Contrarily, if the appeal before the Honourable Court of Appeal fails and yet an order of stay of proceedings shall have been granted, there would be evident delay in the hearing and disposal of the subject suit. In this regard, such a delay would be contrary to and in contravention of the provisions of Article 159 (2) (b) of the *Constitution*, 2010.



113. Consequently and in the premises, weighing the consequences, namely, the pros and cons of granting or refusing to grant the orders of stay or proceedings, the pendulum swings in favor of declining the order sought.
114. Furthermore, it is imperative to underscore that justice delayed is justice denied. In this regard, it thus behooves this court to abide by and comply with the spirit of Article 159 (2) (b) of the Constitution, 2010.
115. In addition, it is imperative to take cognizance of the holding in the case of Said Sweilem Gheithan Saanum versus Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR, where the Court of Appeal 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.

116. In a nutshell, I come to the conclusion that even though the Applicant has established the existence of a sufficient cause on account of there being a subsisting appeal to the Court of Appeal, the Applicant has however, failed to establish the existence of exceptional circumstances, that would warrant the grant of an order of stay of proceedings, given the serious and grave consequences attendant to such orders.

### **Final Disposition**

117. Having reviewed and analyzed the twin issues that were enumerated in the body of the subject Ruling, it must have become evident and apparent that the Application herein has neither met nor satisfied the requisite threshold as envisaged under the law.
118. Consequently and in the premises, I come to the conclusion that the Application dated the August 12, 2022, albeit filed in court on the August 17, 2022, is devoid and bereft of merits.
119. In the premises, the Application be and is hereby dismissed with costs to the Plaintiff/Respondent, 63<sup>rd</sup>, 64<sup>th</sup>, 65<sup>th</sup> and 66<sup>th</sup> Defendants/Respondents, only.
120. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY 2023.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

**In the Presence of;**

Benson Court Assistant

Mr George Sichangi for the Plaintiff/Respondent

Mr Amolloh/b for Mr George Gilbert for the 68<sup>th</sup> Defendant/Applicant



Ms Herine Kabita for the 69<sup>th</sup> Defendant/Respondent

Mr Allan Kamau for the 63<sup>rd</sup>, 64<sup>th</sup>, 65<sup>th</sup> and 66<sup>th</sup> Defendants

Mr Ayugi h/b for Mr Seth Ojienda for the 67<sup>th</sup> Defendant.

Mr S Mbuthia for the 70<sup>th</sup> Defendant

