



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

ELC APPLICATION NO. 442 OF 2017(OS)

SAMUEL MACHARIA MUNGA.....PLAINTIFF/APPLICANT

PETER WAKIAMA KARIUKI.....PLAINTIFF/APPLICANT

EPHRAM WANDERI MURAGE.....PLAINTIFF/APPLICANT

-V E R S U S-

JAMES NGUMO MUGO (sued as a legal representative of the estate of

SALOME NGONYO MUGO (Deceased).....DEFENDANT

RULING

1. Vide a Notice of Motion dated and filed on the 12th June 2017 and later amended and filed on the 3rd July 2017, pursuant to Section 1A,1B, 3B and 63(e) of the Civil Procedure Act and Order 51 Rule 1 and 3 of the Civil Procedure Rules, and all other the enabling provisions of the Law, the Applicant seeks for orders that:-

i. **Spent**

ii. **Spent**

iii. That pending the hearing and determination of the instant suit, there be a stay of the proceedings in Nyahururu Chief Magistrate's Court Succession Cause No 62 of 2013.

iv. That Cost of this Application be in cause.

2. The application is based on the grounds that:

i. The subject matter of the instant suit is also the subject matter in Nyahururu Chief Magistrate's Court Succession Cause No 62 of 2013 involving the estate of Salome Ngonyo mugo (deceased)

ii. The said succession Cause is Scheduled for hearing on the 27th June 2017 in respect of the protest proceedings pertaining to the distribution of the deceased's estate.

iii. Unless the said proceedings are stayed, the hearing of the cause shall proceed and an order for distribution of the deceased's estate made thereby rendering the instant suit nugatory.

iv. It is in the interest of fair administration of justice that the proceedings in the said Succession Cause be stayed in order that the status quo obtaining in the estate is maintained in the pendency of this suit.

3. The application is predicated upon the annexed affidavit of Samuel Macharia Munga the Applicant herein sworn on the 3rd July 2017 and filed on the same date.

4. The application was canvassed by way of written submission with the Applicants filling their amended submissions on the 17th October 2017 and the Respondent herein filling theirs on the 3rd November 2017. A response to the same by the Applicants was subsequently filed on the 30th November 2017.

5. The Applicant's contention is to the effect that they filed the present suit pursuant to an Originating Summons claiming adverse possession of 4 acres, 4 acres and 3 acres respectively out of title No. Nyandarua /Simbara/235 having been on the said parcels of land for more than 12 years.

6. That alongside the said suit, there is a pending case in the Nyahururu Chief Magistrate's Court Succession Cause No 62 of 2013 involving the distribution of the estate of Salome Ngunyong mugo (deceased) wherein the Applicants herein have been listed as creditors.

7. The Applicants have relied on the case of **Kenya Power & Lighting Company Ltd vs Esther Wanjiru Wokabi [2014] eKLR** where the judges in the **case of Global Tours Travels Limited: Nairobi HC winding up Cause No. 43 of 200** laid down the principles that a court should consider on whether or not to grant an order of stay of proceedings; which principles I hereby reproduce as;

- i. Whether the Applicant has established that he/she has a prima facie case.
- ii. Whether the application was filed expeditiously.
- 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.

8. On the first issue, the Applicant's submission was to the effect that the Applicants had been in possession of the suit land for over 12 years and had been listed as creditors in the Nyahururu Chief Magistrate's Succession Cause.

9. That further, although the Applicants herein have been listed as creditors in the Chief Magistrate's Succession Cause, the claim for adverse possession cannot be adjudicated upon in the said proceedings. The applicant relied on the decided case of **Re Estate of Mbai Wainaina (deceased) [2015] eKLR** to buttress their submission.

10. That should the said proceedings in the Magistrate's court be allowed to proceed, the estate will be distributed in the pendency of this case rendering the same nugatory.

11. On the second issue, it was the submission by the Applicants that they had filed the present suit expeditiously on the 6th June 2017 simultaneously with their application for stay of the proceedings which were prompted by the filing of affidavit of protest by Mary Nduta Mugo, and Elizabeth Njeri Mugo who are beneficiaries of the deceased's estate herein.

12. That all along in the succession cause, there had been no issues that the Applicants would not get their respective portions until an affidavit of protest, see SNM2(b) was instituted by Mary Nduta Mugo, Paul Mugo Kamau and Elizabeth Njeri Mugo beneficiaries of the deceased's estate herein.

13. On the third principle as to whether the applicants had established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought, it was the Applicant's submission that should the said proceedings in the Magistrate's court be allowed to proceed, the estate distributed in the pendency of this case, the same would be rendered nugatory.

14. That it was thus in the interest of fair Administration of justice that the proceedings in the said Succession Cause be stayed in order that the status quo obtaining in the estate is maintained in the pendency of this suit.

15. The Application was opposed by the Defendant /Respondent herein who stated that although the Applicants had rightly relied on the case of **Kenya Power & Lighting Company Ltd vs. Esther Wanjiru Wokabi [2014] eKLR** to submitted on the principles to be considered by the court in whether or not to stay proceedings, yet the this approach was illuminated in the **Halsbury's Law of England, 4th Edition Vol. 37 page 330 and 332** to the effect 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."

16. The Respondent submitted that the Applicant herein had not established a prima facie case in the present instance in that, the present suit was instituted by way of Originating Summons dated the 6th June 2017 wherein the Applicant's claim was for ownership of the suit land by adverse possession against the deceased herein.

17. That the law on adverse possession was now settled that in order for one to acquire title, the critical period for the determination as to whether possession is adverse is 12 years and acts on the land must be inconsistent with the owner's enjoyment of the soil by the person entitled for the purpose for which he intended to use it.

18. That from the Respondent's replying affidavit dated the 11th June 2017 in response to the Originating summons, he avers that the Applicants took possession of the land by virtue of a sale agreement. That at paragraph 13 of the said affidavit the Respondent showed by the annexed documents that the deceased had continued to accept the payments made by the Applicants for the suit property. Further that nowhere in their pleadings, had the Applicants showed that the deceased or her beneficiaries intended to evict them from the suit land.

19. That further the Applicants application submission confirms that in the succession cause where the Applicants who have been enjoined as creditors, there has been no issue as to whether the Applicants would get their respective shares.

20. That the issue of possession only became adverse upon the filing of an affidavit of protest dated the 30th December 2016 by some of the beneficiaries in the succession matter. The affidavit was filed one year ago and so the Applicants cannot be said to have qualified to claim ownership under the doctrine of adverse possession over the suit land.

21. On the second issue as to 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, it was the Respondent's submission that since the applicant's claim is that of adverse possession, the same would not be in any way be affected by the change of ownership following orders of distribution of the deceased's estate in the Nyahururu Chief Magistrate's Court Succession Cause No 62 of 2013. They submitted that the law was clear that a title by adverse possession once acquired under the limitation Actions Act for a part of the land, than the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person's adverse possession. They relied on the decided case of **Githu vs Ndeete [1984] KLR 776** a position that was echoed in the case of **Ndungu Kimani & 2 Others vs John Gitau Mburu [2017]eKLR** to further submit that no prejudice shall be visited on the Applicants if the Nyahururu Chief Magistrate's Succession Cause No 62 of 2013 is allowed to proceed to determination.

22. The Respondent further submitted that this matter need to be disposed of expeditiously as the stay in the Nyahururu Chief Magistrate's Succession Cause without justification would in itself work to undermine the valiant judicial effort to conclude matter expeditiously. That there was a far greater interest to protect here being the interest of beneficiaries in the estate of the deceased w oar not parties to this matter and their right to have the Succession Cause determined expeditiously.

23. That the Applicants, herein who have been enjoined as creditors in the deceased's estate in the Succession cause would be in a better position to institute their claim properly against the individual beneficiaries from whom they acquired the land at the determination of the Nyahururu Chief Magistrate's Succession Cause. The Respondents prayed for the Application to be dismissed.

24. In a rejoinder to the Respondent's submission the Applicants reiterated that they had demonstrated that unless stay is granted in the Succession proceeding's, that the estate of the deceased would be distributed at the conclusion of the proceedings their claim in the present suit would be rendered nugatory as nothing would then stop the beneficiaries from disposing of the suit land or dealing with the same in a manner that would be adverse to the Applicants. This case, they submitted, fell within the exception to the general rule quoted from the treatise of the Halsbury's Law of England.

25. That further, it would amount to a travesty of justice if the court was to allow the Succession cause to proceed to conclusion only to later find out that the Applicants were entitled to the claim in adverse possession and therefore to stay the order which would in turn cause injustice to the Applicants than to the Respondents.

26. That the Applicants in their Originating summons had demonstrated that they had been in in actual, open, notorious, continuous and exclusive possession of 11 acres of land out of the suit and for more than 12 years and their claim could not be adjudicated in the succession cause. They relied on the case of **Chevron (K) Ltd vs Harrison Charo wa Shutu [2016]eKLR** where the Judges followed the decision in **Gulam Mariam Noordin vs Julius Charo Karisa, Civil Appeal No. 26 of 2015**.

27. At this point I must state that these two Authorities are distinguishable as the issue therein was whether a claim for adverse possession could be raised as Defence in a suit. The facts with due respect were distinguishable to the present suit.

28. To support their submission that the Applicant's case herein militated in favor of granting a stay of proceedings in respect of the Succession cause, the Applicants further asserted that they had demonstrated an arguable case in line with the decision in the case of **Kenya Power & Lighting Company Ltd (supra)** and further relied on the case of **Mwangi & Another vs Mwangi [1986] KLR 328** where Court of Appeal held that:

The rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights".

Annexed to their supporting affidavit were the following documents:-

- i. Affidavit in support of petition for letters of administration intestate in Nyahururu Chief Magistrate's Court Succession Cause No. 62 of 2013.
- ii. Summons for Grant of letters of administration intestate and supporting affidavit in Nyahururu Chief Magistrate's Court Succession Cause No. 62 of 2013
- iii. Affidavit of Protest Nyahururu Chief Magistrate's Court Succession Cause No. 62 of 2013

29. I have considered the application herewith, the authorities, as well as the reasons given for and against the said application to have the Nyahururu Chief Magistrate's Succession Cause No 62 of 2013 stayed pending the hearing and determination of the suit filed by the

Applicants herein by way of Originating Summons.

30. The matters for determination herein include:

- i. Whether the Applicant has established that he/she has a prima facie case.
- ii. 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.

31. The gist of the matter being that the deceased herein, one Salome Ngonyo Mugo who was the proprietor of land parcel No. Nyandarua /Simbara/235 is said to have had died on 21st November 1994 having put the Applicants in possession of 4 acres, 4 acres and 3 acres respectively out of title No. Nyandarua /Simbara/235, a through a sale agreement

32. That subsequently a grant of representation to his estate was sought vide Nyahururu Chief Magistrate's Succession Cause No 62 of 2013. That on the 18th June 2013, the Respondent herein was issued with the letters of administration. Thereafter the lapse of 6(six) months, he applied for a grant of letters of Administration wherein the Applicants herein were named as creditors. Prior to the distribution of the deceased's estate some of her beneficiaries filed an affidavit of protest on 30th December 2016 protesting that the Applicants herein had no claim against the deceased's estate.

33. Following the filing of the said affidavit of protest, the Applicants filed an originating summons on the 6th June 2017 seeking orders that they had acquired title by way of adverse possession to 11 acres out of land parcel No. Nyandarua /Simbara/235 having been in in actual, open, notorious, continuous and exclusive possession of 11 acres of land out of the suit and for more than 12 years and their claim could not be adjudicated in the succession cause.

34. Rule 41 (3) and (4) of the Probate and Administration Rules provides as follows:

41 (3) "When a question arises as to the identity, share or Estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or Estate which cannot at that stage be conveniently determined, the Court may prior to confirming the grant, but subject to the provisions of Section 82 of the Act, by order appropriate and set aside the particular share or Estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to Section 71(2) of the Act, proceed to confirm the grant"

35. Order XXXVI, now Order 37, of the Civil Procedure Rules is clear on the category of persons who may take out such proceedings. These persons include legal representatives, creditors, devisees, legatee, heirs or cestui quo trust or any persons claiming to be one of them.

36. Order 37 of the Civil Procedure Rules as read with Section 82 of the Law of the Succession Act, is clear to the effect that a Judge or Magistrate handling a succession cause may set aside a particular share awaiting determination of proceedings more so where the identity or share of a beneficiary in a deceased's estate arises.

37. The determination of the proceedings hereinabove mentioned being the present proceedings for adverse possession.

38. It is clear from the annexed documents to the affidavits herein that the Applicants in this matter are in occupation of the suit having taken possession after a sale agreement with the deceased, Salome Ngonyo Mugo who was the proprietor of land parcel No. Nyandarua /Simbara/235, a fact that has not been denied by the Respondent either. The Applicant's possession of a portion of the suit land has clearly been with the knowledge of the Respondent.

39. The doctrine of adverse possession in Kenya is embodied in Section 7 of the Limitation of Actions Act, (Cap 22) in these terms:

'An action may not be brought by any person to recover land after the end of 12 years from the dated on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person'.

Section 37 of the Limitation of Actions Act provides that:

(i) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, to land or easement or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land."

40. I find that although the Applicants herein have been listed as creditors in the Chief Magistrate's Succession Cause, the claim for adverse possession cannot be adjudicated upon in the said proceedings but should be conveniently determined in this court.

41. The Constitution in Article 162 (2) (b) provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land, and shall determine the jurisdiction and functions of these courts. The jurisdiction of the said courts is found in Section 13 of the Environment and Land Court Act of 2012 which provides that the court shall hear disputes relating to :

(a) environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations,

mining, minerals and other natural resources;

(b) compulsory acquisition of land;

(c) land administration and management;

(d) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

42. In **Harman Singh & Others vs Mistri 1971 E.A 122**, it was held that:

The High Court has inherent jurisdiction to order a stay of a suit for sufficient reason where the ends of justice so require. It is a discretionary power vested in the Court

43. I find that the claim by the Applicants herein should first be determined expeditiously so that if it is confirmed that indeed the Applicants have acquired title by adverse possession, then the said property will be removed from the Estate of the deceased to enable the equitable distribution of the same amongst the beneficiaries.

44. I therefore hold and find that the Applicants herein have established a prima facie case to grant the orders sought herein. In the best interest of justice and in the spirit of Section 1A and 3A of the Civil Procedure Act, I direct that the proceedings in Magistrate's Succession Cause ought not to be allowed to continue pending the hearing and determination of the present suit.

45. In the circumstance herein I do allow the Applicant's amended application amended on the 3rd July 2017 to the effect that pending the hearing and determination of the instant suit, there be and is stayed the proceedings in Nyahururu Chief Magistrate's Court Succession Cause No 62 of 2013.

46. That Cost of this Application be in cause.

Dated and delivered at Nyahururu this 24th day of May 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE