



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 180 OF 2016

MARY GOE.....PLAINTIFF

-VS-

1. KYALO KINONGO

2. ROSE WANGUL.....DEFENDANTS

RULING

1) By a notice of motion dated 11th March, 2019, the 1st defendant/applicant is seeking the following orders:

1. That there be a stay of the proceedings herein in this suit, until the final determination and finalization of proceedings in ELC NO.166 of 2015.

2. That costs of this application be provided for.

2) The application is brought under Order 51 Rule 1, 3 and 4 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. The application is based on the grounds that:

i. The 1st defendant has been a resident of Mtwapa Maweni Settlement Scheme since 2002 and in possession of unsurveyed plot which he later came to learn that is a portion of PLOT NO.MN/III/324 and 334.

ii. Sometimes in 2004, one JUMAA CHENGO KASHAHA made an application for vesting order Misapplication No.560 of 2004 (OS) under Land Adjudication Act 284 Laws of Kenya. He was later substituted by Omar Salim Chengo. The court, in its ruling delivered on 30.3.2012, declared plots numbers 324 & 334 SEC MN III as Government Land and the same to be held defendant being one of them) in possession of the land with accordance with Article 62 of the Constitution (sic).

iii. Sometime in April 2017, the 1st defendant benefited from a court Order in ELC No.166 of 2015 compelling the Registrar of Titles at Mombasa to proceed and issue new subdivision Title Deeds in the names of each and every person listed as a resident in the list of 1400 Transferees.

iv. By virtue of the said Court Order, the National Government through National Land Commission in conjunction with the Ministry of Lands and the County Government of Kilifi began the process of allocating the plots to the existing people on the said Land.

v. In light of the foregoing, it is imperative for the proceedings in this case to be stayed until the finalization of proceedings in ELC Civil Suit No. 166 of 2015, since the outcome will significantly affect the proceedings in this case.

vi. If the orders of stay are not granted then it may result to a confusion of having conflicting orders over the same subject matter.

vii. The application will not occasion any prejudice or inconvenience to the plaintiff that cannot be compensated by way of a reasonable award of costs.

viii. It is therefore in the interest of justice that I urge the court to grant the orders sought.

3) In support of the application, the applicant swore an affidavit on 11th March, 2019 in which he has annexed a copy of decree in Misc. Application No.560 of 2004 (OS), copy of court Order dated 8th May, 2017 in ELC No. 166 of 2015 and List of Transferees; copies of Letters from the National Land Commission and County Government of Kilifi; a copy of certificate of Postal Search dated 25th January, 2019, and a letter by the District Surveyor Kilifi.

4) In opposing the application, the plaintiff/respondent filed a replying affidavit sworn by herself on 28th July, 2020 in which she has deposed that she was registered as owner of PLOT NUMBER 6145/III/MN, Title Number CR 58733 measuring 0.0213 hectares or thereabouts on 9th January, 2013. A copy of the certificate of title and a copy of certificate of postal search have been annexed. The respondent states that the defendants without any colour of right have encroached and/or trespassed into the said plot, hence the filing of this suit. The respondent has annexed a copy of survey report allegedly confirming the said encroachment. The plaintiff avers that she is not a party and is a stranger to the suits and proceedings in Misc. Application No.560 of 2004 (OS) and Mombasa ELC NO. 166 of 2015. The respondent urged the court to dismiss the application with costs.

5) The application was canvassed by way of written submissions which were duly filed by both parties. The applicant reiterated the grounds set out in the application and relied on the case of **Attorney General –v- Chief Magistrate, Milimani Law Courts & 3 Others Ex-Parte Mohan Galot (2018)eKLR**.

6) In her submissions the respondent reiterated that from the documents exhibited by the applicant, **Mombasa ELC No. 166 of 2015** was essentially concluded on 11th April 2017 when the consent order was recorded and therefore there is nothing left for determination. That neither the applicant nor the respondent were parties in that case. The respondent relied on the case of **Kenya Wildlife Service –v- James Mutembei (2019)eKLR** and urged the court to dismiss the application with costs.

7) I have considered the application and the rival submissions. The issue to consider is whether this suit should be stayed until the final determination and finalization of the proceedings in Mombasa ELC No. 166 of 2015. 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 thus:

“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 expeditions disposal of cases, the prima facie merits of the intended appeal, in the sence 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. ”

8) In Halsbury’s Law of England, 4th Edition, Vol 37 page 330 and 332, it is stated 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 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.”

9) It is therefore clear that stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his/her litigation. It impinges on the right of access to justice, right to be heard without undue delay and overall, right to fair trial. Stay of proceedings can only be granted sparingly, and only in exceptional cases.

10) In the instant case, the respondent has pleaded that she is the registered owner of the suit property known as SUBDIVISION NO.6145 (ORIGINAL NUMBER 5532/276) SECTION III MAINLAND NORTH. The plaintiff has exhibited the certificate of title in her name and has accused the defendants of encroachment and/or trespass onto the suit property. It has not been shown that the plaintiff is a party in Mombasa ELC NO. 166 of 2015 and/or that the suit property is the same. I have perused the order in ELC NO. 166 of 2015 annexed to the application herein. The same refers to PLOT NO. MOMBASA MN/III and MN/1112; subdivision title numbers 8746/12 and 8746/13. Further, the application herein refers to PLOT NOS. MN/III/324 and 334. The applicant has not shown the nexus between those plots and the suit property herein. Furthermore, a perusal of the order in Mombasa ELC NO. 166 of 2015 indicates that that matter was concluded on 11th April 2017 when a consent order was recorded. The applicant has clearly failed to demonstrate what is pending determination in that case.

11) I am of the considered view that the applicant has not met the test for grant of stay of proceedings in this matter. The upshot is that the notice of motion dated 11th March, 2019 is devoid of merit and is dismissed with costs.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 21st day of January 2021

.....

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE