



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI

ELC CASE NO. 288 OF 2013

CHARLES MUNENE GATIMU.....1ST PLAINTIFF

KAREGI CATHERINE KAMANJA.....2ND PLAINTIFF

VERSUS

ERNEST OMWENGA

(Sued on his own behalf and as Chairman of Amani Self Help Group).....1ST DEFENDANT

PETER KINYUA.....2ND DEFENDANT

ABEL OYARO.....3RD DEFENDANT

PROTAS MANDELA.....4TH DEFENDANT

JOHN NGIGE.....5TH DEFENDANT

CHARLES AKUNGA.....6TH DEFENDANT

SAMUEL TUTURI.....7TH DEFENDANT

EVANS OBIERO.....8TH DEFENDANT

FRANCIS NDIRANGU.....9TH DEFENDANT

PETER KIOKO.....10TH DEFENDANT

STEPHEN KIBUNJA.....11TH DEFENDANT

MARY WAMBUL.....12TH DEFENDANT

LUCY NJERI.....13TH DEFENDANT

RULING

The Defendants brought the application dated 2/3/2020 seeking to have this court stay the order it made on 5/2/2020 pending the determination of their intended appeal. The application was premised on the grounds that being aggrieved by this court's decision, the Defendants had lodged a Notice of Appeal against this court's order to proceed with the trial from the point which Lady Justice Loise Komingoi left the case instead of commencing the hearing afresh and that their appeal would be rendered nugatory if the hearing of this suit proceeded on 30/4/2020 as scheduled. The Defendants contended that they had made the application timeously and that the Plaintiffs did not stand to suffer any prejudice.

The application was supported by the affidavit of Ernest Omwenga sworn on 2/3/2020. He deponed that the matter came up before this court

for directions on 5/2/2020 when the Defendants urged the court to start hearing *de novo* in light of the fact that Lady Justice Loise Komingoi had recused herself from hearing the case. He averred that the appeal they had lodged would be rendered nugatory if the hearing of this case proceeded on 30/4/2020 and added that the Plaintiffs would not suffer any loss or prejudice since there was no decree in place that was capable of being performed. He annexed a copy of the Notice of Appeal dated 6/2/2020.

The 2nd Plaintiff filed grounds of opposition to the application on 19/3/2020. The crux of her objection was that no appeal had been filed against this court's decision and that the Defendants had failed to take steps towards filing the appeal. Further, that the Defendants had not obtained leave to appeal against this court's decision. The 2nd Plaintiff surmised that this was yet another attempt by the Defendants to delay the finalisation of this dispute and added that the Defendants had failed to demonstrate any prejudice they stand to suffer if the hearing of the case proceeds from where it had reached.

Parties filed submissions which the court has had the benefit of reading. The Defendants submitted that they would suffer irreparable loss if the orders sought are not granted as they desire to exhaust the appeal process under the legal framework in Kenya. On the contention by the Plaintiffs that they did not seek the court's leave to appeal, the Defendants maintained that that was now a matter within the ambit of the Court of Appeal. They argued that it was not necessary to obtain the court's leave to lodge the appeal. They relied on Order 42 Rule 6(1) of the Civil Procedure Rules on the ingredients one has to prove for the court to grant them orders of stay which are that substantial loss will result if the order is not granted; the application is made without delay; and the applicant furnishes security for the performance of the decree that may ultimately be binding on him as ordered by the court as ordered by the court. The Defendants urged the court to exercise its discretion judiciously while reiterating that the Plaintiffs had not demonstrated what prejudice they will suffer if the orders they seek are not granted.

The 1st Plaintiff submitted that a party aggrieved by an order made pursuant to Order 18 Rule 8(1) of the Civil Procedure Rules which allows a court to deal with evidence adduced before another judge would be required to seek leave to appeal against such an order which the Defendants had failed to do. The 1st Plaintiff emphasised that there was no law requiring that part heard cases had to start *de novo*. The Plaintiff contended that the Defendants had employed delaying tactics to ensure that the hearing of this suit stalled since 2018. The 1st Plaintiff insisted that the Defendants have not been denied an opportunity to present their case and added that they had not demonstrated what prejudice they stand to suffer if the court does not grant the orders they seek. The 1st Plaintiff urged the court to direct the Defendants to deposit security of Kshs. 20 million in court in court which he gave as the value of the subject matter of this suit.

The 2nd Plaintiff contended that the Defendants did not have a right to appeal against this court's decision under Order 43 without first obtaining leave of the court. The 2nd Plaintiff submitted that the Defendants had neither applied for proceedings nor had they extracted the order that they seek to appeal against. She urged that the present application was a delaying tactic by the Defendants who have never been ready to proceed with their case. She urged the court to take the Defendants' conduct in this matter into consideration and not exercise its discretion in their favour.

She submitted that the Defendants had not met the threshold for the grant of the orders they seek. She urged that stay of proceedings was a serious 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, which should not be imposed unless the proceedings ought not to be allowed to continue beyond all reasonable doubt. She further urged that the court needed to consider factors such as the need for the expeditious disposal of cases, the prima facie merits of the intended appeal and the optimum utilisation of judicial time. She concluded that the Defendants had not taken steps in filing their appeal which in her view demonstrated their intention to frustrate the Plaintiffs' pursuit for justice.

The issue for determination in this ruling is, should the court grant the orders sought by the Defendants? The Plaintiffs case was heard by Komingoi J. before the Defendants applied for Judge Komingoi to recuse herself from hearing the case. The file was placed before the Presiding Judge of the Environment and Land Court who allocated it to me. When the matter came up for directions before this court on 5/2/2020, the Defendants' advocate intimated to the court that they wished to have the hearing of the suit start afresh so that the court could observe the demeanor of the witnesses. The Plaintiffs opposed that application and the court directed that the hearing would proceed from the point where Komingoi J. left off.

On the question of the Defendants taking steps to progress their appeal, the court record shows that the Defendants applied on 11/2/2021 to extract the order which they wish to challenge on appeal, almost a year after the court made that order. There is no record of an application being made by the Defendants for copies of the proceedings for them to pursue their appeal so that they do not delay the finalisation of this dispute. The court notes that the proceedings have already been typed and placed in the court file. A glean through the typed proceedings confirms that the Defendants are in occupation of the Suit Property.

Looking at the facts of this case and taking into consideration the Defendant's conduct in this case, the court is not satisfied that proceedings in this case ought not to be allowed to continue as the Defendants seek.

The application dated 2/3/2020 is dismissed with cost to the Plaintiffs.

DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF MARCH 2021

K. BOR

JUDGE

In the presence of: -

Mr. John Were holding brief for Mr. O. Momanyi for the 1st Plaintiff

Mr. John Were for the 2nd Plaintiff

Mr. Thomas Maosa for the Defendants

Mr. V. Owuor- Court Assistant