



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E&L CASE NO. 348 OF 2014

JARED KIPROTICH BIWOTT.....1ST PLAINTIFF

STEPHEN CHERUIYOT.....2ND PLAINTIFF

VERSUS

JONATHAN KIBE.....DEFENDANT/APPLICANT

RULING

This ruling is in respect of an application dated 20th December 2017 brought by way of notice of motion by the defendant /applicant seeking for orders:

- 1) Spent.
- 2) That pending inter partes hearing this Honourable court be pleased to stay further proceedings in Eldama Ravine Criminal case No. 742 of 2017.
- 3) That this Honourable Court be pleased to stay further proceedings in Eldama Ravine Criminal case No. 742 of 2017 pending the hearing of this application and the main suit.
- 4) That this matter be consolidated with ELDORET ENVIRONMENT & LAND CASE NO. 398 of 2017 JONATHAN KIBE VS JARED KIPROTICH BIWOTT & STEPHEN CHERUIYOT.
- 5) Costs of this application be borne by the plaintiffs.

The defendant filed this application under certificate of urgency dated 20th December 2017 whereby the court certified the same as urgent and granted an order for stay of the Eldama Ravine Criminal case No 742 of 2107 against the defendant. The court ordered that the application be served within 7 days for the inter partes hearing of the application.

Mr. Kibii Counsel for the defendant/applicant argued the application and relied on the grounds on the face of the record and the supporting affidavit and supplementary of the applicant. He stated that these proceedings were instituted by the plaintiff on 19/11/14 seeking for the eviction of the defendant from the suit property. It was Counsel's submission that the defendant filed a defence and counterclaim seeking to be declared owner of the suit land by way of adverse possession since he has been in occupation for the last 50 years

Counsel for the defendant/applicant submitted that the plaintiff during the pendency of the suit instituted criminal proceedings vide Eldama Ravine Criminal case No. 742 of 2017 whereby the defendant is facing charges of forcible detainer with a view of defeating the counterclaim.

It was Counsel's submission that the plaintiff is calling upon the Criminal Court to determine ownership of the suit property during the pendency of this case which will cause prejudice to the defendant for the reason that the Criminal Court might find him guilty and render this trail an academic exercise

Mr. Kibii submitted that the dispute is about ownership of land and this court is vested with jurisdiction to determine ownership and title to land and that the two courts might have conflicting decisions which may embarrass the court. He further stated that the criminal proceedings were instituted 3 years after filing this suit hence it is clear that the plaintiff is using the criminal proceedings as a tool of gathering evidence.

Counsel relied on two authorities which in essence stated that the conduct of a plaintiff instituting criminal proceedings during the pendency of a land matter amounts to fishing of evidence. See **Nairobi ELC No. 802 of 2015, Michael Mwangela Musomba Vs Magdalene Ndinda Raphael & 5 others (2015) eKLR** and **Nairobi High Court Misc. Appl. No 390 of 2013 Republic Vs Inspector General National Police Service & 3 others Exparte Stephen Somba Kithima (2014) eKLR**. Counsel also submitted that the applicant is also seeking for the consolidation of this suit with E & L 398 of 2017 as the issues are substantially in issue. He urged the court to allow the defendant's application.

Miss Tum for the respondent opposed the application and relied on the replying affidavit of the respondent. She stated that the court can exercise the discretion to consolidate suits but the respondent is opposed to the stay of the criminal proceedings as the applicant has encroached on the suit land. It was her submission that the defendant confronted the plaintiff and was charged with a criminal offence.

Counsel took issue with the authorities cited on the ground that they are Judicial review matters and not Environment and land matters therefore they are not relevant to this case. Counsel therefore urged the court to dismiss the application with costs to the plaintiff.

Analysis and determination.

The first issue for determination is as to whether this court has jurisdiction to grant the orders sought for stay of criminal proceedings against the defendant. The other issues for determination are whether the criminal court has jurisdiction to determine ownership of the suit land which is core in this case.

I wish to state that this court is clothed with jurisdiction under section 13 of the Environment and Land Act to hear and determine disputes in respect to use, occupation and title to land. The criminal court is not best suited to determine whether a person has acquired title by way of adverse possession. It should be noted that the defendant was charged with the offence of forcible detainer while this matter was pending before the court. If the plaintiff wanted to assert his rights then he should have approached the same court whereby he sued the defendant to fast track the matter. The plaintiff filed this case in 2014 and went to slumber, he only woke up in 2017 to institute criminal proceedings against the defendant. Using criminal proceedings to intimidate the defendant is an abuse of the court process.

I do not agree with Counsel for the plaintiff that the authorities cited are not relevant as they are in respect of a judicial review. What matters is what was held and the relevance in the current case.

I agree with the authority cited the defendant/respondent's Counsel being ELC No. 802 of 2015 whereby Okon'go J held that it would be prejudicial to the applicant if the pending criminal proceedings are not stayed. Okon'go J further held that the criminal court would not be in a position to determine the crux of the applicant's defence that he has acquired the suit land by adverse possession.

I therefore find that the application dated 20th December 2017 has merit and is therefore allowed. Accordingly Eldama Ravine Criminal case No. 742 of 2017 is hereby stayed pending the hearing and determination of this suit. I further order that the stay is for a period of eighteen (18) months from the date of this ruling. An order of consolidation of this suit with E& L 398 of 2017 is hereby granted.

Dated and delivered at Eldoret this 4th day of July 2018.

M.A ODENY

JUDGE

Ruling read in open court in the presence of Mr. Birir holding brief for Kibii for defendant/Applicant and Mr. Nduhiu holding brief for Miss Tum for Plaintiff/Respondent.

Mr. Koech: Court Assistant.