



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 210 OF 2015

(FORMERLY KERUGOYA ELC 467 OF 2013)

CHARLES NJERU MUGANE.....1ST PLAINTIFF

JOSEPH MUTHEE MURATHI.....2ND PLAINTIFF

VERSUS

HENRY NDWIGA KIURA.....DEFENDANT

RULING

1. By a notice of motion dated 20th June 2019, brought under the provisions of **Sections 1A, 1B, 3A, 3, 6 and 63(e) of the Civil Procedure Act and Order 51(1) of the Civil Procedure Rules and all other enabling provisions of the law** the Defendant sought an order for stay of proceedings herein pending the determination of *Embu High Court Succession Cause No. 9 of 2016 (formerly Nairobi High Court Succession Cause No. 1251 of 1999)*.
2. The said application was based upon the grounds set out on the face of the motion. It was contended that the Plaintiffs had acquired an interest in *Title No. Gatari/Nembure/2657* (hereinafter *the suit property*) through *Succession Cause No. 9 of 2016*. It was further contended that the Plaintiffs had obtained a grant in the said cause through fraud and concealment of material facts. It was contended that the proceedings herein should be stayed to avoid a conflict of decisions as between the Environment and Land Court (ELC) and the succession court.
3. The said application was supported by the affidavit sworn by the Defendant on 20th June 2019 in which he reiterated and expounded upon the grounds set out in the notice of motion. The Defendant acknowledged in his said affidavit that the hearing is concluded and that what is pending is delivery of judgement. In essence, the Defendant is seeking to arrest delivery of the judgement in this suit.
4. The Plaintiffs did not file any response to the Defendant's said application for stay. The Plaintiffs' application for adjournment on 4th July 2019 to enable them file a replying affidavit was rejected by the court. Consequently, the Plaintiffs' advocate left the matter to the decision of the court.
5. The court has considered the Defendant's said application in light of the facts and circumstances of this suit. The material on record indicates that the suit property was jointly registered in the name of Plaintiffs' father, William Mugane and the Defendant's grandfather, Njeru Wamishi on 29th June 1973. Each one of them had ½ share in the suit property according to the relevant land register.
6. It would appear from the record that the Plaintiffs filed Succession Cause No. 9 of 2016 to obtain ½ share which they believed belonged to their late father William Mugane (hereinafter *Mugane*). The Defendant on the other hand is the administrator of the Estate of his late grandfather, Njeru Wamishi (hereinafter *Wamishi*) in *Embu High Court Succession Cause No. 354 of 2007* which is pending confirmation due to several protests against confirmation by some interested parties.
7. The pleadings and material on record further indicate that the Plaintiffs herein were registered as proprietors of ½ share of the suit property which they believed was due to Mugane. They are by this suit seeking to enforce their acquired rights since they claim that the Defendant is in occupation of the entire suit property without regard to their rights over one half of the property.
8. The Defendant, on the other hand, has filed a counterclaim stating that the entire suit property actually belonged solely to Wamishi and that the Plaintiffs' late father was fraudulently registered as a co-owner of ½ share on 29th June 1973. By his counter claim, the Defendant seeks a declaration that his grandfather (*Wamishi*) was the *bona fide* registered proprietor of the suit property and an order for cancellation of the Plaintiffs' names from the land register as co-proprietors of the suit property.
9. So, in those circumstances, can the Defendant canvass the issue of the legality or validity of the joint proprietorship of Mugane and

Wamishi entered in the land register on 29th June 1973 in either of the two succession causes? It must be remembered that entry No. 4 on joint proprietorship was an *inter vivos* transaction. It was not entered pursuant to any succession proceedings.

10. The Defendant must have forgotten that he provided the answer to this question in his witness statement dated 7th June 2018 which he adopted as his sworn testimony at the trial hereof. In paragraph 5 of the statement he stated as follows:-

“That I raised the issues herein in the succession cause namely High Court Succession Cause No. 9 of 2016 and the learned Judge stayed the proceedings to enable me pursue the issues before this court”

11. So, if the succession court stayed the succession proceedings in Succession Cause no. 9 of 2016 to enable the Defendant canvass the allegations of fraud and his challenge to entry No. 4 of the land register before the ELC, then why is the Defendant also seeking a stay of the instant suit? If the Defendant's sworn evidence is to be believed, then the result of granting the orders sought would result in a stay of both suits! The natural consequence of that is that the Defendant's grievances would never be addressed in any of the two matters.

12. The court is of the opinion that the succession court was right in requiring the Defendant to ventilate his allegation of fraud before this court because the impugned entry No. 4 was the result of an *inter vivos* transaction between the concerned parties. It was not an entry made pursuant to any succession proceedings relating to inheritance. In the circumstances, the issue of the two courts making conflicting decisions would not arise.

13. In the case of *National Oil Corporation of Kenya Vs Real Energy Ltd [2017] eKLR*, the court considered the principles for stay of proceedings in paragraph 9 as hereunder:

“9. In the case of *Global Tours & Travels Ltd; Nairobi High Court Winding up Cause No. 43 of 2000* which was cited with approval in *Gichuki Macharia & Another Vs Kiai Mbaki & 2 Others, Winding up Cause No 1 of 2001, Ringera J (as he then was) stated as follows:*

“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.”

14. The court's jurisdiction to grant a stay is essentially discretionary and like all judicial discretion, it must be exercised in a judicious and not an arbitrary manner. It must be exercised on the basis of some reason and established principles in relation to the subject matter under consideration. The court has noted that this suit has been pending in court for about 12 years having been filed in 2007. There has undoubtedly been considerable delay in its hearing and conclusion.

15. The court is aware that the hearing of the suit was concluded on 22nd November 2018. The Plaintiffs were given 30 days to file and serve their submissions whereas the Defendant was given 30 days to do the needful as well. The suit was thereupon fixed for judgement on 9th May 2019. The Defendant, however, filed an application dated 11th December 2018 seeking leave to amend his defence and counterclaim and to adduce additional evidence. That application was determined on 9th May 2019 thus necessitating deferment of the judgement date to 11th July 2019.

16. The record further indicates that on 20th June 2019, a few weeks before the date due for delivery of judgement, the Defendant filed the instant application for stay of proceedings. It is not clear why the Defendant did not apply for stay at an earlier stage of the proceedings. The Defendant fully participated in the proceedings including amending his pleadings twice and testifying in support of his further amended defence and counterclaim.

17. The court is of the opinion that there was unreasonable delay in making the application for stay. There is no plausible reason why a party would participate in legal proceedings for a period of over ten years and only seek a stay when the suit is pending judgement. The court is of the view that further delay in the conclusion of this suit would be inimical to the administration of justice. It would also run counter to the overriding objective of dispensing justice in a proportionate, just, timely and cost effective manner as required by **sections 1A and 1B of the Civil Procedure Act (Cap. 21)**.

18. At the hearing hereof, the Defendant's advocate relied upon two authorities in support of the application for stay. The first was the case of ***Ansazi Gambo Tinga & Another V Nicholas Patrice Tambuche Mombasa Civil Appeal No. 74 of 2018 [2019] eKLR***. It is apparent from the said judgement that the main issue for determination in that appeal was whether a creditor of an estate of a deceased person had *locus standi* to apply for revocation of a grant issued to his administrators. The Court of Appeal found that a creditor could fall within the category of an interested person under **section 76 of the Law of Succession Act (Cap. 160)**. The appeal has nothing to do with either an application for stay of proceedings or arrest of a pending judgement.

19. The second authority cited by the Defendant was ***Rose Karanja & 3 Others Vs Geoffrey Chege Kirundi & Another Nairobi Civil Appeal No. 172 of 2010 [2016] eKLR***. That was a judgement which allowed an appeal against the ruling of the High Court in three consolidated suits relating to claims against certain property which belonged to the estate of a deceased vendor. The question of stay of proceedings or arrest of judgement was not one of the issues canvassed either at the High Court or the Court of Appeal. The court finds no relevance of that authority to the instant application.

20. For the foregoing reasons, the court finds no merit whatsoever in the Defendant's said application for stay of proceedings. It would appear that the said application was mischievously filed in order to delay the cause of justice and forestall the determination of the pending suit. This is the second attempt by the Defendant to derail the conclusion of the suit. It would not be surprising if the Defendant filed yet another application in a bid to stop delivery of judgement.

21. The upshot of the foregoing is that the Defendant's notice of motion dated 20th June 2019 (erroneously dated 20th June 2018) is hereby dismissed in its entirety with costs to the Plaintiffs.

22. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **11TH DAY** of **JULY, 2019**

In the presence of Ms. Muriuki holding brief for Ms. Muthoni for Plaintiffs and Ms. Ndorongo holding brief for Mr. Otwere for the Defendant.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

11.07.19