



REPUBLIC OF KENYA



**Sangura v Mwayafu (Environment & Land Case 9 of 2020)
[2023] KEELC 19114 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19114 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 9 OF 2020
EC CHERONO, J
JULY 28, 2023**

BETWEEN

JAMES KIMALENI SANGURA PLAINTIFF

AND

JOSEPH BUYUNI MWAYAFU DEFENDANT

RULING

1. Before the court for determination is an application dated 6th April, 2023 taken by the Plaintiff/Applicants pursuant to Sections 1A, 1B, 3A of the Civil Procedure Act CAP 21 Laws Order 51 Rule 1 of the Civil Procedure Rules. In this Application the plaintiff/Applicants are seeking the following orders:
 1. Spent
 2. That the Honorable Court be pleased to grant and or issues stay of proceedings herein pending hearing and determination of Bungoma Cmcc Succession Cause No. 15 of 1979 In The Matter of The Estate of Mwayafu Chembuka Alias Mwayafu Chembuka Mwinyili.
 3. Costs of the application be provided for
2. The application is premised on nine (9) grounds on its face which are explicated in the supporting affidavit of James Kimaleni Sangura, the Plaintiff/Applicant and sworn on 16th April, 2023.
3. The Respondents are opposed to the Application and in so doing have filed Grounds of Opposition dated 20th April, 2023 Directions were taken that the application be canvassed by way of written submissions and all parties indicated that they would be relying on their said written submissions. The Applicant's submissions were filed on 16th May, 2023 while those of the Respondent, were filed on 2nd June, 2023.



Applicants Case

4. The applicant states that there is a pending succession cause BungomaCMCC Succession Cause No. 15 of 1979 touching on the suit subject matter currently pending for hearing and determination before the Chief Magistrates Court in Bungoma. He states that the land in dispute i.e. land parcel no. E. Bukusu/North Sang'alo/169 is allegedly registered in the respondent's name by virtue of a grant issued therein excluding the heirs/beneficiaries of the estate and unless the proceedings herein are stayed a miscarriage of justice will be occasioned since the legitimacy of the title can only be determined by the succession court and the true heirs /beneficiaries stand to lose.

Respondents Case

5. The respondent states that the current application is a delay tactic and an outright attempt to divert the courts attention from the real issues. He states that this dispute emanates from a Land Disputes tribunal case no. 50 of 1997 where the applicant was awarded the suit property a position which was adopted in Bungoma SPM'S Case no. 20 of 2001 and quashed in Bungoma HCCA No. 36 of 2001 by Mukunya J. The respondent further states that the applicant is not a party to the said succession file and that the said succession cause is non-existent noting that the same was determined in the year 1979 with no further legal proceedings being instituted.

Analysis and Determination

6. I have considered all the application, the grounds of opposition thereto and submissions raised by the parties together with cited statutory and case law. The issue to determine is whether the applicant has met the threshold for the court to grant stay of these proceedings. Put differently, will the outcome of the summons for revocation in Bungoma Cmcc Succession Cause No. 15 of 1979 In The Matter of The Estate of Mwayafu Chembuka Alias Mwayafu Chembuka Mwinyili affect the outcome of this suit.
7. The court in the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR held 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 fair trial. Therefore, the test for stay of proceeding is high and stringent...”
8. Additionally, in the case of *Global Tours & Travels Limited; Nairobi HC winding up cause no. 43 of 2000 Ringera J* (as he then was) persuasively 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”.



9. The Court of Appeal in the case of *David Morton Silverstein v Atsango Chesoni* [2002] eKLR held that:
- “The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court's own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay”.
10. The provisions of Article 159(2)(a)(b)(c) and (d) of the *Constitution* of Kenya as read with Sections 1A and 1B of the *Civil Procedure Act*, Cap 21 enjoin this court to foster and facilitate the overriding objective of the Act to render justice to parties in all Civil Proceedings in a just, expeditious, proportionate and affordable cost to parties.
11. From the pleadings of the parties in this case it is clear that the suit before this honourable court is one for adverse possession. Adverse possession is a doctrine of law vide which a person obtains legal title to land by reason of actual, open and continuous occupation of it to the exclusion of the registered owner for a prescribed period. In Kenya, the prescribed period is 12 years. The doctrine is anchored on Section 7, 13 and 38 of the *Limitation of Actions Act*. Section 7 provides that:
- “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
- Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR the court of Appeal defined adverse possession as:
- Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”
12. It is not clear the relation between the claim for adverse possession has in relation to the succession cause. In fact from where I sit the applicant herein seems to be forum shopping as was described in *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR where the court made a deliberate effort to outline some of the instances which would fall within the realm of the definition of an abuse of the legal process. It rendered itself in the following manner; "The situation that may give rise to an abuse of court process is indeed exhaustive, it involves situations where the process of the court has not been used or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of the court process in addition to the above arises in the following situations: -
- a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
13. It is apparent that on one hand the applicant seeks to pursue an alleged revocation of grant issued in Bungoma Cmcc Succession Cause No. 15 of 1979 In The matter of the estate of Mwayafu Chembuka Alias Mwayafu Chembuka Mwinyili claiming purchasers interest while on the other hand he is before this court seeking to be awarded the parcel of land on grounds of adverse possession. In my view this



application is a ploy by the applicant to hold this court at ransom as he awaits the outcome of the court in the succession cause and this cannot be tolerated.

14. In the instant case, it is my considered opinion that it would not be in the interest of justice to exercise court's discretion and grant stay of proceedings as the same will only serve the purpose of delaying this suit.
15. For the above reasons, the Application dated 6th April, 2023 is dismissed with costs to the Respondent.
16. I further direct that Plaintiff/Applicants to set the main suit for hearing before the trial court within 30 days of this Ruling.

Orders accordingly.

READ, DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 28TH DAY OF JULY, 2023.

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HON E C CHERONOELC

JUDGE

In the presence of;

Mr Onyando for Applicant-present

Mr. Makokha for Respondent-presen

M/S Joy-Court Assistant -present

