



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KAPSABET

ELC CASE NO. 78 OF 2021

JEROP TRAPRANDICH NGETICH.....1ST PLAINTIFF
SAMUEL KIPLIMO BETTL.....2ND PLAINTIFF
CHRISTOPHER KIPKERING BETT.....3RD PLAINTIFF
JOHN KIPKEMEI CHEPTAREI.....4TH PLAINTIFF
RUTH JEPKOECH NGETICH.....5TH PLAINTIFF
SALLY JEPKIRONG NGETICH.....6TH PLAINTIFF

VERSUS

KIPTOO ARAP CHELULE.....DEFENDANT

RULING

1. This ruling is in respect to the application dated 22nd March 2021. The Application is by way of Notice of Motion seeking the following order:

i. That there be temporary stay of this suit pending hearing and determination of Eldoret E & LC No. 15 of 2020 (Now Kapsabet Petition No. 1 of 2021).

ii. That any necessary directions be given.

2. The application is brought pursuant to the provision of Order 2 Rule 15, Order 7 Rule 13, Order 51 Rule 1 and 4 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 6 of the Civil Procedure Act. The application is supported by grounds on the face of it and sworn affidavit of Kiptoo Arap Chelule, the Defendant herein.

3. The Applicant deponed that the issue in this suit is directly and substantial the same as the one in Eldoret E & LC No. 15 of 2020 (Now Kapsabet Petition No. 1 of 2021).

4. In opposing the application, the Respondent filed Grounds of Opposition dated 15th July, 2021 and Replying Affidavit sworn by John Kipkemei Cheptarwei, the 4th Plaintiff in this suit. He deponed that there have been several suits between the same parties and over the same subject matter which have since been dismissed. That this suit was filed only to enforce the orders issued previously he deponed further that the Petition is resjudicata and cannot stay proceedings in this matter.

5. The Instant application was disposed by way of written submissions pursuant to directions taken on 3rd February, 2022.

6. The Defendant/ Applicant's Counsel framed two issues for determination in their submissions namely whether the Applicant has satisfied the conditions for grant of orders of stay of suit and whether the Applicant stands to suffer grave mischief necessitating grant of order of stay of suit N. Kapsabet E & LC No. 78 of 2021 pending hearing and determination of Kapsabet E & LC No. 1 of 2021.

7. On the first issue, the Applicant's Counsel submitted that the law on stay of suits is provided under Section 6 of the Civil Procedure Act which state that:

“6. Stay of Suit

No court shall proceed 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.”

8. Counsel further submitted that Petition No. 1 of 2021 and the instant suit are premised on the same subject matter which is land parcels numbers NANDI/LESSOS/659, 660, 661, 662, and 663 formerly NANDI/LESSOS/351 prior to sub-division, transfer and registration. Counsel also submitted that parties in both suits are similar, therefore, proceeding with the matters in distinct courts would generate different outcomes.

9. On the second limb of issues raised by Applicant’s Counsel, he submitted that Petition Number 1 of 2021 raises fundamental issues of serious violation of Applicant’s rights to own property. That denying the Applicant orders in the instant application will occasion an injustice, the applicant will lose his land and be evicted from land he has occupied for decades. Counsel relied in the case of Kenya wildlife service - James Mutembei (2019) eKLR where the court stated thus: -

“My brother Justice Gikonyo observed that stay of proceedings is a grave judicial action which 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 proceedings is high and stringent. I need not buttress any further this point as it is well put. The Applicant has not demonstrated any loss or damage that would be occasions if Narok CMCC ELC NO. 192 of 2018 proceeds for hearing and determination.”

10. Counsel for the Applicant further quoted Halsbury’s Law of England, 4th Edition Vol. 37 page 330 and 332 which states 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 proceedings beyond allowed to continue.”

“this is a power which, it has 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 basics of the pleading and the facts of the case.”

11. In a nutshell counsel submitted that an injustice is imminent if this suit proceeds parallel to Kapsabet E & LC Petition No. 1 of 2021.

12. I note that on 3rd February 2022 both counsels agreed to canvass the application by way of written submissions and took directions to that effect. While the Defendant/Applicant filed their written submissions, the Plaintiff/ Respondent has not filed theirs. Nevertheless the court has read and considered the application, the affidavits and submissions filed and proceeds to render its determination.

ANALYSIS AND DETERMINATION:

13. The pertinent issues that stand out for determination are:

- i. Whether the instant suit is subjudice
- ii. Whether the Defendant/ Applicant is entitled to the orders sought.

I. WHETHER THE INSTANT SUIT IS SUBJUDICE:

14. The defendant/ Applicant contends that this suit is subjudice since there is a similar suit pending between the parties over the same subject matter being Kapsabet E & LC Petition No. 1 of 2021. The Principle of subjudice is set out under Section 6 of the Civil Procedure Act which provides that:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issues 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 proceedings is pending in the same or an other court having jurisdiction in Kenya to rant the relief claimed.”

15. The Court of Appeal in the case of Joel Kenduiywo Vs. District Criminal Investigation Officer Nandi & 4 Others (2019) stated the rationale of Section 6 of the Civil Procedure Act as follows: -

“Section 6 of the Civil Procedure Act is meant to prevent abuse of the Court process where parallel proceedings are held before two different court with concurrent jurisdictions or before the same court at different times. This is to obviate a situation where

two court of concurrent jurisdiction arrive at different decisions on the same facts, evidence and cause of action.”

16. Further, the court held in the case of Barclay Bank of Kenya Limited Vs. Elizabeth Agidza & Others (2012) eKLR that:

“.....if the controversy in the subsequent suit can be conveniently and properly adjudicated upon in the previous suit, by virtue of the enactment of Sections 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 Civil disputes between parties.....”

17. The court has carefully perused pleadings in both suits and notes that the subject matter in dispute in both suit are the same. The suit properties are Nandi/ Lessos/559, 660, 661, 662 and 663 which emanated from mother title property number Nandi/ Lessos/351 upon sub-division.

18. Moreover, parties in both suits are similar save for addition of the following parties in the Petition and subtraction of the same in the instant suit, the Settlement Fund Trustees, Land Registrar Nandi county and the Attorney General. In my view, addition or subtraction of parties does not make a fresh suit. In the same breath I quote the decision in the case of Diocese of Eldoret Trustees (Registered) Vs. Attorney General (on behalf of the Principal Secretary Treasury) & Another (2020) eKLR where the Honourable Judge was faced with a similar issue of addition and subtraction of parties held thus:

“Courts must always be vigilant to guard against litigants who metamorphosis to bring suits as new litigants or add others to circumvent the doctrine of resjudicata. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit.”

19. It is the court’s observation that the main issue in both suits are similar and intertwined. The decision of the Court in Kapsabet Petition No. 1 of 2021 formerly Eldoret Petition No. 15 of 2020 will have a bearing in the instant suit. I say this because what is up for determination in the Petition is whether the Kilibwoni Land Dispute Tribunal had jurisdiction to hear and determine dispute over suit properties and award suit properties in favour of the Plaintiff’s/ Respondents who as a result of that decision are seeking permanent injunction and eviction of the Defendant/Applicant herein. Proceeding with this matter concurrently with the Petitioner may lead to different outcomes that may embarrass this court.

20. In view of the above, I agree with the Defendant/Applicant that the issue in the instant suit is directly and substantially the same as in Kapsabet Petition No. 1 of 2021 formerly Eldoret Petition No. 15 of 2020.

II. WHETHER THE DEFENDANT/ APPLICANT IS ENTITLED TO THE ORDERS SOUGHT

21. The Defendant/ Applicant has sought for a temporary order of stay of proceedings in this suit pending hearing and determination of Eldoret E & LC Petition No. 15 of 2020 now Kapsabet E & LC No. 1 of 2021. The court has already held ad found that the instant suit is directly and substantially in issues with Eldoret Petition No. 15 of 2020 now Kapsabet Petition No. 1 of 2021.

22. Moreover, the Court has to consider the pros and cons of granting or not granting the order for stay of proceedings as held by Ringera J (as he was then) in the case of Re Global Tours and Travel Limited HCWC No. 43 of 2000 where he 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 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 orders.”

23. In the instant case, I have weighed the pros and cons of granting the order of stay of proceedings and am of the view that the pros outweigh the cons. This is because proceeding with the instant suit as demonstrated b the Applicant will lead to eviction of the Applicant from the suit property whose ownership is in question.

24. In the upshot, I allow the application dated 22nd March 2021, and order that there be stay of this suit pending hearing and determination of Eldoret E & LC Petition No. 1 of 2021.

DATED AT KAPSABET THIS 17TH DAY OF MARCH 2022

M. N. MWANYALE

JUDGE

Delivered in the Presence of:

Ms. Cherop for Petitioner

Ms. Odeyo for 1st to 3rd Respondent

Ms. Muiru for 4th to 6th Respondent