



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 158 OF 2017

MUATHE MULWA & 21 OTHERS.....PLAINTIFFS

VERSUS

DAVID MUNYAE & 10 OTHERS.....DEFENDANTS

RULING

Introduction:

1. This Ruling is in relation to the Notice of Motion Application dated 20th November, 2020, brought under Order 42 Rule 6 Civil Procedure Rules and Section 3A, Civil Procedure Act where the Defendants/Applicants are seeking for the following Orders:

a) That this Honourable Court be pleased to order a stay of proceedings pending the hearing and determination of Nairobi Civil Appeal No. 249 of 2020.

b) That the costs of this Application be provided for.

2. The Application is supported by the Affidavit of David Munyae, the 1st Defendant, who deponed that on 24th April, 2020, this Honourable Court delivered its Ruling in respect of the Plaintiffs' Application dated 5th April, 2017 where the court granted a temporary injunction restraining the Defendants from interfering in any manner with Land Parcel L.R. No. 1849 pending the hearing and determination of the main suit.

3. The 1st Defendant deponed that the court also issued a mandatory injunction directing the Defendants to excise any portion of land in excess of 80 acres held in parcel of land L.R. No. 1849 for distribution among the Plaintiffs and that the Defendants were aggrieved and dissatisfied with the said Ruling and proceeded to prefer an Appeal Case No. 249 of 2020.

4. It was the deposition of the 1st Defendant that pending hearing and determination of the Appeal, the proceedings herein be stayed and that the Applicants stood to be greatly prejudiced if the proceedings herein were to continue since the Court of Appeal might differ with the findings of this Honourable Court.

5. The 1st Defendant finally deponed that their Appeal has overwhelming chances of success; that the Plaintiffs will not suffer any prejudice if the proceedings herein were stayed pending the hearing and determination of the Appeal and that it was in the interest of justice that the prayers sought be granted.

6. The Application was opposed vide a Replying Affidavit sworn on 9th December, 2020 by Muathe Mulwa, the 1st Defendant, on behalf of the Defendants. The 1st Defendant deponed that the instant Application was filed after the Applicants' counsel was served with a hearing notice of the main suit and that the Application is only meant to delay the hearing and determination of the main suit and therefore an abuse of the court process.

7. The deponent also averred that although the Applicant filed Civil Appeal No. 249 of 2020, the said Appeal cannot not act as a stay of proceedings in this matter and that in any case, the Applicants ought to have shown sufficient cause why a stay should be granted which they have failed to do.

8. The 1st Plaintiff finally deponed that him and his Co-Plaintiffs stood to suffer prejudice if the main suit was not heard and determined expeditiously; that it is now three years since the matter was filed and that the overriding objective of Section 1A of the Civil Procedure Act provides that there should be a just and expeditious resolution of civil disputes. The Application was canvassed by way of written

submissions which I have considered.

9. This suit was commenced by way of a Complaint dated 5th April, 2017. In the Complaint, the Plaintiffs have sought for numerous declaratory orders, including a declaration that the Defendants are entitled to 80 acres each of L.R. No. 1849 and that any excess land is held unlawfully and ought to be excised and distributed to the Plaintiffs. The Plaintiffs also sought for an order of permanent injunction.

10. The Complaint was filed together with the Notice of Motion dated 5th April, 2017 for injunctive orders pending the hearing and determination of the suit. The Application was allowed by this court on 24th April, 2020. In the current Application, the Defendants have sought for a stay pending the hearing of the Appeal in respect to the Ruling of the court.

11. The principles guiding the grant of stay of execution or proceedings pending Appeal are well documented. Order 42 Rule 6(2) of the Civil Procedure Rules provides that for Applicant to be granted a stay of execution or proceedings pending the hearing of an Appeal, he must satisfy the Court that:-

a) *Substantial loss may result to him unless the order is made;*

b) *The Application has been made without unreasonable delay; and*

c) *The Applicant has given such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him.*

12. In the case of ***Sichuan Huashi Development Company Ltd vs. Remax Realtor Ltd (2020) eKLR***, the court quoted ***Halsbury's Laws of England, 4th Edition. Vol. 37*** page 330 and 332, which provides as follows:

“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.”

13. In the case of ***Kenya Power & Lighting Co. Ltd vs. Esther Wanjiru Wokabii Civil Appeal No. 326 of 2013 (2014) eKLR***, the Court quoted Ringera J. (*as he then was*) in the case of ***Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000*** where he 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. As observed in the above decisions, the stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation. The court's general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond all reasonable doubt, ought to be allowed to continue. This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.

15. This suit was filed four years ago, and ought to be heard on merits expeditiously. If the orders that were granted by this court at an interlocutory stage are found to be unmeritorious by the Court of Appeal, they will be substituted by the appropriate orders. Considering that the orders of this court did not amount to final orders, but were subject to the Judgment of the court, it will be prejudicial, not only to the Plaintiffs, but also the Defendants themselves to stay the current proceedings.

16. The Defendants/Applicants have not shown the substantial loss that they will suffer in the event these proceedings are not stayed. To the contrary, the parties in this suit will continue suffering loss unless their rights in respect to the suit property are dealt with finality. The parties in this matter should fix the matter for hearing and allow the trial court determine the issues herein, whereafter the aggrieved party can lodge an Appeal in the Court of Appeal.

17. For those reasons, the Defendants' Application dated 20th November, 2020 is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 24TH DAY OF SEPTEMBER, 2021.

O. A. ANGOTE

JUDGE