



**Kimaiyo & 5 others v Kimilot (Environment & Land Case
321 of 2016) [2023] KEELC 22638 (KLR) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 22638 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 321 OF 2016**

JM ONYANGO, J

JUNE 14, 2023

BETWEEN

DAVID KIMAIYO 1ST PLAINTIFF
RAEL KIMAIYO 2ND PLAINTIFF
ALFRED KIMAIYO 3RD PLAINTIFF
KIPKEMOI KIMAIYO 4TH PLAINTIFF
BONIFACE KIMAIYO 5TH PLAINTIFF
MICHAEL KIMAIYO 6TH PLAINTIFF

AND

DAVID CHERUIYOT KIMILOT DEFENDANT

RULING

1. This ruling is in respect of the Defendant/Applicant's Notice of Motion dated 19th December, 2016 seeking an order of stay of proceedings pending the hearing and determination of Judicial Review Misc. Application No 175 of 2002, ELC Case No 834 of 2012 and HCCC No 202 of 2011. The application is anchored on the grounds set out on the face of the application, the main one being that the issues raised in this suit are directly and substantially in issue in Judicial Review Misc. Application No 175 of 2002, ELC Case No 834 of 2012 and HCCC No 202 of 2011.
2. The said grounds are elaborated in the Applicant's Supporting affidavit sworn on the 19th December, 2016. The applicant avers that he filed JR No 175 of 2002 seeking to quash the award given in Land Tribunal Case No 9 of 2002 adopted in CMCC award No 52 of 2002 and the matter is still pending for hearing. That ELC Case No 834 of 2012 which was filed by the Respondents over the same subject matter is also still pending. He further avers that the issues raised herein can be resolved in Judicial



Review Misc. Application No 175 of 2002 and since this matter is the latest one to be filed, it ought to be stayed pending the hearing of the matters filed earlier.

3. The application was opposed by the Respondents through the Replying affidavit of Michael Kimaiyo, the 6th Plaintiff/Respondent herein sworn on 25th July, 2022 on his own behalf and on behalf of the 1st -5th Plaintiffs/Respondents. In the said affidavit he depones that the Judicial Review application was filed by one Tamining Kimaiyo who passed away on 8th November 2003 and no steps were taken to substitute her. In the circumstances the application has abated.
4. He averred that while the Judicial Review application sought orders of certiorari, prohibition and mandamus, the instant suit seeks orders of adverse possession over land parcel No Uasin Gishu/kaptagat/150 and therefore the issues raised in the two suits are different and further the plaintiffs are not parties in the Judicial Review proceedings. That on the other hand, ELC Case No 134 of 2012 seeks declaratory and eviction orders while the suit herein is for adverse possession. He averred that the two suits should be prosecuted separately and prayed that the application be dismissed.
5. The application was canvassed through written submissions and both parties filed their submissions.

Applicant's Submissions

6. Learned counsel for the Applicants submitted that JR. No.175 of 2002 had not abated as it is the interested party and not the Applicant who died. He referred to Order 24 Rule 3 of the Civil Procedure Rules which provides for abatement of a suit upon the demise of the plaintiff. It was his contention that his application was not an afterthought.
7. He relied on the case of Jane Ajwang Nyangari (suing as the legal representative of the estate of Edward Nyandimo Nginja) v Wycliffe Otieno and another (2020) eKLR. In the said case the court cited the case of Barclays Bank of Kenya Ltd v Elizabeth Agidza & 2 others (2012)eKLR where the court held as follows:

“...If the controversy in the subsequent suit can be conveniently and properly adjudicated upon in the previous suit, by virtue of the enactment of section 1A and 1B of the Civil Procedure Act, section 6 will still apply. This is so because the overriding objective of the Civil Procedure Act is for expeditious and proportionate resolution of disputes between parties”
8. It was counsel's contention that Judicial Review No 175 of 2002 was still active and it relates to the same subject matter as the one in this suit and it was therefore prudent to stay this suit pending the hearing and determination of the Judicial Review matter since the latter was filed earlier.

Respondent's Submissions

9. On his part, learned counsel for the Respondent relied on the case of Kenya Wildlife Service v James Mutembei (2019) eKLR for the proposition that stay of proceedings is a grave judicial action which interferes with the right of a litigant to access justice and the right to be heard without delay and therefore the test for stay of proceedings should be high and stringent.
10. He identified 3 issues for determination namely:-
 - i. Whether JR Miscellaneous Application No 175 of 2002 had abated and whether it has been revived.
 - ii. Whether the Applicant has established that the issues ensuing from this suit can be determined in JR Misc Application No 175 of 2002.



- iii. Whether the Applicant has established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought.
11. With regard to the first question he submitted that the Interested Party against whom the suit was filed died in November 2003 and he/she has never been substituted and therefore the suit against her has abated. Additionally, the Respondent, that is, Ainabkoi Land Disputes Tribunal ceased to exist upon the repeal of the Land Disputes Tribunal Act and therefore there is no party upon whom the orders sought in the said suit can be enforced.
12. Secondly, counsel submitted that the issues raised in the two suits though relating to the same subject matter are different in that in the Judicial Review matter, the court will be concerned with the manner in which the decision of the Land Disputes Tribunal was arrived at, while in the instant suit the court will determine whether the Respondents are entitled to the suit property by way of adverse possession.
13. With regard to the third question, counsel submitted that the Applicant had not demonstrated that there was sufficient cause to grant the orders sought. He was of the view that the suits raise different causes of action and the even though the Judicial review matter was filed more than 20 years ago, the applicant has failed to prosecute it. He relied on the case of *Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi* 2014 eKLR where the Court declined to grant an order for stay of proceedings as the court held that allowing the application would delay the hearing of the suit and increase costs for the parties which was against the interest of justice. The Court further held that the Applicant had not demonstrated what prejudice it would suffer if the orders were not granted.
14. Having considered the application and the rival submissions, the main issue for determination is whether the order for stay of proceedings ought to be granted.
15. *Halsbury's Laws of England* 4th Edition Vol 37 states 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 substantive merits of his case and therefore the court’s general practice is that a stay of proceedings should not be imposed unless beyond all reasonable doubt proceedings ought not to be allowed to continue.”
16. In the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR the court observed that:
“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 a fair trial”.
17. The grounds advanced by the Applicant are that there is a pending Judicial Review matter filed by the Applicant over the same subject matter which is still pending and which is likely to resolve the issues in dispute. It is instructive to note that the said matter has been pending since 2002. Furthermore, the Interested Party against whom the suit was filed died way back in 2003 and no steps have been taken to substitute her. Additionally, the Judicial Review matter seeks prerogative orders of certiorari, mandamus and prohibition as the Applicant is challenging the jurisdiction of the Ainabkoi Land Disputes Tribunal which has since been disbanded whereas the instant suit seeks orders that the Applicants are entitled to the suit property by virtue of adverse possession. It is therefore clear that the remedies sought in the two suits are different. Staying this suit would only result in further delay in prosecuting the instant suit which would be contrary to the overriding objective of the *Civil Procedure*



Act and the ELC Act which is to facilitate the just, expeditious, proportionate and affordable resolution of disputes.

18. In view of the foregoing the application lacks merit and it is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 14TH DAY OF JUNE, 2023

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J.M ONYANGO

JUDGE

In the presence of;

Miss Chepkwony for Mr. Nyamweya for the Applicant

Miss Salim for the Respondent

Court Assistant: A. Oniala

