



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC APPEAL NO. 4 OF 2021

PAUL AMISI SAGARA.....APPELLANT

VERSUS

JOEL WAFULA.....RESPONDENT

RULING

The Application

1. By a Notice of Motion dated 29/6/2021 and filed on 30/6/2021 brought under provisions of **Sections 3, 3A and 6** of the **Civil Procedure Act** and **Order 42 Rule 6, Order 51 Rule 1** of the **Civil Procedure Rules**, the appellant/applicant seeks the following orders:-

(1) ...spent

(2) That the honourable court be pleased to issue an order of stay of proceedings in Kitale Chief magistrates Land Case No. 47 of 2019 between Paul Amisi Sagara -vs- Joel Wafula & 2 Others and Land Case No. 63 of 2018 between Paul Amisi Sagara -vs- Joel Wafula pending the hearing and determination of the appeal.

(3) That upon determination of the appeal if successful the honourable court be pleased to order consolidation of the cases cited in prayer No. 2 above for disposal by another court other than the trial court in both cases.

(4) That costs be provided for.

2. Though the Memorandum of Appeal names only one respondent this court notes that the application names all the three respondents and was on the verge of ordering that henceforth the other two respondents that is **Ebrahim Ambwere** and **Simon Ludeki** shall be enjoined in the appeal as the 2nd and 3rd respondents respectively but restrained itself from doing so on account of the respondent's explanation that the applicant herein had previously withdrawn the case against the latter two in **Kitale CMC Land Case No. 63 of 2018**. Consequently the issue of joinder shall be left in abeyance for the present moment and the applicant should by this observation be forewarned against causing any confusion as to joinder hereafter.

3. The instant application is supported by the affidavit of the appellant sworn on 29/6/2021. The grounds upon which the appellant relies are that the issues in **Kitale Chief Magistrates Land Case No. 47 of 2019** between **Paul Amisi Sagara -vs- Joel Wafula & 2 Others** and **Kitale Chief Magistrates Land Case No. 63 of 2018** between **Paul Amisi Sagara -vs- Joel Wafula** are substantially the same; that the trial court in **Kitale Chief Magistrates Land Case No. 47 of 2019** struck out the name of **Joel Wafula** on ground of non-disclosure of any reasonable cause of action yet in **Kitale Chief Magistrates Land Case No. 63 of 2018** the same **Joel Wafula** is seeking eviction orders against the appellant in respect of the suit land subject matter in both suits; that the applicant has appealed against the decision and he seeks **Joel Wafula** to be reinstated in the suit for the purpose of a fair determination and that as the appeal is still pending; that if the eviction proceedings in **Land Case No. 63 of 2018** take place and orders are granted, and the applicant succeeds in the appeal against the decision in **Kitale Chief Magistrates Land Case No. 47 of 2019**, then the former suit shall be rendered nugatory.

The Response

4. The respondent filed a replying affidavit sworn on 5/7/2021. His response is that the filing of an appeal does not entitle the applicant to the orders sought; that the appeal has little chance of success; that no risk of substantial loss has been shown; that the applicant is guilty of unreasonable delay; that the application is only calculated at delaying the hearing of **Kitale Chief Magistrates Land Case No. 63 of 2018**; that the application for stay of proceedings filed in **Kitale Chief Magistrates Land Case No. 63 of 2018** was dismissed and the decision therein has not been challenged by way of an appeal or review; that the instant application is an attempt to challenge the decision in **Kitale Chief Magistrates Land Case No. 63 of 2018** through the backdoor and an abuse of the process; that the applicant has no interest in plot number 245 as he had bought plot no 246; that the suit in the court below can not be sustained as the agreement was not in writing and executed as required; that as both suits were instituted by the applicant he can not complain that substantially the same matters are in issue in

both suits; he further avers that in any event perchance the commonality of issues is established, that in his opinion it is the proceedings in **Kitale Chief Magistrates Land Case No. 47 of 2019** that ought to be stayed and not both suits; that the issues in both suits are not the same and the case against the defendants in **Kitale Chief Magistrates Land Case No. 63 of 2018** was withdrawn by the applicant.

Submissions

5. The appellant filed his written submissions on **14/7/2021**. I have perused the court record and I have not seen any submissions filed on behalf of the respondent. **Determination**

6. The issue that arises in the instant application is whether proceedings in both suits in the lower court should be stayed pending the hearing and determination of the appeal herein.

7. In this court's view the issue of whether the striking out of *Joel Wafula* from one suit is a very pertinent issue. However I do observe that a degree of inadvertence may have arisen from the existence of two parallel suits which were being tried by two different courts. The respondent blames the applicant for this state of affairs and I think to some degree he may be right. It is quite a mystery why if the applicant is of the view that the two suits raise similar issues and the courts dealing with them are of parallel jurisdiction, he has not had them consolidated thus contributing to a multiplicity of suits. However in order not to prejudice the hearing of appeal before me it suffices to note that it is the right of every litigant to lodge an appeal where applicable if dissatisfied with a decision of the court and the applicant herein is no exception.

8. I also am of the view that subject to the outcome of the appeal herein and considering this court's expressed view as to possible consolidation hereinbefore any proceedings that may be undertaken in the two suits during the pendency of the appeal may be a waste of much valued judicial time and resources perchance the appeal subsequently succeeds.

9. Consequently I find that the application dated **29/6/2021** has merit and the same is granted in terms of **Prayer No. 2**. However, **Prayer no 3** in the same application is dismissed as the issue of consolidation as brought up by this application is premature and it should first be dealt with by the lower court handling the suits, and should be entertained by this court only at a secondary appellate level yet this is an interlocutory application pending appeal.

10. The costs of the application shall be costs in the appeal.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 5TH DAY OF AUGUST, 2021.

MWANGI NJORGE

JUDGE, ELC, KITALE.