



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NANYUKI**

**ELC CASE NO. 2 OF 2021**

**(FORMERLY NYERI ELC CASE NO. 89 OF 2013)**

**BENSON MATHU WAKABA.....1<sup>ST</sup> PLAINTIFF**

**NELIUS NYAMBURA MATHU.....2<sup>ND</sup> PLAINTIFF**

**EDWARD MWANGI MATHU.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**DORIS KIGETU MAINGI.....DEFENDANT**

**ON**

**RULING**

Before the court is the Defendant's application dated 13/7/2017 brought under Section 6 of the Civil Procedure Act, seeking to stay further hearing of this suit until her application for the revocation of the grant dated 7/6/2017 which was issued in **Nairobi High Court Succession Cause No. 3302 of 2005** is heard and determined. The grounds on which the application is made are on the face of the application as well as the supporting affidavit of Mercy Kaume, the advocate representing the Defendant in this case.

The application was opposed by the 1<sup>st</sup> Plaintiff through the replying affidavit he swore on 21/8/2017, in which he averred that the outcome of the proceedings in **Nairobi Succession Cause No. 3302 of 2005** would not affect this case because the reliefs sought in the two matters were different. Further, that it is only the Environment and Land Court (ELC) which has the jurisdiction to cancel the registration of the late Stephen Muchoki Benson as the owner of the suit land. He added that the succession cause related to the distribution of the assets of the Estate of the late Stephen Muchoki Benson while pointing out the fact that the Defendant was not a beneficiary and therefore lacked *locus standi* to seek nullification of the grant.

The background of this case is that the Plaintiffs lay claim to the land known as land reference number 2787/919 Nanyuki Municipality ("the Suit Property"), by virtue of their appointment as administrators of the Estate of the late Stephen Muchoki Benson vide a rectified grant issued in **Nairobi Succession Cause No. 3302 of 2005**. The late Stephen Muchoki Benson was the son of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, and a brother to the 3<sup>rd</sup> Plaintiff. On the one hand, the Plaintiffs contention is that the late Stephen purchased the Suit Property from Sedekiel Simon Minja and the land was duly registered in his name. On the other hand, the Defendant who claims that she was the wife of Sedekiel contends that she was in possession of the Suit Property and that Sedekiel did not sell the land. Sedekiel Simon Minja died after the transfer of the Suit Property. The Plaintiffs deny knowledge of such marriage.

The Plaintiffs brought this suit seeking the eviction of the Defendant from the Suit Property and mesne profits. In her counterclaim, the Defendant averred that the Suit Property was fraudulently transferred through a forged sale agreement and sought cancellation of the name of late Stephen Muchoki Benson from the register. Initially, the Plaintiffs annexed a grant in which the Suit Property was not listed but during the pendency of the trial they produced an amended grant. The Defendant is an Objector in **Nairobi Succession Cause No. 3302 of 2005** and seeks revocation of the amended grant.

The application was canvassed through written submissions. The Defendant filed her submissions dated 12/11/2021 in which she urged the court to allow her to ventilate her case in **Nairobi Succession Cause No. 3302 of 2005** to meet the ends of justice. It was her submission that the amended grant would affect the substance and outcome of this case. The Defendant relied on **Mits Electrical Company Ltd v Mitsubishi Electric Corporation [2018] eKLR** where the court proceedings were stayed and the dispute was referred to arbitration. She also cited **In the matter of the Estate of John Kiptum Bartilol v Ednah Kangogo [2021] eKLR** in which the applicant was granted stay of 60 days to pursue an intended appeal.

The Plaintiffs contended in their submissions dated 22/11/2021 that the application for stay pending the hearing of the application for

revocation of the amended grant in **Nairobi Succession Cause No. 3302 of 2005** is misconceived because the Suit Property was not registered in the name of the late Stephen Muchoki Benson based on the grant in the succession cause. Further, that the Defendant's counterclaim was premised on an alleged fraudulent transfer yet she had not demonstrated the nexus between the grant and the alleged fraudulent transfer. The Plaintiffs maintained that the determination of the issue of the fraudulent transfer falls within the jurisdiction of the ELC and was not a probate matter. The Plaintiffs submitted that the Defendant had failed to explain her delay in prosecuting her application for revocation of grant which is dated 7/6/2017.

The Plaintiffs argued that since this suit was initially filed in the Magistrates court on 27/1/2007 while the Defendant's application for revocation of the grant was filed on 7/6/2017, this suit cannot be deemed to be a previously instituted suit within the meaning of Section 6 of the Civil Procedure Act. Finally, the Plaintiffs submitted that the authorities which the Defendant cited in her submissions are irrelevant to the facts of this case because they relate to stay of proceedings pending arbitration and appeal. The Plaintiffs urged the court to dismiss the Defendant's application with costs and added that a stay of these proceedings would occasion injustice to the parties given the age of the suit.

The court has considered the application, the response together with the parties' submissions. It is not in dispute that the Suit Property is also the subject of **Nairobi Succession Cause No. 3302 of 2005**. Section 6 of the Civil Procedure Act prohibits the court from proceeding with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

It is helpful to first address the issue of the delay in this case. The original claim was filed on 22/1/2007. The Defendant filed the application seeking the revocation of the grant on 14/7/2017 and has not prosecuted it. The reasons which the Defendant gave for not prosecuting that matter are that the court file in Nairobi disappeared for a long time. There is no evidence to show that the Defendant sought the intervention of the Deputy Registrar in retrieving that file. She also alluded to the difficulties brought about by the Covid 19 pandemic. It is public knowledge that the Covid 19 pandemic struck Kenya in mid-2020 and not earlier as the Defendant would like the court believe. During that time cases continued to be heard through virtual proceedings. The Defendant explained that the succession cause was being handled by a different advocate but failed to provide evidence to support this contention. Even if this were so, it would still be the duty of the Defendant to ensure that the advocates she instructs to represent her in different cases touching on the same subject matter are kept informed of all the developments in the different proceedings.

The court agrees with the Plaintiffs that the Defendant has been indolent in getting her application for the revocation of the grant in the High Court heard and determined. The delay in prosecuting the instant application was also inordinate.

Nevertheless, and in the interest of justice, the court will still determine the present application on its merits. The issue for determination is whether the Defendant has met the threshold for the court to stay these proceedings. Put differently, will the outcome of the Defendant's application in **Nairobi Succession Cause No. 3302 of 2005** affect the outcome of this suit?

According to **Halsbury's Law of England, 4th Edition Volume 37**, stay of proceedings is a serious and fundamental interruption in the right a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case and the general practice is that a stay of proceedings should not be imposed unless there is no doubt that the proceeding ought not to be allowed to continue. The power to stay proceedings ought to be exercised sparingly and only in exceptional cases like where the proceedings are shown to be frivolous, vexatious or harassing, groundless or where there is clearly no cause of action in law or in equity.

The 1<sup>st</sup> Plaintiff deponed in his Replying Affidavit that the Suit Property was inadvertently omitted from the initial certificate of confirmation of the grant and that the error was rectified through the issuance of an emended grant which was issued by the High Court on 12/6/2012. It would have been helpful if the Plaintiffs had produced a copy of the amended grant. The court notes that the Defendant only annexed a copy of the confirmation of grant dated 15/8/2006 to her application. The schedule in the confirmation of grant ordinarily shows the mode of distribution of the assets of the Estate of a deceased person. It is not clear who the beneficiary of the Suit Property is under the amended confirmation of grant. The outcome of the proceedings in **Nairobi Succession Cause No. 3302 of 2005** will certainly affect this case because the suit land in this suit is the main subject of the application for review of the grant in the succession cause.

In this court's view, the prudent course to follow is to first have the application for revocation of the grant heard and determined by the High Court in the succession cause before this court can hear this dispute. If the Defendant does not succeed in her quest to have the amended grant revoked so that the Suit Property can be excluded from the assets of late Stephen Muchoki Benson, there will be nothing to go to trial in this case as the Suit Property will be distributed in accordance with the grant issued and confirmed by the High Court.

Weighing the case of both parties this court is satisfied that it will be in the interest of justice to stay these proceedings until the application for revocation of the grant dated 7/6/2017 is determined in **Nairobi High Court Succession Cause No. 3302 of 2005**.

The stay order will be in force for one year which in the court's view is sufficient for the Defendant to move with alacrity and prosecute her application for revocation of the grant and for a determination to be made by the High Court. The costs of the application will be in the cause.

**DELIVERED VIRTUALLY AT NANYUKI THIS 17TH DAY OF FEBRUARY 2022.**

**K. BOR**

**JUDGE**

**IN THE PRESENCE OF: -**

**MR. MWANGI MUTHONI FOR THE PLAINTIFFS**

**MS. STELLA GAKII- COURT ASSISTANT**

**NO APPEARANCE FOR THE DEFENDANT**