



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE 80 OF 2015**

**GUY SPENCER ELMS**

*(suing as the personal representative of*

*the Estate of Roger Bryan Robson (Deceased).....PLAINTIFF/APPLICANT*

**=VERSUS=**

**AGNES KARIUKI KAGURE.....DEFENDANT/RESPONDENT**

**RULING**

1. This is the Notice of Motion dated 10<sup>th</sup> May 2019 brought under section 3, 13 and 19 of the Environment and Land Court Act, Section 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act and all enabling provisions of the law.

2. It seeks orders:-

**1) Spent.**

**2) Spent.**

**3) That this suit and all proceedings herein be and are hereby stayed pending the hearing and final determination of High Court Succession Cause No. 955 of 2013; In the matter of the Estate of Roger Bryan Robson (Deceased).**

**4) That honourable court be pleased to issue further directions and orders that may be deemed just and expedient in the circumstances.**

**5) Costs of this application be in the cause.**

3. The grounds are on the face of the application and are set out in paragraphs (i) to (vii).

4. The application is supported by the affidavit of Guy Spencer Elms, the plaintiff/applicant herein sworn on the 10<sup>th</sup> May 2019 and supplementary affidavit sworn on the 30<sup>th</sup> January 2020.

5. The application is opposed. There is a replying affidavit sworn by Agnes Kagure Kariuki, the defendant/respondent herein sworn on the 14<sup>th</sup> November 2019.

6. On the 10<sup>th</sup> December 2019, the court with the consent of the parties directed that the application be canvassed by written submissions.

**The Plaintiff's/Applicant's Submissions**

7. They are dated 12<sup>th</sup> February 2020. This application is premised on the fact that the subject matter in this suit being properties known as LR No. 2327/10 and 2327/117; is substantially the subject matter of the dispute in **High Court Succession Cause No. 955/2013**, between the Estate of Roger Bryan Robson (Deceased) and the defendant herein as well.

8. Consequent to various orders of the High Court, the plaintiff is the Administrator of the Estate of the Deceased, that the defendant as the 4<sup>th</sup> objector respectively filed evidence, affidavits and further called witnesses who have so far adduced substantial evidence and testified

substantially in support of their respective claims on the suit properties in the said **High Court Succession Cause NO 955 of 2013, Estate of Roger Bryan Robson**.

9. Rights and reliefs claimed by parties in this case and in High Court Succession Cause No 955 of 2013 Estate of Roger Bryan Robson are fairly similar and arise from the same set and/or series of transactions. The crux of the succession cause is to determine whether the suit properties in the matter before this honourable court also form part of the Estate of the deceased and hence whether either of the parties to this suit may actually be entitled to the subject matter of the suit.

10. The overriding objective in the circumstances require that this suit be stayed to pave way for completion of hearing and determination of the same questions of law and fact raised herein and in High Court Succession Cause No 955 of 2013 Estate of Roger Bryan Robson and in order to avoid waste of judicial time, resources and absurdity of different decisions by court of concurrent jurisdiction on the same set of facts, issues and questions of law.

11. **Section 6** of the Civil Procedure Act provides that :-

***“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”.***

He has put forward the cases of **ASL Credit Limited vs Abdi Basid Sheikh Ali & Another [2019] eKLR** which quoted the case of **Republic vs Registrar of Societies, Kenya & 2 Others Exparte Moses Kirima & 2 Others [2017] eKLR; Thika Min Hydro Co. Ltd vs Josphat Karu Ndwiga [2013] eKLR**.

12. The result of the pending succession cause in High Court Succession Cause No. 955 of 2013; In the matter of the Estate of Roger Bryan Robson (Deceased) will be the determination of the ownership of the suit properties known as LR NO 2327/10 and LR No 2327/117. He has also put forward the case of **A.B & Another vs R.B [2016] eKLR**.

13. The application will not prejudice the defendant at all but will instead save her money, time and resources contrary to the assertions in her replying affidavit.

14. It is only just and fair that the instant suit be stayed to await the outcome of High Court Succession Cause No 955 of 2013; in the matter of the Estate of Roger Bryan Robson (Deceased). In order to save precious judicial time and resources, as well as to avoid the absurdity of having contradictory decisions over same set of facts in respect of the same properties. He prays that the application be found to be merited and be allowed.

#### **The Defendant's/Respondent's Submissions**

15. This application has been brought after undue delay and that the plaintiff has always been aware of the grounds set out in support of his application. The grounds in support of the application smack of *mala fides* and are put forth by the plaintiff as a part of a dilatory strategy to protract the matter after securing conservatory orders against the defendant/respondent.

16. A stay of proceedings is a grave one for it prevents a litigant from prosecuting his case- a right that should only be curtailed for good cause. The threshold one must meet before these orders are granted is therefore quite high as it interferes with right of a party to conduct his litigation. She has relied on Halsbury's Laws of England, 4<sup>th</sup> Edition Vol 37 page 330 and 332 which states:-

***“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”.***

17. The applicant has provided no compelling grounds to stay this suit as the two suits are different; one being a succession matter which does not even include the subject parcels of land. The jurisdiction of the two courts is separate and distinct and this court ought to proceed with the suit relating to ownership as any further delay will be prejudicial to the respondent. She has put forward the case of **Charles Njeru Mugane & Another vs Henry Ndwiga Kiura (2019) eKLR**.

18. The courts jurisdiction to grant stay is essentially discretionary and like all judicial discretion, it must be exercised judiciously. It must be exercised on the basis of some reason and established principle in relation to the subject matter under consideration. The court ought to consider that this suit has been pending in court for over five years having been filed in 2015. She has put forward the case of **National Oil Corporation of Kenya vs Real Energy Ltd [2017] eKLR**.

19. There has been unreasonable delay in making this application for stay. The respondent avers that any further delay in the conclusion of this suit would be inimical to the administration of justice in a proportionate, just, timely and cost effective manner as required by section 1A and 1B of the Civil Procedure Act (Cap 21).

20. This application is a waste of court's time. She has put forward the case of **In re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR**. The family court took cognizance of Rule 41(3) of the Probate and Administration Rules and directed that the suit property herein

be exempted from the assets of the Estate and directed the parties to litigate over the ownership of the property before this honourable court. The family court has no jurisdiction over the matter in question before this court.

21. The applicant has not produced any evidence that the probate court has made determination with respect to summons for revocation of grant **in High Court Succession Cause No 955 of 2013; in the matter of the Estate of Roger Bryan Robson (Deceased)** she prays that the application be dismissed with costs and this matter proceeds to hearing on an expedited basis.

22. I have considered the notice of motion and the affidavits in support. I have considered the replying affidavit and the submissions on record. The issue for determination is whether this application is merited.

23. By a plaint dated 4<sup>th</sup> February 2015 the plaintiff seeks judgment against the defendant, amongst other orders for;

***“A declaration that the plaintiff being the executor and therefore legal representative of the deceased one Rodger Bryan Robson is the lawful owner of all that piece of land known as Land Reference Number 2327/10 and Land Reference Number 2327/117 pursuant to the will dated 24<sup>th</sup> March 1997 in favour of the plaintiff”.***

24. In her statement of defence the defendant state that she is the owner of the suit properties having purchased the same from the then owner Roger Bryan Robson (Deceased) on 18<sup>th</sup> November 2011 through a conveyance and/or title.

25. The plaintiff in his supplementary affidavit sworn on 30<sup>th</sup> January 2020 depones in paragraph 9:

***“That the defendant only lodged an objection, a protest and later on an application to revoke the grant of probate of the written will of Roger Bryan Robson issued on 30<sup>th</sup> October 2013 to me claiming ownership over the suit properties subsequent to this suit”.***

*In paragraph 11 he deposes:*

***“That filing of the protest in the High Court Succession Cause No 955 of 2013 granted the High Court jurisdiction to determine whether the suit properties form part of the estate or not”.***

These averments by the plaintiff have not been controverted by the defendant.

26. I have gone through the replying affidavit and there is nothing to contradict the plaintiff’s averments except that this application has been brought after undue delay. She does not dispute that ownership of the said properties is the issue in **High Court Succession Cause No 955 of 2013; In the matter of the Estate of Roger Bryan Robson (Deceased)**.

Section 6 of the Civil Procedure act provides that:-

***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”.***

27. In the case of **ASL Credit Limited vs Abdi Basid Sheikh Ali & Another [2019] eKLR** the court in analysing the above provision quoted the case of **Republic vs Registrar of Societies – Kenya & 2 Others Exparte Moses Kirima & 2 Others [2017] eKLR** with approval where it was held that:-

***“...Therefore the principle to apply certain conditions precedent must be shown to exist; First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceedings must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.....”***

I am guided by the above authority.

28. I agree with the plaintiff’s counsel submission that this suit ought to be stayed pending the outcome of **High Court Succession Cause No 955 of 2013, In the matter of the Estate of Roger Bryan Robson (Deceased)**. This is to save on judicial time and resources. I find that no prejudice will be occasioned to the defendant/respondent if this suit is stayed.

29. In conclusion I find merit in this application and I grant the orders sought namely:-

***(a) That this suit and all proceedings herein be and are hereby stayed pending the hearing and determination of High Court Succession Cause No. 955 of 2013; In the matter of the Estate of Roger Bryan Robson (Deceased).***

***(b) That costs of this application do await the outcome of the main suit.***

It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 11<sup>TH</sup> DAY OF MARCH 2021.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Nyachoti for the plaintiff

Ms Omanga for Mr. Waloba for the Defendant

Phyllis - Court Assistant