



Ogutu & another v Mbengele (Environment & Land Miscellaneous Case E207 of 2020) [2022] KEELC 13371 (KLR) (5 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13371 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E207 OF 2020
EK WABWOTO, J
OCTOBER 5, 2022**

BETWEEN

YASMIN EASLEY 1ST APPLICANT

SOPHIA OTIU OGUTU 2ND APPLICANT

AND

MAURICE MBENGELE RESPONDENT

RULING

1. This Ruling is in respect to the Applicants Notice of Motion application dated 15th November 2021 and accompanied by a supporting affidavit sworn by Betty Atieno Achieng where the Applicants sought the following orders:
 - a. That this Honourable Court grants orders to stay the proceedings in Civil Case No 4281 of 2019, Maurice Mbengele vs. Sophia Otiu Ogutu & Yasmin Easley in the Chief Magistrates Court, Milimani Commercial Courts, Nairobi
 - b. That this Honourable Court do grant an order to transfer the said suit from the Chief Magistrate's Court to Environment and Land Court (ELC) Nairobi in order to be consolidated with ELC Case NO 368 of 2009 Yasmin Easley vs. Hassan Hamed & Kenya Deposit Insurance Corporation
 - c. That the costs of this Application be in the cause.
2. The Application is hinged on three limbs: First, the claim that the Magistrates' court lacked pecuniary jurisdiction to hear and determine the matter which they valued at 100 million (KES). Secondly, that there existed a pending suit regarding the same matter in the ELC Court and lastly that the application was made pursuant to the directions of the Chief Magistrates Court on 30th August 2021 in Civil Case No 4281 of 2019.



3. The Application was opposed by the Respondent who filed grounds of opposition dated 18th July 2022 and accompanied by a Replying affidavit sworn by Maurice Mbengele in which the Respondent sought for dismissal of the application with costs on the following grounds:
 - a. The Applicants knew from the beginning that the suit property being LR NO 330/650 was located in Lavington and registered to Rueben Alumbe Nasibi but went ahead to sue non-parties.
 - b. The matter sought to be transferred has been proceeding for over two years within which they had ample time to seek orders.
 - c. The ELC No 368 of 2009 was in an advanced stage and therefore consolidating would be prejudicial to the Plaintiff unless directions for re-hearing of the same suit were made.
 - d. The Applicant's allegation that the Plaintiff has no locus standi is ill founded as there exists a power of attorney
 - e. The subject matter in Civil Case No 4281 of 2019 is concerned with trespass whereas Civil Appeal No 7 of 2019 is concerned with ownership.
 - f. The subject matter is distinct and so are the parties and as such it does not offend the provisions of Section 6 of the Civil Procedure Act Cap 21
 - g. That the applications should procedurally have been filed in ELC No 368 of 2009
 - h. The suit in the Magistrates Court bring based on trespass the issue of pecuniary jurisdiction is merely speculative as they have not attached any document to that effect.
4. Pursuant to the directions issued by this court on 2nd June 2022, the court directed all the application to be canvassed by way of written submissions. The Applicant duly complied and filed their submissions dated 1st July 2022 through the firm of B.A Achieng & Company Advocates. The Respondent chose to rely on his grounds of opposition and Replying Affidavit dated 18th July 2022.
5. Having considered the Application, written submissions and rival affidavits, it is clear that the issues for determination before this court is; Whether this Court should stay the proceedings in Civil Case No. 4281 of 2019 Maurice Mbengele vs Sophia Otiu Ogutu & Yasmin Easley in the Chief Magistrates' Court Milimani Commercial Court and also whether this Court should transfer the same and consolidate with ELC Case No. 368 of 2009 Yasmin Easley v Hassan Hamed & Kenya Deposit Insurance Corporation.
6. On the issue of stay of proceedings, stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent. See Ringera J. (as he then was) in the case of Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000 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 expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense 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”

7. See also illumination on the threshold for stay of proceedings in the following passages in Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332, 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 proceeding 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. Stay of proceedings is also a discretion of the court. The use of discretion is to ensure proper use of judicial time and resources to dispense justice for the parties. This is also to guard against multiplicity of applications which are meant to delay the finalization of matters which go against the spirit of Article 159 of *the Constitution* that enjoins the court to hear matters expeditiously. However, this is not to turn a blind eye on deserving applications for stay of proceedings. The provisions of Article 159(2)(a) (b)(c) and (d) of *the Constitution* of Kenya as read with Sections 1A and 1B of the *Civil Procedure Act*, Cap 21 enjoin this court to foster and facilitate the overriding objective of the Act to render justice to parties in all Civil Proceedings in a just, expeditious, proportionate and affordable cost to parties.
9. In the instant application, no compelling reason or prima facie case has been established to warrant the court to stay the proceedings. The delay that would be occasioned by the stay of the proceedings in the lower court would defeat the purpose of expeditious disposal of matters. An order staying the proceedings before the subordinate court would be counterproductive and would delay the finalization of this case, it is my considered opinion that it would not be in the interest of justice to exercise court’s discretion and grant stay of those proceedings.
10. Section 18 of the *Civil Procedure Act* outlines the powers of the High Court (of which the ELC is a court of equal status) to withdraw, try, transfer or re-transfer suits from a sub-ordinate court. Further pre-requisites have been enumerated as in the David Kabungu Case where it was stated that:

“Section 18 (1) (b) of the *Civil Procedure Act* gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. The burden lies on the applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is a relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice. What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction... it is well established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court



that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship, and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused... Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer would be refused...”[Emphasis mine]

11. The pecuniary limits applicable to the Magistrates Courts are elucidated under Section 7 of the *Magistrates Court Act 2015*. Therefore, to put forward the issue of jurisdiction at this juncture and more so for a case that has been prosecuted for nearly two years, casts a spotlight on the undeniable errors made on the part of the Applicants’ advocates.
12. In this instance, the value of the suit property extinguishes the jurisdiction of the Magistrates Court. Additionally, I share in the sentiments of the learned judges in *Kagenyi v. Musiramo & Another* [1968] E.A. 43. and reiterated in *Boniface Waweru Mbiyu v Mary Njeri & another* [2005] eKLR where:

“...The High Court will decline to assume jurisdiction in relation to any matter which has been filed before a Court or tribunal lacking jurisdiction. Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel... As for the Court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore it is not a motion or suit that can be transferred to any other Court. [Emphasis mine]
13. Having perused the Court records in ELC CASE NO 368 of 2009, the Court takes note that the suit is not pending judgement (as presented by the parties) but had been placed before Justice Bor and Justice Oguttu who exhaustively determined the issues in the suit and consequently marked it as closed. In the circumstances the same cannot be transferred for consolidation.
14. In any event, the Court remains cognizant of the overriding oxygen principles as envisaged in Sections 1A, 1B and 3A of the *Civil Procedure Act* to ensure just, fair, proportionate and expeditious administration of justice. In my opinion, the Applicants had ample time since the filing of the suit at the Magistrates Court in 2019 to apply for the current orders sought. In upholding the maxims of equity, this Court refrains from rewarding indolence of the parties.
15. In the foregoing, the Court hereby finds that the Application dated 15th November 2021 is not merited and proceeds to dismiss the same with an order that each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF OCTOBER 2022.

E. K. WABWOTO

JUDGE

In the presence of: -

Ms. Omoha for the Applicant.

N/A for the Respondent.

Court Assistant; Caroline Nafuna and Philomena Mwangi.

E. K. WABWOTO

JUDGE

