



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC (OS) 132 OF 2019

DAVIS MWATELA DZUYA.....1ST PLAINTIFF

MASUDI BAKARI MUSA.....2ND PLAINTIFF

VERSUS

SALIM ANJARWALLA (the legal representative of the

Estate of Hussein Karimbhai Anjarwalla).....DEFENDANT

RULING

1. The application for determination is dated 23rd September 2020 brought by the defendant under Section 1A, 1B and 3A of the Civil Procedure Act, Order 25 Rule 4, 7 and Order 51 Rule 1 of the Civil Procedure Rules. The application seeks the following orders:-

a) THAT proceedings in this suit be stayed until the 1st plaintiff and 2nd plaintiff (hereinafter the “plaintiffs”) settle the defendant/respondent costs in ELC Case (OS) No 110 of 2017 Davis Mwatela Dzuya and Masudi Bakari Musa V Hussein Karimbhai Anjarwalla.

b) THAT this court be pleased to issue directions as to the period of time within which the said costs ought to have been settled by the plaintiffs.

c) That the costs of this application be provided for.

2. The application is supported by the affidavit of Salim Anjarwalla in which it is stated that the plaintiffs sued the defendant in ELC Case (OS) No 110 of 2017 through an Originating Summons dated 29th March 2017. That the plaintiffs later withdrew the case and the costs of the suit awarded to the defendant as per the orders of this court dated 13th August 2019. Further to that, there was a Certificate of Taxation issued on 17th June 2020 that certified the costs awarded to the defendants to the tune of Kshs 252,715.00. That in the quest of demanding the said costs, the defendant wrote to the advocate on record for the plaintiffs on 7th July 2020 to settle the costs but there was no response. The defendant prayed for court to stay these proceedings until the awarded costs are settled.

3. The plaintiffs filed grounds of opposition on 13th November 2020 opposing the application and stated that the application was a waste of court’s time and an abuse of court process which lacks merit and that the instant suit was distinct from ELC No 110 of 2017. Further, that the defendant has not demonstrated to court that he has unsuccessfully tried to execute and/or recover his costs from the plaintiffs to warrant stay of proceedings in this suit nor has he demonstrated how he has been unsuccessful in executing and/or recovering his costs from the previous suit.

4. Having considered the application, the grounds of opposition and the submissions for both parties, the issue before court for determination is whether the suit may be stayed pending the payment of costs awarded by court in the previous case.

5. **Order 25, Rule 4 of the Civil Procedure Rules provides that:-**

“If any subsequent suit shall be brought before payment of the costs of a discontinued suit, upon the same, or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid.”

Court defines ‘subsequent proceedings’ as proceedings that are between substantially the same parties and concern substantially the same

cause of action as the discontinued proceedings.

6. The plaintiffs have previously discontinued **ELC Case (O.S) No 110 of 2017** which is substantially similar proceedings against the same parties. It is not denied that costs are yet to be settled in the case that was withdrawn. The plaintiffs instituted this suit seeking ownership of Plot No MN/1/858 by virtue of adverse possession, before they could settle the defendant's costs in ELC OS 110 of 2017 which in my view is similar to the present case. The similarity between the withdrawn suit ELC OS 110 of 2017 and this current suit is that they are both anchored on the same suit property and same parties or those claiming through them. Order 25, Rule 4 therefore applies in terms of court having the discretion to stay the current proceedings until the plaintiffs settle the costs awarded to the plaintiff in the discontinued suit.

7. The plaintiffs ought to have paid the defendant costs of the proceedings previously brought and discontinued by them. The proceedings are identical to the previous set of proceedings brought by the plaintiff against the defendants. From the reading of Order 25 Rule 4, a plaintiff having withdrawn an action, commences a second action for the same matter. A court may stay the second action until costs of the first action have been paid. Stay may be granted despite a technical difference in the capacity in which the subsequent action is brought. More so the plaintiffs have not advanced any proper explanation why the previous costs have not been paid neither have they shown any intention of doing the same.

8. The upshot is that the Notice of Motion dated 23rd September 2020 is allowed and I make the following orders:-

a) The proceedings herein are stayed pending payment of costs by the 1st and 2nd Plaintiff/Applicant in ELC Case (OS) No 110 of 2017 Davis Mwatela Dzuya and Masudi Bakari Musa V Hussein Karimbhai Anjarwalla within 60 days from the date of this ruling.

b) In default of compliance with (a) above as aforestated the suit stands dismissed with costs to the defendant.

c) Costs of this application are awarded to the defendant.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MARCH, 2021

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE

Environment and Land Court- Judge