



REPUBLIC OF KENYA



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Ontiri v Omwenga & 2 others (Environment and Land Miscellaneous Application 2 of 2022) [2022] KEELC 2293 (KLR) (19 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2293 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 2 OF 2022
JM ONYANGO, J
MAY 19, 2022

BETWEEN

EVERLYN KEMUNTO ONTIRI APPLICANT

AND

FRANCIS ONGERI OMWENGA 1ST RESPONDENT

CHARLES ONSONGO MOCHAMA 2ND RESPONDENT

SABINA MORAA SWANYA 3RD RESPONDENT

RULING

Introduction

1. The Applicant brought this application pursuant to Order 51 of the Civil Procedure Rules, 2010, Section 3A, 18 and 63 of the *Civil Procedure Act*, Section 93(1) and 97(c) of the *Law of Succession Act* and Articles 40(6), 159 and 165(6) of *the Constitution* of Kenya 2010 seeking the following orders:
 - a) Spent
 - b) That pending the hearing and determination of this application, the Honourable Court be pleased to order a stay of proceedings in Kisii Chief Magistrate’s Court ELC Case No.75 of 2019 and No 66 of 2020 Charles Onsongo Mochama V Francis Ongeru Omwenga & 2 Others and Sabina Moraa Swanya V Francis Ongeru & 2 Others.
 - c) That the Honourable Court be pleased to stay the proceedings referred to in (b) pending the determination of the application in Kisii High Court Succession Cause No. 211 of 1999 by Francis Ongeru Omwenga dated 5th September, 2021.



- d) That the Honourable Court be pleased to recall and examine the record of proceedings to direct the Honourable S.K Onjoro PM to recuse himself from presiding over Kisii Chief Magistrate's Court ELC Case No.75 of 2019 and No. 66 of 2020.
 - e) That upon such calling up and examining the record of proceedings in Kisii Chief Magistrate's Court ELC Case No.75 of 2019 and No. 66 of 2020, the Honourable Court be pleased to grant such orders or further orders as may be appropriate.
 - f) That the Honourable Court be pleased to allow the Applicant herein to appear and participate in the proceedings in Succession Cause No. 211 of 1999 as an Interested Party.
 -) That owing to the nature of issues in controversy that cut across the jurisdiction of this Court, this Court in the event that it lacks jurisdiction, it directs this matter to be transferred to Kisii Environment and Land Court for directions and disposal of the application.
 - h) That the costs of this application be in the cause.
2. The application is anchored on the grounds set out on in the Notice of Motion and the Applicant's Supporting Affidavit sworn on 24th January, 2022.
 3. The Applicant's main complaints are that the trial Magistrate in the CMELC Case No, 75 of 2019 was biased and had allowed Mr. Philemon Ochwangi, Advocate to represent one of the parties in the case yet he was likely to appear as witness since he had been involved in the conveyancing relating to the titles in question. The Applicant is also unhappy about the manner in which the matter has been conducted by the trial Magistrate and fears that she may not get justice. Additionally, she has pointed out that Succession Cause no. 211 of 1999 which relates to the suit property is still pending before the High Court.
 4. The application is resisted by the 2nd and 3rd Respondents through their Grounds of Opposition dated 3rd March, 2020 raising the following points:
 - i. The instant Notice of Motion application is misconceived, incompetent and otherwise legally untenable.
 - ii. The Applicant has not satisfied the conditions to warrant granting the orders sought herein.
 - iii. The instant Notice of Motion is calculated to circumvent and defeat the finalization of CMELC Case No. 75 of 1019 and 66 of 2020.
 - iv. The Applicant is guilty of concealment, misrepresentation and suppression of material facts. Consequently, the Applicant is not entitled to partake of the discretion of the court.
 - v. The instant Notice of Motion does not raise and/or capture any reasonable cause of action.
 - vi. The instant application constitutes and/or amounts to an abuse of the due process of the court.
 - vii. In the premises the Notice of Motion herein is devoid of merits whatsoever (sic).
 5. The court directed that the application be disposed of by way of written submissions and both parties complied by filing their respective submissions.
 6. Having carefully considered the Notice of Motion, the Supporting Affidavit and rival submissions, the main issues for determination are :



- i. Whether the proceedings in Kisii CMELC Case No. 75 of 2019 and 66 of 2020 should be stayed pending the hearing and determination of the application dated 5th September, 2021 in Kisii HC Succession Cause No. 211 of 1999.
- ii. Whether this Honourable Court has the jurisdiction to direct that the Applicant be allowed to participate in Kisii HC Succession Cause No. 211 of 1999.
- iii. Whether this Honourable Court has Supervisory jurisdiction over the Magistrates' courts in Environment and Land cases.

Analysis and Determination

7. The threshold for stay of proceedings is illuminated in *Halsbury's Laws of England*, 4th Edition. Vol. 37 page 330 and 332, as follows:

“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 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.”

8. 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 the right of access to justice, right to be heard without delay and overall, right to fair trial”.

9. In the instant case, the Applicant has not demonstrated that the proceedings in CMELC Case No. 75 of 1999 and 66 of 2020 are so frivolous and groundless that they should not be allowed to continue. The main reason that the Applicant wants the said proceeding stayed is that she would like to be allowed to participate in HC Succession Cause No. 211 of 1999. She has also alleged that the trial Magistrate was biased in the manner in which he was conducting the hearings.
10. First of all, this court cannot stay proceedings to allow the Applicant to participate in the Succession case without proof that she has been granted leave by the High Court to participate in the said proceedings. I must add that this court has no jurisdiction to direct that the Applicant be allowed to participate in a matter pending before the High Court.
11. Secondly, on the issue of bias, it was incumbent upon the Applicant to file an appropriate application requesting the trial Magistrate to recuse himself and if he refused to do so, then the Applicant would be at liberty to file an appeal before this Court. As I held in ELC Misc Application No. 12 of 2021 where the Applicant made a similar application, this court has no supervisory powers over subordinate courts in Environment and Land cases. Be that as it may, the issue or recusal has been overtaken by



events as the said Magistrate has since been transferred from Kisii CM's Court and inevitably the case shall be heard by a different Magistrate.

12. In light of the foregoing, it is my finding that the Applicant has not met the threshold for stay of proceedings. Consequently, I find no merit in the application and I hereby dismiss it with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 19TH DAY OF MAY, 2022.

J.M ONYANGO

JUDGE

